

# NOTATION VOTE

## RESPONSE SHEET

RELEASED TO THE PDR

12/13/96

date

DKW

initials

TO: John C. Hoyle, Secretary

FROM: CHAIRMAN JACKSON

SUBJECT: SECY-96-222 - USE OF OPEN PREDECISIONAL  
ENFORCEMENT CONFERENCES AND ELIMINATION OF  
CERTAIN PROVISIONS FOR COMMISSION  
CONSULTATION; PROPOSED REVISIONS TO THE  
ENFORCEMENT POLICY TO ADDRESS RISK  
SIGNIFICANT VIOLATIONS AND CERTAIN  
NON-CITED VIOLATIONS

Approved with 1 exception  
X and comments Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_ Request Discussion \_\_\_\_\_

COMMENTS: SEE ATTACHED

170022

Marky Ann Jackson  
SIGNATURE

Release Vote / /

November 5, 1996

DATE

Withhold Vote / X /

Entered on "AS" Yes X No \_\_\_\_\_

0/1  
DF02

### Chairman Jackson's Comments

I approve of the staff's recommendations with one exception. Due to the agency's need to act cautiously when exercising discretion to refrain from taking enforcement action, I feel that the Commission should be consulted prior to the staff exercising enforcement discretion to refrain from issuing notices of violation and civil penalties during extended shutdowns or work stoppages.

I have attached other minor revisions to the text of the Federal Register notice.

Most enforcement decisions are made at the NRC staff level. However, based on guidance in Section III of the Enforcement Policy "Responsibilities," certain cases require formal Commission consultation. The practice of Commission consultation has existed since the Enforcement Policy was first published as an interim Policy in 1980. After 1980, the number of cases requiring this type of consultation has more than doubled. Most of the criteria for consultation were adopted many years ago, to address particular Commissioner concerns or areas where the NRC staff had little experience. The NRC staff has had substantial experience in implementing the objectives of the Enforcement Policy. It is relatively rare that the Commission deviates from the recommended NRC staff approach. Thus, there is less need for mandatory Commission involvement in many enforcement matters.

Based on these factors and considering the significant effort currently expended in providing Commission consultation on enforcement matters, the Commission has given the NRC staff more flexibility to decide what enforcement issues should be brought to the Commission's attention because of policy significance, controversy, or known Commission interest.

Section III of the Enforcement Policy is being modified to delete the specific requirements for consultation with the Commission before the NRC staff issues enforcement actions involving material false statements, orders or civil penalties to unlicensed individuals, or civil penalties to licensed reactor operators. Because of the egregious nature of material false statement cases, it is logical that they would be considered very significant regulatory concerns and be categorized at Severity Level I and require Commission consultation on that basis (Section III(10) of the Enforcement

conferences will be open to public observation. However, as for any public meeting, the NRC retains the discretion to close the conference for a specific case. The criteria for closing conferences are currently addressed in Section V of the Enforcement Policy.

With two additions, these criteria will continue to be used. The changes involve opening a conference if it is based on an NRC Office of Investigations (OI) report that has been publicly disclosed and providing flexibility to open or close a conference with the approval of the Executive Director for Operations. The Enforcement Policy will continue to emphasize that predecisional enforcement conferences are open for public observation and not participation consistent with the NRC's policy on open meetings.

#### Non-Cited Violations

The Enforcement Policy provides examples of when discretion generally should be considered for departing from the normal approach under the Policy. Section VII.B.1 addresses non-cited violations (NCVs) which are used to recognize the existence of a legal violation but are not formal violations. NCVs are used to provide an incentive to licensees to identify and correct violations. <sup>Criterion</sup> ~~Example 1(a)~~ in Section VII.B.1. is a Severity Level IV violation that was "identified by the licensee, including identification through an event."

This discretion is normally used when the licensee identifies and corrects a non-recurring violation. However, this provision is not normally used for violations that meet the criteria for Severity Level III violations, and where the circumstances justify characterization at Severity Level IV. Such cases normally are the more significant Severity Level IV violations. In addition, the NRC has considered whether this exercise

of discretion should normally be used in cases involving violations identified through an event. If the root cause of the event is obvious or the licensee had prior opportunity to identify the problem but failed to take action that would have prevented the event, the licensee should not be rewarded by the NRC's exercising discretion not to cite the violation. On the other hand, there may be cases when, notwithstanding a self-disclosing violation, the licensee demonstrated initiative in identifying the violation's root cause. In such a case, an NCV may be appropriate.

In general, when the licensee's identification is through an event, discretion should only be exercised when the licensee has demonstrated initiative. Further, the violation should be cited if it caused the event, the cause is obvious, or a clear opportunity existed to identify the violation and take action to prevent the event. The Commission believes that the Enforcement Policy should be clarified by deleting the reference to identification through an event in the ~~example~~<sup>criteria</sup> in Section VII.B.1.(a) to make it clear that use of discretion is not automatic if the violation is identified through a self-disclosing event.

#### Risk-significant Violations

In evaluating violations for enforcement, the higher the risk from a violation, the greater the severity level and sanction should be. However, the converse is not necessarily true; low risk should not necessarily result in no sanction or a minor violation being cited. This is because many violations, although having low risk significance, may indicate a broader problem, often indicative of a programmatic licensee failure to comply with NRC requirements and, therefore, have a high regulatory significance.

The Enforcement Policy currently does not address risk explicitly, except in

Section VII.A.1(e) which addresses the escalation of enforcement sanctions in situations when the excessive duration of a problem has resulted in a substantial increase in risk. Although there is inherent discretion in the Enforcement Policy to increase Severity Levels and sanctions based on risk, the Commission believes it is appropriate to modify the Policy to state the consideration of risk aspects more clearly.

In analyzing risk, the NRC recognizes the uncertainties associated with risk assessment. Generally, qualitative rather than quantitative risk assessments are made given the number of variables associated with risk assessment. Risk should be a consideration in proposing enforcement actions, but not necessarily determinative. In developing higher civil penalties, the Commission intends to consider, where appropriate, assessing separate civil penalties for each violation that is aggregated into a Severity Level II problem.

Therefore, to provide sufficient discretion to be able to appropriately consider risk in enforcement decisions, Section ~~III~~<sup>IV</sup> of the Policy is being modified to state that in considering the significance of a violation, the NRC considers the technical significance, i.e., actual and potential consequences, and the regulatory significance; and that in evaluating the technical significance, risk is an appropriate consideration. Further, Section VII.A.1(e) is being modified to state that exercise of discretion should be considered in situations where the violation has resulted in a substantial increase in risk, including cases in which the duration of the violation has contributed to the substantial increase.

#### Paperwork Reduction Act Statement

This policy statement does not contain a new or amended information collection