



Department of Energy
Washington, DC 20585

July 21, 2003

MEMORANDUM FOR: DOE PAAA COORDINATORS
CONTRACTOR PAAA COORDINATORS

FROM: STEPHEN M. SOHINKI *sm*
DIRECTOR
OFFICE OF PRICE-ANDERSON ENFORCEMENT

SUBJECT: Enforcement Guidance Supplement 03-01
Supplemental Guidance Concerning the Factual Bases for
Issuing Consent Orders Pursuant to 10 CFR 820.23

In October 2000, the Office of Price-Anderson Enforcement (OE) issued Enforcement Guidance Supplement (EGS) 00-04, "Factual Bases for Issuing Consent Orders Pursuant to 10 CFR 820.23 and Compliance Orders Pursuant to 10 CFR subpart C." That EGS, in part, delineated a set of criteria that OE would use to determine whether to apply its enforcement discretion, in this case through the use of Consent Orders. Those criteria provided both guidance to DOE contractors regarding situations for which the use of Consent Orders are appropriate, and a tool to assure consistency in the OE evaluation of requests for resolution of potential violations by Consent Order.

A pivotal aspect of EGS 00-04 is that the willingness of DOE to enter into a Consent Order represents, among other things, a conclusion that confidence, built over time, is warranted in a contractor's ability and commitment to anticipate precursor problems, comprehensively investigate significant issues and adverse events, and properly resolve these nuclear safety issues. Since the issuance of EGS 00-04, it has become increasingly apparent that additional guidance is needed to further define what is meant when OE draws the conclusion that it has **confidence** in a contractor's ability to anticipate and proactively resolve nuclear safety issues and that this conclusion is "**built over time.**"

OE recognizes that even a contractor with a history of strong, proactive nuclear safety performance may have an occasional event or other noncompliance issue that would justify consideration of potential enforcement action. In such cases, this history of strong performance, coupled with an aggressive investigation of the subject issues and comprehensive corrective actions, forms the basis for the use of a Consent Order. In this regard, a contractor's performance history over an extended period, i.e., about two years in most cases, must demonstrate a consistent proactive approach to the anticipation, comprehensive investigation and resolution of nuclear safety issues or be reflective of a consistent improving trend in performance.

A contractor organization that cannot demonstrate such consistent proactive behavior should not expect favorable action on a request for a Consent Order solely on the basis of **recent** aggressive action to deal with nuclear safety issues. Such recent proactive behavior may justify partial mitigation of a civil penalty but would not justify the use of a Consent Order. In this regard, 10 CFR 820 Appendix A, section IX, describes the means by which OE can provide a DOE contractor with enforcement discretion for initiative in promptly identifying, reporting, and correcting nuclear safety related problems. It is in this context that OE can recognize more recent contractor initiatives such as problem identification and reporting, investigatory efforts (including root cause analysis), and corrective action identification and implementation. It is important that the DOE contractor community understand this clear distinction between circumstances that warrant mitigation of an enforcement action and those circumstances that merit the use of a Consent Order.

Thus, this Office cannot support requests for Consent Orders based solely on the contractor response, however, aggressive, to recent safety noncompliance situations. Recent changes in contractor senior management and a resultant improvement in nuclear safety performance over the last few months are likewise not sufficient.

In making the final determination whether a contractor has demonstrated a history of strong nuclear safety performance, OE will obviously first consider its own enforcement experience with that contractor. However, OE will carefully consider the views of DOE-National Nuclear Security Administration line management personnel who have responsibility for safe operations of the various facilities around the complex. In addition, OE will solicit input from colleagues in the Office of Environment, Safety and Health who have conducted oversight reviews at the sites and facilities of interest. Finally, OE will review the results of relevant assessments performed by the DOE Office of Independent Oversight and Performance Assurance and others for any information that may inform OE's decision regarding a Consent Order.

The use of a settlement agreement in the form of a Consent Order is mutually beneficial to both DOE and the contractor. Further, OE encourages the application of this approach whenever appropriate. However, it is incumbent upon OE to apply this tool in a consistent manner and to assure that, when it is applied, it is in the best interest of DOE to do so.

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