



POLICY ISSUE

(Information)

April 16, 2020

SECY-20-0034

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: STAFF APPROACH TO EXERCISE ENFORCEMENT DISCRETION
FOR NONCOMPLIANCES CAUSED BY THE COVID-19 PANDEMIC

PURPOSE:

The purpose of this paper is to inform the Commission of the staff's plan to exercise enforcement discretion via the development of an enforcement guidance memorandum (EGM) or through existing Enforcement Policy discretion for licensee noncompliances of regulatory requirements resulting from illnesses or other factors caused by the COVID-19 pandemic. This approach will be applicable to all U.S. Nuclear Regulatory Commission (NRC) licensees.

BACKGROUND:

On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services declared a public health emergency (PHE) in the United States to aid the Nation's healthcare community in its response to COVID-19. On March 11, 2020, the World Health Organization officially declared the COVID-19 viral disease a pandemic.

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DISCUSSION:

Federal Government projections suggest that the crisis “will last 18 months or longer” and could include “multiple waves of illnesses.”¹ The principal safety and security threat to licensees posed by a pandemic is the absence of essential personnel from the workplace for extended periods due to multiple waves of illness and/or challenges stemming from the issuance of stay-at-home orders by State and local authorities.

The staff is aware that during this COVID-19 PHE, each licensee may have additional or license-specific regulatory challenges for which it will seek regulatory relief. The staff has recently held and continues to hold public meetings (via telecom) with licensees during which licensees have expressed specific concerns about how the COVID-19 PHE may impact operations at their facilities. One example raised by reactor licensees is the sequestration of employees necessary for continued safe reactor operation. These licensees may need to be afforded some regulatory flexibility if they are to maintain overall safe plant operation during a pandemic event. For instance, licensees may need to dedicate qualified personnel to safety-related operational functions, rather than to otherwise required administrative activities (e.g., certain reporting requirements). This PHE could similarly affect other licensees, such as medical facilities, which may also need to be afforded some regulatory flexibility related to administrative activities as they reallocate staff to critical areas to meet the COVID-19 PHE demand for medical care. Such flexibility must account for the need to ensure adequate protection of public health and safety, the common defense and security, and the environment.

The staff also recognizes that the absence of a few employees could significantly impact materials licensees. Although licensed material would be safely and securely stored until personnel are able to return to work, programmatic (e.g., training) and administrative activities may be delayed causing some licensees to become noncompliant. Additionally, depending on the job responsibilities of these absent employees, some licensees may not identify a noncompliance for weeks or months until after the COVID-19 PHE is official terminated.

All licensees are expected to show a good faith effort during the COVID-19 PHE to achieve regulatory compliance with all NRC requirements. If a noncompliance is identified, licensees should document their noncompliance and notify the NRC in accordance with their license reporting requirements. All licensees should follow the applicable, appropriate normal licensing processes (e.g., license amendments, exemption or relief requests, alternative measures, etc.) to achieve regulatory compliance.

If a licensee is unable to follow the normal licensing process to address a potential challenge before a noncompliance occurs, the licensee may request enforcement discretion. Requests for enforcement discretion should be made in writing (letter or email), but if a licensee is unable to submit a timely written request, they may verbally notify the NRC. Interim enforcement discretion may be granted until such time that the licensee’s notification is supported with a written request and subsequently approved by the staff. All requests for enforcement discretion must include information regarding the noncompliance, including identification of the requirement(s) not met or that will not be met, the reason why the requirement was/will not be met, the reason immediate relief is required, any associated compensatory actions that will be implemented, and when the licensee expects to come back into compliance. This information

¹ United States, House of Representatives, Committee on Oversight and Reform, Letter to Secretary Azar, Department of Health and Human Services, and Director Redfield, Centers for Disease Control and Prevention, March 19, 2020.

will be used by the NRC staff to continue to provide reasonable assurance of adequate protection of public health and safety, to promote the common defense and security, and to protect the environment.

As an early step, the staff reviewed the Enforcement Policy to determine if the discretion being contemplated by the staff in this paper is covered by it or whether a Commission decision to broaden the policy is necessary. Because Section 3.5 of the Enforcement Policy already recognizes the need for enforcement discretion in special circumstances, the staff concluded that the policy is sufficient as written to contemplate the circumstances presented by COVID-19. For COVID-19, the staff is applying the policy to a public health emergency outside of the licensees' control, with regional considerations being important to the decisions, and case-specific bases being required for individual decisions. This approach supports the intent of the Enforcement Policy that the staff remain flexible to use discretion in a public health emergency in carrying out its important health and safety mission. We respect the differing view in the enclosure and recognize that this paper benefitted from considering the varying perspectives.

The staff will evaluate all requests for enforcement discretion and, on a topic-by-topic basis, may develop specific enforcement discretion guidance for those regulatory requirements needing the highest level of attention to maintain the safe and secure operations of NRC licensees. The staff will address these specific topics using an EGM pursuant to the provision in Section 3.5, "Violations Involving Special Circumstances," of the Enforcement Policy.

For specific case-by-case requests, the staff will evaluate the request using the NRC Enforcement Policy and associated inspection guidance in order to disposition the noncompliance both during and after the PHE is terminated. For example, for power reactor licensees, some noncompliances could otherwise require a plant shutdown, possibly adversely affecting the stability and reliability of the electrical power grid or other critical infrastructures. Section 3.8, "Notices of Enforcement Discretion for Operating Power Reactors and Gaseous Diffusion Plants," of the Enforcement Policy allows the staff to "grant enforcement discretion in cases involving severe weather or other natural phenomena, based upon balancing the public health and safety or common defense and security of not operating against the potential radiological or other hazards associated with continued operation, and a determination that safety will not be impacted unacceptably by exercising this discretion." For other licensees (e.g., material users, research test reactors, etc.), the noncompliances may be evaluated for enforcement discretion under Section 3.5 "Violations Involving Special Circumstances."

The staff is confident that granting enforcement discretion via the Enforcement Policy on a case-by-case, or topic-by-topic basis via the EGM process, affords licensees the temporary relief needed from enforcement sanctions while they submit, and the staff approves, an exemption or other appropriate licensing action. To the extent a noncompliance is identified, the NRC staff will take enforcement action for non-COVID-19-related root causes that led to the noncompliance. Enforcement action will also be considered, consistent with the Enforcement

Policy, if a licensee provides incorrect or incomplete information to the NRC staff in its justification. Enforcement action could include the assessment of civil penalties and the issuance of orders.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

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for Operations

Enclosure
Differing Views

cc: SECY
OGC
OCA
OPA
CFO

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DIFFERING VIEW

At least one member of the Office of Enforcement staff believes the scope of discretion that will likely be necessary, as described herein, to be well beyond the scope of enforcement discretion approved by the Commission in the current Enforcement Policy. An increase in policy scope should necessitate an Interim Enforcement Policy, approved through a Commission notation vote paper rather than this information paper. This paper reasonably describes the circumstances that will likely necessitate the staff's use of enforcement discretion during and after the COVID-19 PHE, namely for all licensees, over a long period of time, covering a broad set of circumstances (to include allowing continued operation in violation of otherwise required technical specification mandated shutdowns) and with no identifiable specific threat to public health necessitating continued operation (e.g. power grid instability). The only element of the Enforcement Policy that considers such actions is associated with weather-related Notices of Enforcement Discretion, the application of which is substantially more limited than that considered for COVID-19. Concerned staff recognizes that the extent of the staff's authority derived from the Enforcement Policy is a matter of judgment and by providing this information paper to the Commission, their concerns have been heard and no further discussion is necessary.