



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555

March 2, 1988

OFFICE OF THE  
SECRETARY

MEMORANDUM FOR: Victor Stello, Jr.  
Executive Director for Operations

FROM: *U.S.*  
Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION  
AND VOTE, 3:30 P.M., WEDNESDAY, FEBRUARY 24,  
1988, COMMISSIONERS' CONFERENCE ROOM, D.C.  
OFFICE (OPEN TO PUBLIC ATTENDANCE)

I. SECY-88-33 - Reconsideration of Enforcement Policy  
Provision Involving Reopening Closed Cases

The Commission, by a 5-0\* vote, approved the proposed revisions to the Commission's enforcement policy as modified on the attached pages.

The Federal Register Notice should be revised as noted on the attached pages and returned for signature and publication in the Federal Register.

(EDO)

(SECY Suspense: 3/25/88)

Attachment:  
As stated

cc: Chairman Zech  
Commissioner Roberts  
Commissioner Bernthal  
Commissioner Carr  
Commissioner Rogers  
OGC (H Street)  
GPA  
PDR - Advance  
✓ DCS - 016 Phillips

\* Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Carr was not present when this item was affirmed. Accordingly the formal vote of the Commission was 4-0 in favor of the decision. Commissioner Carr, however, had previously indicated that he would approve this paper and had he been present he would have affirmed his prior vote.

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PDR 10CFR  
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NUCLEAR REGULATORY COMMISSION

10 CFR PART 2

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR ENFORCEMENT ACTIONS

AGENCY: Nuclear Regulatory Commission

ACTION: Modification to policy statement

SUMMARY: The NRC is publishing a minor modification to its Enforcement Policy to <sup>clarify</sup> ~~revise~~ its policy on reopening closed enforcement actions. ~~The policy~~ X

~~statement describes the policy which the Commission intends to apply in taking~~ superfluous  
~~enforcement actions.~~ This policy is codified as Appendix C to 10 CFR Part 2.

*SINCE this action concerns a general statement of policy, no prior notice is required and, hence,*

DATES: *1* This modification to the Enforcement Policy is effective upon publication. Comments may be submitted on or before \_\_\_\_\_.

ADDRESSES: Send comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. ATTN: Docketing and Service Branch. Hand deliver comments to: Room 1121, 1717 H Street, NW., Washington, DC between 7:30 a.m. to 4:15 p.m.

Copies of comments may be examined at the NRC Public Document, 1717 H Street, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (301-492-0741).

SUPPLEMENTARY INFORMATION:

The Commission on September 23, 1987 issued a revised Enforcement Policy (52 FR 36211 September 28, 1987) in which Section V.F. addressed reopening closed enforcement actions. Section V.F. provided that if significant new information is received which indicates that a previous enforcement sanction was incorrectly applied, the action could be reopened. ~~However~~ The policy also *stated* ~~provided~~ that (1) reopening should occur only if remedial action is necessary to abate a continued harm or if the new information shows that the violation was less serious than originally believed or that the violation did not occur, and (2) normally actions would not be reopened where the only change to the prior action would be to increase the severity level of a violation or to impose or increase a civil penalty.

While comments submitted in response to the September 28, 1987 Federal Register Notice were generally favorable to the wording of section V.F, the Commission has reconsidered this policy because it implies that an enforcement action would not normally be reopened to increase a sanction even if such action was warranted. For example, reopening may be warranted to increase a sanction such as a civil penalty on the basis of new information if the reason NRC did not have the information initially was because the licensee misled the NRC by providing false information or withholding the information from the NRC. In such a case, any prejudice to the licensee is the result of its own action. Reopening would be justified to ~~provide~~ <sup>impose</sup> the appropriate sanction. Not to do so would reward a licensee's failure to cooperate with the NRC, which of course cannot be ~~accepted~~ tolerated.

*→ under the terms of the current enforcement policy*

It should be noted that the issue here is reconsidering the existence of the original violation or the circumstances and severity of the original violation. If the new information supports a different violation, then reopening is not the issue because a new and different enforcement action can be taken.

Whether or not to reopen a completed enforcement action requires the exercise of sound discretion and judgment. It is difficult in the absence of a specific case to establish what action if any should be taken as a result of new information. Considerations in making a determination to reopen a closed case might include: whether the licensee knew or should have known of the information at the time the original action was closed, whether the doctrine of res judicata applies, the opportunities available to learn of the information earlier and the reason for NRC not obtaining it earlier, the significance of the new information, the extent of the change to the enforcement action warranted by the new information, the resources necessary to reopen the case, the need for an increased sanction to provide additional deterrence for the impacted licensee and other similar licensees, whether the licensee acquiesced to the original enforcement action, whether remedial action is needed to abate the effect of the original violation, whether the original violation in fact occurred, and whether the licensee would be severely or unjustly prejudiced by a reopening decision (apart from receiving a more severe sanction).

Recognizing that this is an issue which <sup>arises</sup> ~~occurs~~ very infrequently and that there are many considerations relevant to a reopening decision on the basis of new information, the Commission has determined <sup>to modify</sup> ~~it is inappropriate to set out in~~

~~advance the circumstances when the Commission believes it is appropriate to~~  
~~reopen a case. Therefore, Section V.F. of the Enforcement Policy is being~~  
~~modified to make it clear~~ <sup>emphasize</sup> that the decision to reopen a case is to be made on  
a case-by-case basis. X

#### List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following modification to its statement of Enforcement Policy in Appendix C to 10 CFR Part 2.

#### Part 2 - Rules of Practice for Domestic Licensing Proceedings

1. The authority citation for Part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 75 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332; sec. 301, 88 Stat. 1248 (42 U.S.C. 5871)). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section V.F. of Appendix C - General Statement of Policy and Procedure for NRC Enforcement Actions is revised as follows:

V. Enforcement Actions

\* \* \* \* \*

F. Reopening Closed Enforcement Actions

If significant new information is received or obtained by NRC which indicates that an enforcement sanction was incorrectly applied, consideration may be given, dependent on the circumstances, to reopening a closed enforcement action to increase or decrease the severity of a sanction or to correct the record. Reopening decisions will be made on a case-by-case basis, are expected to occur rarely, and require the specific approval of the Deputy Executive Director for Regulatory Operations.

Dated at Washington, DC, this       day of       1988.

For the Nuclear Regulatory Commission

Samuel J. Chilk  
Secretary of the Commission