

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

February 9, 1989

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: J. Chilk, Secretary

SUBJECT: REQUIREMENTS - AFFIRMATION/DISCUSSION  
AND VOTE, 3:30 P.M., THURSDAY, FEBRUARY 2,  
1989, COMMISSIONERS' CONFERENCE ROOM, ONE  
WHITE FLINT NORTH, ROCKVILLE, MARYLAND  
(OPEN TO PUBLIC ATTENDANCE)

1. SECY-89-003 Shoreham - intervenor Motion to Admit New-Contention on Medical Services for contaminated Injured Individuals

The Commission, by a 4-0 vote, approved an order responding to a pending motion to add a new contention for litigation in the Shoreham proceeding. The order denied the motion.

Commissioner Curtiss did not participate in this action.

(Subsequently on February 2, 1989, the Secretary signed the order.)

- II. SECY-88-357 - Final Rule an Informal Procedures for Materials Licensing Adjudications

The Commission, by a 5-0 vote, approved a final rule which provides procedures for the conduct of informal adjudicatory hearings in materials licensing proceedings subject to the following:

1. The rule should be modified to require that if FRN's of pending actions are issued, they would describe the opportunity for a hearing or reference the regulations under which a hearing request can be made;
2. Section 2.1211(b) of the rule should require states, localities and other similar entities, at the they seek to participate, to state with reasonable specificity the subject matter on which they desire to participate;

and

3. The attached editorial corrections.

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The rule should be modified as noted and returned for signature and publication.

(OGC)

(SECY Suspense: 3/3/89)

III. SECY-88-358 - Final Rule on Immediate Effectiveness  
Procedures and Related Federal Register Notice on TMI-  
Related Policy Statement

The Commission, by a 5-0 vote, approved a final rule which makes minor changes in the Commission's rules of practice that specify when a license, -permit or amendment can be issued following an initial adjudicatory decision resolving all issues. The final rule also deletes outdated language in the existing regulations emanating from the Three Mile Island related regulatory policies upon which action has been completed. The Commission also approved the issuance of an updated policy statement and the revocation of a superseded policy statement relating to requirements imposed after the Three Mile Island accident. The attached modifications should be incorporated into the policy statement.

The revised rule and policy statement should be returned for signature and publication in the Federal Register.

(OGC)

(SECY Suspense: 3/3/89)

Attachments:  
As stated

cc: Chairman Zech  
Commissioner Roberts  
Commissioner Carr  
Commissioner Rogers  
Commissioner Curtiss  
EDO  
GPA  
PDR - Advance  
DCS - P1-124

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Informal Hearing Procedures for  
Materials Licensing Adjudications

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to provide rules of procedure for the conduct of informal adjudicatory hearings in materials licensing proceedings. The Atomic Energy Act of 1954 requires that the NRC; afford an interested person, upon request, a "hearing" in any proceeding for the granting, suspending, revoking, or amending of an NRC license, including a license involving source, byproduct, and special nuclear materials. The Commission previously has determined that the "hearing" provided for a materials licensing proceeding need not encompass all the procedures in NRC regulations that currently govern more formal adjudications for the licensing of reactor facilities. Rather, the Commission has determined that, in most instances, an informal hearing with an opportunity to present written views is sufficient to fulfill this requirement. The final rule prescribes the procedures that would govern these informal proceedings.

EFFECTIVE DATE: Insert date 30 days after date of publication in the FEDERAL REGISTER.

REGISTER.

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C.

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informal hearing is designed to elicit information and resolve issues primarily through inquiry by the presiding officer rather than through an adversarial confrontation between the parties. As a consequence, the presiding officer has broad discretion in controlling the manner in which the issues raised by the parties are to be explored.

## II. Comments and Commission Responses

The Commission received twelve letters of comment representing a broad spectrum of interested persons. Commenters included private corporations that hold NRC materials licenses, a trade association representing companies holding NRC materials licenses, private counsel that represent NRC reactor and materials licensees, public interest groups, a local governmental entity, and an individual member of the public. Seven of the commenters expressed general support for the proposed rules and provided specific comments and suggestions on particular provisions. Three commenters opposed the rules as providing insufficient procedural protections for intervening parties. Two other commenters opposed the rules as unnecessarily formalizing the hearing process for materials licensing adjudications. A review of the specific comments and the Commission's responses to those comments follows.

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## A. General Comments

## 1. Hearing Procedures Are Too Formal

Several commenters who are materials licensees or who represent materials licensees expressed concern that the proposed informal procedures were unnecessary or too formal. One commenter suggested that, given the small number of materials licensing hearing requests received by the Commission over the past several years, the Commission need only continue its present practice.

That practice, which has been in effect since the first informal hearing in the 1982 West Chicago proceeding, is to issue an order in response to each materials licensing hearing request that establishes the procedures governing that informal hearing. The Commission disagrees. Its practice of issuing individual orders has allowed the agency to gain valuable practical experience in conducting informal adjudications, experience that is reflected in the provisions of this final rule. The small number of hearing requests explains in part the delay in the Commission's promulgation of this final rule in that it has taken longer to gain the relevant experience that has guided it in formulating appropriate procedures. However, it ultimately is not a sufficient counterweight to the prudent observation of the United States Court of Appeals for the Seventh Circuit in its West Chicago decision, 701 F.2d at 645, that the interests of all concerned in the hearing process are better served if the agency formulates regulations that make it clear what procedures will apply to all informal proceedings. This is particularly so given the large number of materials licensing actions the Commission takes each year that potentially are subject to hearing requests.

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This commenter also asserted that the proposed informal procedures should not be adopted because the adjudicatory format is not suited to the resolution of technical questions and, in any event, the existence of two sets of procedures, one for informal proceedings and one for formal proceedings, inevitably will lead intervenors to complain that their allegations require the use of the more extensive formal procedures. Regarding the issue of the suitability of "adjudicatory" procedures, the commenter appears to be questioning the advisability of using a trial-type, adversary format, as opposed to more legislative-type, informal procedures, to resolve technical disputes. In its proposed rule, however, the Commission has sought to strike a necessary balance between these two poles. Recognizing that interested persons within the meaning of AEA section 189a are statutorily afforded the status of "parties" with an opportunity right to participate in a hearing, 1/ the rules allow participation through written and, in limited circumstances, oral submissions by which a challenged licensing action can be supported or opposed. On the other hand, cognizant that these materials licensing hearings need not adhere to the Administrative Procedure Act's (APA) adversary trial model set forth in the formal hearing provisions of 5 U.S.C. 556-557, the Commission has attempted to enhance the role of the presiding officer as a technical by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties. Further, the Commission

n does not believe that the mere existence of a set of informal procedures will lead to an

1/ Because an interested person has a statutory right to request and receive a hearing on those materials licensing actions specified in AEA section 189a, the Commission cannot, as one licensee appeared to suggest, simply decline to convene any materials licensing hearings.

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erosion of the distinction between formal and informal proceedings or lead to undue confusion about when the use of either type of proceeding is appropriate. See generally Sequoyah Fuels Corp. (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 NRC 489 (1986) (Commission declines to accept presiding officer's suggestion to convert informal hearing to formal proceeding).

## 2. Hearing Procedures are Too Informal

In contrast to the comments discussed above, several individuals and public interest groups asserted that the Commission's proposed informal procedures were too "informal." In particular, these commenters decried the failure of the rules to provide for discovery or for wide-ranging cross-examination by parties to the proceeding.

Parties generally have no right to discovery even in APA "on the record" hearings, unless discovery procedures are authorized by agency regulations. Further, because the Commission is not required to conduct an APA "on the

record" hearing in a materials licensing case, the parties in these cases have no right to cross-examination under the Commission's "on the record" hearing procedures in 10 CFR Part 2, Subpart G. Nor does the Commission believe these measures are necessary to afford the parties a full and fair hearing.

Although there is no discovery, the proposed rules do provide that the NRC staff is to create and update a hearing file consisting of the materials relevant to the licensing proceeding, including the application and any amendments to the application, any environmental assessment or impact statement, and any NRC report or correspondence between the NRC and the applicant relating to the

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application. In addition, if an oral presentation is found by the presiding officer to be an appropriate aid to fact-finding the presiding officer is given the authority to pose to witnesses questions that have been suggested by the parties. This is not the type of cross-examination usually associated with formal adjudicatory proceedings, as is described in more detail in the discussion that follows; nonetheless, it still provides the parties in the context of this more informal proceeding with an opportunity to raise questions with the presiding officer about a witness' testimony.

B. Comments Relating to Specific Provisions of the Proposed Rule

1. Proposed • 2.1201 -- Scope of Proceeding

One commenter has raised two concerns about • 2.1201 of the proposed rule, which describes those materials licensing actions for which informal hearings

are provided. This commenter pointed out that in previous instances involving a request under 10 CFR 20.302 for agency approval of proposed procedures for the disposal of very low-level radioactive waste not covered by 10 CFR Part 61, the Commission has authorized the use of informal hearing procedures and suggested this does not appear to be covered by proposed • 2.1201. An authorization under • 20.302, which is not referred to specifically in • 2.1201, generally comes about as an amendment to an existing byproduct, source, or special nuclear material license issued under Parts 30, 40, or 70. As an amendment for authorization to dispose of materials held under an existing materials licenses, rather than a request for a license to operate a waste disposal facility under 10 CFR Part 61, this authorization clearly falls within • 2.1201. The same would be true of various other Part 20

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NUCLEAR REGULATORY COMMISSION

Statement of Policy on Litigation of TMI-Related Issues  
in Power Reactor Operating License Proceedings;  
Revocation of Superseded Policy Statement Concerning  
TMI-Related Procedures

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement; revocation of policy statement.

SUMMARY: The Nuclear Regulatory Commission is issuing an updated policy statement on the manner in which the applicant and any intervening party to an NRC operating license proceeding can raise a challenge to those requirements imposed upon utilities seeking an operating license as

a result of the March 1979 accident at Three Mile Island, Unit 2. In addition, the Commission is revoking another policy statement relating to requirements imposed after the Three Mile Island accident as superseded by subsequent agency action.

EFFECTIVE DATE: [Insert date thirty days after publication in the Federal

Register.]

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC. 20555. Telephone: (301) 492-1634.

SUPPLEMENTARY INFORMATION: Following the March 1979 accident at Three Mile Island, Unit 2 (TMI-2), the Commission took a number of regulatory measures designed to provide the appropriate mechanisms for assimilating the regulatory changes resulting from TMI-2 into the ongoing process for facility licensing. Principal among these was the Commission's issuance of policy guidance on how the regulatory requirements imposed as a result

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#### I. Commission Policy on Litigation of TMI-Related Issues in Power Reactor Operating License Proceedings

Current Commission policy on the appropriate parameters for applicant and intervenor litigation of TMI-related issues in operating license proceedings is set forth in a Commission Policy Statement, CLI-80-42, 12 NRC 654 (1980) (45 FR 85236; Dec. 24, 1980). However, the implementation of TMI "lessons learned" and other events have rendered much of the background discussion in this 1980 policy statement outdated and confusing. Also, while the Commission previously noted that very few operating license hearings have involve

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litigation of these issues (48 FR 13987, 13988; Apr. 1, 1983), there n  
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less are facilities under construction for which certain specific guid  
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afforded by the policy statement could be pertinent. Accordingly, the  
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mission has decided to rescind that 1980 policy statement, but to prov  
ide the  
following supplemental guidance for the litigation of TMI-related issu  
es in  
operating license proceedings:

In conjunction with existing NRC regulations, the guidance  
for new operating licenses found in NUREG-0737, "Clarifi-  
cation of TMI Action Plan Requirements," can serve as the basis upon w  
hich the  
NRC staff makes a determination about whether an applicant meets the n  
ecessary  
requirements for issuance of an operating license as NUREG-0737 guida  
nce

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)  
Information Service, 5285 Port Royal Road, Springfield, VA 22161. A c  
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is available for public inspection and/or copying at the NRC Public Do  
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Room, 2121 L Street, NW., Washington, DC.

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interprets, refines, or quantifies the general language  
of existing regulations. The parties to a proceeding may challenge th  
ese  
guidance in NUREG-0737 as unnecessary on the one hand or insuf-  
ficient on the to meet existing regulations.  
Parties to a proceeding, the Licensing Boards, and the Appeal Boards a  
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should heed the additional Commission guidance regarding the litigatio  
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TMI-related issues given in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units I and 2), CLI-81-5, 13 NRC 361 (1981).

## II. Policy Statement Relating to Immediate Effectiveness

Prior to the Commission's action in November 1979 adopting the now rescinded Appendix B to 10 CFR Part 2 (44 FR 65049),<sup>2</sup> the Commission's post-TMI policy relating to immediate effectiveness of Licensing Board initial decisions authorizing the issuance of construction permits and operating licenses was set forth in an October 1979 policy statement, "Interim Statement of Policy and Procedure" (44 FR 58559). This policy

2/ The existing Appendix B to Part 2, "General Statement of Policy and Procedures Concerning Petitions Pursuant to 2.802 for Disposal of Radioactive Waste Streams Below Regulatory Concern," which was issued on August 29, 1986 (51 FR 30839), is not related to this policy statement.

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statement was superseded by the November 1979 action and is hereby formally rescinded. Reference • 2.764 as the existing procedure by which Commission undertakes an "effectiveness review." Bated at Rockville, MD, this..... day of.....,1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,  
Secretary of the Commission.

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