
OFFICE OF
THE INSPECTOR GENERAL

U.S. NUCLEAR
REGULATORY COMMISSION

FOLLOW UP REVIEW OF NRC'S PROCESS
FOR ISSUING AND TRACKING
NOTICES OF ENFORCEMENT DISCRETION (NOED)

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AUDIT REPORT



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REPORT SYNOPSIS

The Office of the Inspector General has conducted a follow up review of the U.S. Nuclear Regulatory Commission's (NRC) policy and procedures for issuing Notices of Enforcement Discretion (NOED). Our objective was to evaluate whether the agency had implemented recommendations from our previous audit of 1994 in this same area, and if the agency continues to comply with its NOED procedural requirements.

The NRC Inspection Manual, Part 9900: Technical Guidance, provides the NRC procedures for implementing the exercise of discretion with regard to limiting conditions for operation in power reactor Technical Specifications or other license conditions for an operating facility. This enforcement discretion, an NOED, may only be exercised if the NRC staff is clearly satisfied that the action is consistent with protecting the public health and safety. The action requested by the licensee must be temporary, nonrecurring, and involve minimal or no safety impact. In addition, NRC is expected to take enforcement action for any root cause violation that led to the request for the NOED.

The number of NOEDs issued by the agency has decreased significantly since our last review in 1994. The number of NOEDs issued for the years 1991 through 1994 ranged between 64 and 73 per year. The number of NOEDs issued for the period covering this review, which included 1995 through 1998, ranged from 5 to 39 per year.

Our review, based on a sample of 59 of the 87 NOEDs from NRR and Region II files, found that NRC remains in general compliance with its procedures for granting NOEDs. However, we found some shortcomings in NRC's administration of the NOED program. First, NRC did not complete its commitment to our 1994 recommendation to improve its tracking mechanism. Second, documentation of oral conversations and the participants involved in granting NOEDs is not maintained. Third, NRC needs to ensure that proper tracking and follow up inspection occurs between the Regions and NRR. Finally, we believe that NRC needs to ensure that the requirements stated in the Manual are properly documented. NRC has corrective actions underway to address these shortcomings. Therefore, we made no recommendations.

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INTRODUCTION

The Office of the Inspector General (OIG) has completed a follow up review of the U.S. Nuclear Regulatory Commission's (NRC) policy and procedures for issuing Notices of Enforcement Discretion (NOEDs). We performed an initial review in 1994⁽¹⁾ and found that NRC was in general compliance with its procedures for granting NOEDs. However, we also identified some shortcomings in NRC's administration of the NOED program and made four recommendations to address those shortcomings.

Our overall objective for this follow up review was to evaluate whether the agency continued to comply with its NOED procedural requirements and had implemented our 1994 recommendations. Appendix I contains a more detailed description of our objectives, scope, and methodology.

BACKGROUND

The Office of Enforcement (OE) exercises oversight of and carries out the NRC enforcement program. Subject to OE's oversight and direction and, if necessary, with the approval of the appropriate Deputy Executive Director for Operations (DEDO), regional offices normally issue Notices of Violation and proposed civil penalties to licensees, vendors, contractors, and their employees. Similarly, the Office of Nuclear Reactor Regulation (NRR) issues Notices of Violation and proposed civil penalties for certain activities. In March 1993, NRC revised the Code of Federal Regulations that contained the "General Statement of Policy and Procedures for NRC Enforcement Actions" by adding a new subsection entitled "Exercise of Discretion for an Operating Facility." That new subsection stated:

On occasion, circumstances may arise where a licensee's compliance with a Technical Specification (TS) Limiting Condition for Operation or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions, or unnecessary delays in plant startup without a corresponding health and safety benefit. In these circumstances, the NRC staff may choose not to enforce the applicable TS or other license condition. This enforcement discretion will only be exercised if the NRC staff is clearly satisfied that the action is consistent with protecting the public health and safety.

¹ Review of NRC's Compliance With Notice of Enforcement Discretion Policy and Procedures, OIG/94A-24, October 17, 1994.

NRC Inspection Manual, Part 9900: Technical Guidance (the Manual), provided NRC's procedures for implementing this policy revision. Subsequently, the NRC removed its Enforcement Policy from the Code in July 1995 and issued NUREG-1600⁽²⁾, containing the same general statement of policy and procedures.

The Manual continues to provide the NRC procedures for implementing the exercise of discretion for an operating facility. The Manual states that NRC may exercise enforcement discretion only when the requested action is temporary, nonrecurring, and when the course of action is consistent with protecting public health and safety. However, "the decision to exercise enforcement discretion by issuing an NOED does not change the fact that a violation will occur, nor does it imply that enforcement discretion is being exercised for any violation that may have led to the violation at issue." Therefore, "in each case where the NRC staff has chosen to exercise enforcement discretion, enforcement action will normally be taken for any violations that were part of the root causes leading to the noncompliance."

NRC intends that enforcement action emphasize that licensees should not rely on NRC's authority to exercise enforcement discretion. Enforcement discretion should not be viewed as a routine substitute for compliance, or for requesting a license amendment.

Guidance in the Manual authorizes NRC Regions to issue NOEDs if licensees do not need amendments to license conditions or plant technical specifications. However, the duration for exercising this discretion should not exceed 14 days (except in unusual circumstances). NRC has the responsibility for issuing NOEDs that will result in an amendment to a license condition or plant technical specification.

At the time of our initial review, a public interest group and Senator Joseph Lieberman had raised concerns about the agency's NOED policy. Shortly after we had initiated our first review, NRC established a task force to review the implementation of the NOED policy, as well as the NOED policy itself. The task force's charter went beyond examining procedural compliance to include an examination of the technical decisions made in granting NOEDs and the consideration of subsequent root cause enforcement actions. Technical determinations related to an analysis of operational and shutdown risk, as well as the likelihood of a plant transient. In our opinion, these technical determinations are critical when deciding to grant an NOED.

In contrast, our initial review focused on nontechnical compliance issues. We found that NRC was in general compliance with its procedure for granting NOEDs and revealed that licensee requests for NOEDs generally contained the required information. However, we also found that (1) the agency's NOED procedures did

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NUREG-1600, Rev. 1 was published in May 1998 containing the same general statement of policy and procedures as NUREG-1600.

not stipulate time frames for NOEDs involving license amendments, (2) licensee requests and NRC approvals for NOEDs did not address conditions for allowing plant startup, (3) NRC did not perform root cause follow-up or follow-up was inconsistent, and (4) NRR could improve its NOED tracking and information process. As a result, we made four recommendations for improving the NOED program.

The DEDO agreed with our findings and recommendations. His response to our draft report stated that our audit recommendations would be implemented in conjunction with recommendations made by the NRC task force.

The number of NOEDs issued by the agency has significantly decreased since our last review. The number of NOEDs issued during our last review consisted of 70, 73, 64, and 67 for the years 1991, 1992, 1993, and 1994, respectively. For the period covering this review, the number of NOEDs issued was 39 for 1995, 7 for 1996, and 20 for 1997. There were 5 NOEDs for 1998 for the months of January and February.

FINDINGS

Similar to what we reported in 1994, we found that NRC remains in general compliance with its procedures for granting NOEDs. With a few exceptions, NRC provides the licensee with all required information for the basis of its NOED decisions.

However, we found that NRC needs to improve its implementation of the NOED process in three areas. Most significantly, we determined that NRC needs to update and improve its mechanism for tracking NOEDs. NRC did not complete the action plan to resolve our 1994 recommendation in this area. Secondly, we believe that NRC needs to improve its process for documentation and authorization. Finally, we found that NRC needs to clarify some procedural aspects of the Manual.

NRR NEEDS TO UPDATE AND IMPROVE ITS NOED TRACKING MECHANISM

In conducting our review, we found that most information regarding the NOED tracking was not contained in NRR's NOED tracking system. The information in the database had been lost due to a computer system failure, and had not been restored completely. We believe this lack of an updated tracking system impedes the ability to ensure that appropriate follow up, and any related enforcement action, is taken. The lack of an updated tracking system also decreases the ability to ensure that NOEDs are closed out in a timely manner.

In 1994, we reported that NRC did not have an adequate mechanism in place for tracking NOEDs. Accordingly, NRC revised the Manual to require that NRR and the Regions track their NOEDs in a LAN-based system. Additionally, the revised Manual identified information to be tracked, including the assignment of tracking numbers for all NOEDs granted. Although the agency committed to the development of the LAN-based tracking system³, we found that they did not follow through on their commitment. Instead, NRR maintained the agency's NOED database in a personal computer residing in NRR. The agency designed the database, partly in response to our 1994 finding and recommendation in this area, to track relevant data pertaining to the NOED process, including follow up and closeout information. We found that all information in the database was lost due to a computer system failure that occurred toward the end of Fiscal Year 1996. At that time, the backup file resided on the same computer, which resulted in the loss of all backup information. NRR reprogrammed the system and began to restore information by scanning reports distributed prior to the system failure. Recovery included portions of information from 1993 through 1998. However, at the time of our review, most of the information still was not restored in the database. Computer system problems again occurred during our review in March 1998. This second system failure corrupted the macros and queries that provided data entry screens and report generating capabilities. However, the basic NOED data was not affected at this time.

Most significantly, for the NOEDs we sampled, we found that the NOED database did not have information relating to follow up root cause analysis and related enforcement action. Additionally, the database did not include license amendment information. Therefore, we could not determine the timeliness of issuing amendments. There was also no information in the database indicating actual closing dates for NOEDs. Because of the system failure and incomplete database, we believe the agency cannot follow the process from the granting of the NOED to its closeout electronically. This impedes the ability to ensure (1) the timely closeout of NOEDs and (2) that appropriate follow up action, and related enforcement action, is taken.

NRR senior managers told us that NRR and the Information Resource Management (IRM) office discussed the development of a LAN-based NOED tracking system. However, they also said that, at that time, IRM did not have the resources to support such a small program. A November 1995 memorandum from the Director, NRR, to the Executive Director for Operations reported that the action plan activities were complete. According to NRR senior managers, NRR erroneously dropped the development of the LAN-based system with the closeout of the action plan.

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SECY-95-078, "Staff Actions to Address Recommendations Resulting from Recent Evaluations of the Notice of Enforcement Discretion (NOED) Policy and Process."

During our review, we found two cases in which Region II was unaware of tracking numbers being assigned. According to NRR, tracking numbers were assigned for all NOEDs granted, including these two cases. They further stated that it is possible that an NOED letter could go out without a tracking number, but it is rare. They added that it may be possible that Region II was sent a copy of the NOED concurrence letter prepared and reviewed before the final NOED letter was distributed. The final approval letter would contain the NOED number. Additionally, we believe an overall understanding of the database fields is required to ensure the accuracy of information, and to reinforce the timely closeout of NOEDs. In discussions with NRR and Region II representatives, we identified that a misunderstanding exists with definitions of database fields. As a result, the ability to ensure the accuracy in NOED information reporting is questionable.

At the time we began our audit, the NOED tracking system maintained by NRR had not been restored completely because it was not considered one of the high priority activities by NRR senior management. This was due (in part) to the decreased number of NOEDs being submitted since 1995. They also told us that only one person was assigned to NOED tracking, and that person had ancillary responsibilities, which prevented full attention to this matter. Additionally, the time involved to research information necessary to restore the system's information has delayed updating the system.

NRR SHOULD IMPROVE ITS PROCESS FOR DOCUMENTATION/AUTHORIZATION

NRC often grants NOEDs during oral discussions that occur between the licensee, the Region, and NRR. The Manual states that an NOED may be requested orally, but must be followed by a written request that confirms the information relied upon in arriving at the decision made. From the sample we reviewed, we found that NRR often grants NOEDs orally before receiving the written request from the licensee. However, we were unable to determine if sufficient information transpired in the oral discussions to reach the same conclusions as stated in the written submittal.

From our sample, we found that NRC granted 19 out of 43 NOEDs orally before receiving the licensees' written requests. In talking with NRR senior managers, we found that they developed an NOED Checklist, but it is not an official part of the inspection manual or the NOED. The checklist provides a tool for NRC Project Managers to reference when discussing and taking information relating to oral requests. However, we found that the identification of participants in the discussions, or the retention of documentation pertaining to the discussions is not a requirement. The licensee's written request and the agency's concurrence process are used to confirm that the information discussed in the oral conversation corresponds with the written request. For the most part, NRC's letter to the licensee references the oral conversation. However, we were unable to determine or confirm if sufficient information transpired in the oral conversations to reach the same conclusion as stated in the written submittal. Additionally, we could not determine if the appropriate concurrences and approvals were obtained before granting the NOED.

Manual requires that the NOED be based on a written request from the licensee. Licensees can request an NOED orally; however, a written request must follow it. Oral discussions occur between NRR, the Region, and the licensee in which they can grant the NOED verbally. The Manual further requires that if the request is made orally, NRC must have sufficient information to reach the same conclusions as if it had received a written submittal. The follow up written request should confirm the information the NRC staff relied upon in making its decision. The Manual further directs that NRC staff obtains specific concurrences depending on whether it is granted by the Region or by NRR. Any discrepancies between the oral and written request are to be documented.

NRR senior managers told us they believe NRC's letter to the licensee serves as the reference to verify all NOED information. Additionally, they said they are administering the agency's efforts toward a paperless system by not requiring the retention of notes or the checklist pertaining to the oral discussions. Therefore, they choose to continue to document orally granted NOEDs through the issuance of NRC's letter authorizing the NOED. In continuing with this documentation process, the participants in the oral conversation cannot be identified. We believe this lack of participant identification results in a lack of accountability for those involved in the decision to grant the NOED. Additionally, there is no official record of NRC participants involved with granting NOED requests made orally.

NRR NEEDS TO ENSURE SCRUTINY IN DOCUMENTING THE MANUAL REQUIREMENTS

The Manual requires that NOEDs be closely coordinated between NRR and the Region to ensure that they are given consideration for enforcement action for any root cause violations that led to the NOED. We found that improvements need to be made in providing adequate documentation through NRC's letter to the licensee that the requirements as stated in the Manual are met.

NRC's Letter to the Licensee

During our review, we found that some requirements as stated in the Manual are not being appropriately documented in NRC's letter to the licensee. Because of this lack of documentation, we were unable to determine if certain criteria as stated in the Manual are being met.

We found in several instances that NRC did not issue its NOED approval letter within the required time after receipt of the licensee's written NOED request. Additionally, in at least five cases involving requests for license amendments, NRC's letters did not show the type of license amendment to be processed (emergency or exigent). For 52 out of 59 NOED files sampled, we could not determine if NRC verified they had reviewed the licensee's safety issues. Similarly, for 51 out of the 59 NOED approval letters, NRC did not clarify inclusion of marked-up technical specification pages with the licensee's request, or if the licensees stated that the NOED request is not based on a failure to adopt approved line-item

improvements. Licensees are to adopt the Improved Standard Technical Specifications that focus on plant conditions important to safety issues and were developed to reduce unnecessary technical specification requirements.

The Manual states that NRC should normally issue its NOED approval letter within two working days of receipt of the licensee's written request. The Manual further states that the NRC should verify that the Plant Onsite Review Committee, or its equivalent for reviewing safety issues, approves the licensee's request. The Manual provides direction to confirm that the licensee's request included marked-up technical specification pages for a follow-up license amendment, and that prior adoption of approved line-item improvements to the technical specification would not have prevented the need for the request.

We believe this lack of NRC verification limits the ability to ensure the NOED process is consistent with the policy and guidance. In our opinion, the line-item improvement, if implemented, should reduce the need for an NOED. The marked-up technical specification pages allow the agency to evaluate the safety impacts when reviewing the NOED request.

CONCLUSION

By the time we had completed our audit field work, NRC had initiated corrective actions. These actions were based on ongoing discussions we held with NRR senior management related to our findings during the course of our review. As a result, NRR senior management committed to update the database to include root cause follow up and associated license amendment information by July 1, 1998. Based on a preliminary review of the work done with respect to updating the database, it appears that NRR has updated the system as discussed during our review. Beyond updating the NOED information in the database, NRR senior managers approved the installation of additional hardware to the personal computer containing the NOED database as a method to ensure backups of the database system are maintained separately. NRR senior management has also committed to having two additional staff serve as backup personnel to the original NOED tracking coordinator.

Additionally, NRR senior management agreed to provide clarification on database field definitions based on our observation of potential misunderstandings. We found that the agency is reviewing the Manual to determine if any other areas need additional clarification, and to ensure that the proper foundation for documenting the basis of the decision for granting the NOED is provided. NRR senior management also agreed to identify the participants involved in the oral conversations when NOEDs are requested and granted orally to ensure accountability for the decision made.

Based on the corrective actions underway by NRR, we are not making any recommendations at this time. However, we plan to monitor the agency's implementation of these corrective actions.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our goal in performing this review was to determine whether the agency has effectively continued to follow its Inspection Manual, Part 9900 (the Manual), for implementing NRC's Notice of Enforcement Discretion (NOED) policy, and if the agency effectively implemented our recommendations made in 1994. To accomplish this goal we:

- (1) Determined the extent of compliance with the Manual, and
- (2) Determined whether the agency effectively implemented recommendations made in 1994.

We conducted our review from early February to late April 1998. We interviewed NRC headquarters staff in the Office of Nuclear Reactor Regulation (NRR) and Office of Enforcement. We also interviewed personnel from regional offices who are involved in the NOED process.

We reviewed NRC rules and guidance affecting the issuance of NOEDs. We also reviewed a sample of NOEDs granted for the period January 1995 through February 1998. Our sample represented 43 of the 71 NOEDs maintained in NRR's files, and 16 of the 16 NOEDs from Region II files during that period. The sample included NOEDs granted by both NRR and the Regions. We did not verify the completeness of the sample provided. Because this review examined compliance with the Manual only, we did not evaluate the internal controls related to the agency's overall enforcement policy. We also did not evaluate the technical merits of the NOEDs granted.

We conducted our review according to generally accepted Government auditing standards.

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GLOSSARY: OFFICE OF THE INSPECTOR GENERAL PRODUCTS

INVESTIGATIVE

1. *INVESTIGATIVE REPORT - WHITE COVER*

An Investigative Report documents pertinent facts of a case and describes available evidence relevant to allegations against individuals, including aspects of an allegation not substantiated. Investigative reports do not recommend disciplinary action against individual employees. Investigative reports are sensitive documents and contain information subject to the Privacy Act restrictions. Reports are given to officials and managers who have a need to know in order to properly determine whether administrative action is warranted. The agency is expected to advise the OIG within 90 days of receiving the investigative report as to what disciplinary or other action has been taken in response to investigative report findings.

2. *EVENT INQUIRY - GREEN COVER*

The Event Inquiry is an investigative product that documents the examination of events or agency actions that do not focus specifically on individual misconduct. These reports identify institutional weaknesses that led to or allowed a problem to occur. The agency is requested to advise the OIG of managerial initiatives taken in response to issues identified in these reports but tracking its recommendations is not required.

3. *MANAGEMENT IMPLICATIONS REPORT (MIR) - MEMORANDUM*

MIRs provide a "ROOT CAUSE" analysis sufficient for managers to facilitate correction of problems and to avoid similar issues in the future. Agency tracking of recommendations is not required.

AUDIT

4. *AUDIT REPORT - BLUE COVER*

An Audit Report is the documentation of the review, recommendations, and findings resulting from an objective assessment of a program, function, or activity. Audits follow a defined procedure that allows for agency review and comment on draft audit reports. The audit results are also reported in the OIG's "Semiannual Report" to the Congress. Tracking of audit report recommendations and agency response is required.

5. *SPECIAL EVALUATION REPORT - BURGUNDY COVER*

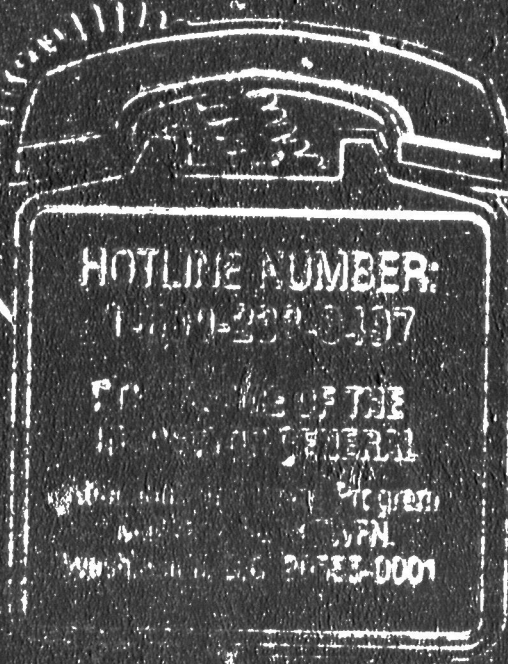
A Special Evaluation Report documents the results of short-term, limited assessments. It provides an initial, quick response to a question or issue, and data to determine whether an in-depth independent audit should be planned. Agency tracking of recommendations is not required.

REGULATORY

6. *REGULATORY COMMENTARY - BROWN COVER*

Regulatory Commentary is the review of existing and proposed legislation, regulations, and policies so as to assist the agency in preventing and detecting fraud, waste, and abuse in programs and operations. Commentaries cite the IG Act as authority for the review, state the specific law, regulation or policy examined, pertinent background information considered and identifies OIG concerns, observations, and objections. Significant observations regarding action or inaction by the agency are reported in the OIG Semiannual Report to Congress. Each report indicates whether a response is required.





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