

April 28, 2011

EGM-11- 004

MEMORANDUM TO: William M. Dean, Regional Administrator, Region I
Victor M. McCree, Regional Administrator, Region II
Mark A. Satorius, Regional Administrator, Region III
Elmo E. Collins, Regional Administrator, Region IV
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation
Michael R. Johnson, Director, Office of New Reactors
Scott W. Moore, Acting Director, Office of Federal
and State Materials and Environmental Management Programs
Catherine Haney, Director, Office of Nuclear Material Safety
and Safeguards
James T. Wiggins, Director, Office of Nuclear Security
and Incident Response

FROM: Roy P. Zimmerman, Director /RA/
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM (EGM) – INTERIM
GUIDANCE FOR DISPOSITIONING VIOLATIONS OF SECURITY
REQUIREMENTS FOR PORTABLE GAUGES

Purpose

The purpose of this memorandum is to provide enforcement guidance to disposition violations involving a failure to maintain the required minimum of two independent physical controls to include a provision for enforcement discretion for certain violations related to the security requirements for portable gauges.

Background

On July 11, 2005, a new NRC security requirement for portable gauges, 10 CFR 30.34(i), became effective. The primary intent of this rule was to increase licensees' control of portable gauges to reduce the opportunity for unauthorized removal or theft. This regulation requires a portable gauge licensee to use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges are not under the control and constant surveillance of the licensee.

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The 10 CFR 30.34(i) rule applies to a licensee with a portable gauge regardless of the location, situation, and activities involving the portable gauge. At all times, the licensee is required to either maintain control and constant surveillance of the portable gauge or use a minimum of two independent physical controls to secure it. This requirement is intended to enhance the level of security and control for portable gauges while providing sufficient flexibility for licensees to implement these requirements without an unreasonable burden. The expectation is that both of the physical controls must be defeated for the portable gauge to be removed deterring a theft by requiring a more determined effort to remove the gauge. However, the NRC believes that the additional controls would not necessarily stop a determined thief from stealing a portable gauge, and that even with the additional control portable gauges might still be stolen.

In the current Enforcement Policy that became effective September 30, 2010, a violation of 10 CFR 30.34(i) requirements constitutes a severity level (SL) III violation for gauges having either no security or one level of security. In addition, the NRC uses its policy statement published on December 18, 2000, "Base Civil Penalties for Loss, Abandonment, or Improper Transfer or Disposal of Sources," known as the "Lost Source Policy" for violations of 10 CFR 30.34(i), and a resultant lost or stolen gauge normally involves at least a base civil penalty.

Considering the reduced risk associated with having one barrier instead of no barrier, a graded approach is considered in citing this requirement by exercising enforcement discretion. The graded approach would allow for 30.34(i) violations of lower significance to be cited as SL IV violations as indicated below.

Disposition of Violations of 10 CFR 30.34(i) Requirements

If an inspector identifies a potential noncompliance with 10 CFR 30.34(i) requirements, the inspector shall notify the applicable branch chief before the exit meeting with the licensee. All of the potential noncompliances shall be brought back to the regional office for disposition.

The regional office shall evaluate each potential noncompliance and make one of two conclusions as discussed below.

1. A region may use discretion and cite as a SL IV violation in cases where a licensee fails to secure a portable gauge as required by 10 CFR 30.34(i), whenever the gauge is not under the control and constant surveillance of the licensee, provided that the failures are characterized by all of the following:
 - a) At least one level of physical control existed;
 - b) There was no actual loss of material;
 - c) The failure was isolated; and
 - d) The failure does not demonstrate a programmatic weakness

In accordance with the Enforcement Policy, willfulness will normally escalate this SL IV violation to SL III.

If the regional office determines that the noncompliance meets the criteria for SL IV, the regional office can disposition the violation without an enforcement panel. However, these cases will be assigned an enforcement action (EA) number to document the exercise of enforcement discretion.

In preparing Notices of Violation, in those cases where the violation is to be classified as SL IV, the subject line in the letter to the licensee should either read or include, "EXERCISE OF ENFORCEMENT DISCRETION," as described in Section 3 of the Enforcement Policy.

The following language should be included in the text of the report discussing the inspection finding when exercising enforcement discretion in accordance with this EGM:

A violation of 10 CFR 30.34(i) was identified during this inspection and is described in the attached Notice of Violation. In accordance with the Enforcement Policy, although such violations are normally categorized at Severity Level III and considered for escalated enforcement action, because (1) one physical control existed to prevent loss or theft of the portable gauge; (2) you retained possession of the gauge; 3) the violation was isolated; and 4) no indication of programmatic weakness was identified, NRC is exercising enforcement discretion to categorize this violation as Severity Level IV.

2. If the conditions described above do not apply, the regular enforcement process will be used in accordance with the current Enforcement Policy to evaluate and disposition the noncompliance, with input from the region and headquarters, with the likely outcome being a Severity Level III violation.

The effectiveness of the EGM will be monitored for at least two years. If application of this EGM fails to provide the intended results and the staff identifies an increasing trend in lost or stolen gauges when only one level of security was maintained, the EGM will be closed and the original method of citing all violations of 30.34(i) at SL III will be used. After at least 2 years of monitoring, if no negative results are identified, the staff will propose a change to the Enforcement Policy, to create a SL IV example to reflect the graded approach.

cc: M. Weber, DEDMRT
M. Virgilio, DEDR
SECY

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The following language should be included in the text of the report discussing the inspection finding when exercising enforcement discretion in accordance with this EGM:

A violation of 10 CFR 30.34(i) was identified during this inspection and is described in the attached Notice of Violation. In accordance with the Enforcement Policy, although such violations are normally categorized at Severity Level III and considered for escalated enforcement action, because (1) one physical control existed to prevent loss or theft of the portable gauge; (2) you retained possession of the gauge; 3) the violation was isolated; and 4) no indication of programmatic weakness was identified, NRC is exercising enforcement discretion to categorize this violation as Severity Level IV.

3. If the conditions described above do not apply, the regular enforcement process will be used in accordance with the current Enforcement Policy to evaluate and disposition the noncompliance, with input from the region and headquarters, with the likely outcome being a Severity Level III violation.

The effectiveness of the EGM will be monitored for at least two years. If application of this EGM fails to provide the intended results and the staff identifies an increasing trend in lost or stolen gauges when only one level of security was maintained, the EGM will be closed and the original method of citing all violations of 30.34(i) at SL III will be used. After at least 2 years of monitoring, if no negative results are identified, the staff will propose a change to the Enforcement Policy, to create a SL IV example to reflect the graded approach.

cc: M. Weber, DEDMRT
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