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MISTRAS – PREDECISIONAL ENFORCEMENT CONFERENCE

JULY 11, 2023

- ▶ Apparent Violation A – MISTRAS' Legal Position
- ▶ Apparent Violation B – MISTRAS' Legal Position
- ▶ Description of Mitigating Factors and Corrective Actions

- ▶ This is at most an SL IV violation and does not warrant escalated enforcement.
- ▶ The NRC's Enforcement Policy (January 13, 2023 Revision) provides the following as an example of an SL IV violation:
 - “Failure to implement adequate 10 CFR Part 21 or 10 CFR 50.55(e) processes or procedures that has more than minor safety or security significance.”
- ▶ The NRC has not alleged, nor is there any reason to believe, that the procedural issues in this case had any safety or security significance.
- ▶ MISTRAS, in conjunction with NUPIC, EPRI and select customers, determined that the deviation does not pose a safety risk.
- ▶ Thus, the procedural issues alleged in Apparent Violation A at most could arguably rise to a Significance Level IV.

- ▶ The Enforcement Policy does not provide a directly on-point example of an SL III violation but does provide the following analogous example that arises under Part 21:
 - “An inadequate review or failure to review such that, if an appropriate review had been made as required, a 10 CFR Part 21 or 10 CFR 50.55(e) report would have been required.”
- ▶ Other Part 21-related examples set a “careless disregard” standard.
- ▶ The NRC has not alleged that a 10 CFR Part 21 report would have been required.
- ▶ MISTRAS conducted an evaluation that was conducted in good faith and without careless disregard for the potential consequences.
- ▶ This provides further evidence that the apparent violation does not warrant escalated enforcement.

- ▶ No violation occurred with respect to MISTRAS’ customer communications during the Part 21 evaluation
- ▶ 10 CFR 21.21(b) states: “If the deviation or failure to comply is discovered by a supplier of basic components, or services associated with basic components, **and the supplier determines that it does not have the capability to perform the evaluation** to determine if a defect exists, then the supplier must inform the purchasers or affected licensees **within five working days of this determination** so that the purchasers or affected licensees may evaluate the deviation or failure to comply, pursuant to § 21.21(a).”
- ▶ The regulation unambiguously states that as a prerequisite to a requirement to inform purchasers, the supplier must make a determination that it does not have the capability to perform the evaluation itself. The five day clock to inform purchasers does not begin until such a determination is made.
- ▶ MISTRAS never made a determination that it could not perform the evaluation itself and thus never triggered the requirement to notify purchasers.

- ▶ The Supreme Court's *Auer* Deference Doctrine holds that deference is only given to agency interpretations of regulations when the regulation is ambiguous.
- ▶ Recently, in *Kisor v. Wilkie*, the Supreme Court placed significant restrictions on *Auer* and stated:
 - “[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation...if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.”
- ▶ 10 CFR 21.21(b) unambiguously requires a supplier determination as a prerequisite to customer notification and thus, under Supreme Court precedent, Courts cannot grant deference to any other agency interpretation.

- ▶ Even if the regulation were ambiguous, the requirement for a supplier to make its own determination as a prerequisite to customer notification complies with the original intent of 10 CFR 21.21(b).
- ▶ The current 21.21(b) was proposed in 1988 (53 Fed. Reg. 44594-02) and finalized in 1991 (56 Fed. Reg. 36081-01). In those notices, the NRC did not expressly state a reason for the prerequisite of a supplier determination but, in response to comments saying that the five day limit was too short, expressly stated its intent that the clock does not begin until “after the formal evaluation process has reached the conclusion that the vendor cannot determine if a defect exists.”
- ▶ Further, the addition of 21.21(b) was part of a package of revisions that was published with the intent of eliminating duplicate reporting and reducing administrative burden. If the NRC could retroactively decide that a supplier’s determination that it was able to perform an evaluation was incorrect and issue a violation, then no supplier would have incentive to ever perform an evaluation on its own. Instead, it would pass the responsibility on to multiple customers to perform duplicate evaluations, in contravention of the intent of the rule.

- ▶ Nonetheless, MISTRAS' voluntary consultations with multiple utilities via NUPIC as well as consultations with EPRI and some customers that were not on the NUPIC team, which went above and beyond its obligations to perform the Part 21 evaluation itself, satisfied the higher threshold the agency is asking for.
- ▶ Even if a violation occurred, it would not qualify for escalated enforcement because, as demonstrated by the example of an SL III violation cited earlier, the NRC has not alleged that a report would have been required had customers been notified.
 - ▶ SL III Example: “An inadequate review or failure to review such that, if an appropriate review had been made as required, a 10 CFR Part 21 or 10 CFR 50.55(e) report would have been required.”

- ▶ Mistras has sent detailed reports of every known impacted job to customers and no customers have reported actual safety consequences or asked for Mistras to retest impacted equipment.
- ▶ The Part 21 evaluation procedure is being revised to include adequate criteria for determining (a) whether MISTRAS is capable of performing any particular Part 21 evaluation itself or if it must transfer the responsibility to its customers and (b) if it is able to make the determination itself, whether the deviation could lead to a substantial safety hazard. Revision to be completed by the end of July.
- ▶ MISTRAS is implementing a new Nuclear Projects Division (NPD) with oversight responsibilities over all nuclear projects including pre-project and post-project checks. Members of the NPD are already performing records reviews while final procedures are being approved. The team will be fully stood up by the end of August 2023.



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