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POLICY ISSUE
(Information)

October 14, 1992

SECY-92-347

For: The Commissioners
From: James M. Taylor
Executive Director for Operations
Subject: STAFF GUIDANCE ON THE USE OF CONFIRMATORY ACTION LETTERS
Purpose: To notify the Commission of the results of the staff's evaluation to determine if additional guidance is required regarding the use of Confirmatory Action Letters (CALs).

Background: By memorandum dated February 12, 1992, the Commission directed the staff to address the issue of whether noncompliance with commitments of CALs could be used as a basis for revocation of a license. This issue was raised by the Appeal Board as a result of proceedings involving Wrangler Laboratories (LBP-91-37, 34 NRC 196 (1991)).

The staff replied to the Commission in a memorandum dated April 7, 1992. In its response, the staff noted its ongoing effort to determine if additional guidance on the use of CALs was necessary. The staff committed to provide the Commission with the results of its evaluation.

The NRC Enforcement Policy addresses CALs in describing available administrative mechanisms used to supplement the enforcement

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program. In 10 CFR Part 2, Appendix C, Section VI.D, CALs are described as letters confirming a licensee's or vendor's agreement to take certain action to remove significant concerns about health and safety, safeguards, or the environment. Id. Section VI.D (3). The Policy provides that the NRC expects that licensees and vendors will adhere to any obligations and commitments resulting from administrative actions and that the NRC will not hesitate to issue appropriate orders to ensure that these obligations and commitments are met.

CALs are also addressed in the NRC Enforcement Manual, Section 4.9. This staff guidance provides that an order confirming the commitments in a CAL be considered if the corrective actions appear to require more than 30 days to complete and that a CAL not be used as a substitute for an order when the appropriate action involves the removal of an individual.

Discussion:

The staff has evaluated the need for additional guidance regarding the use of CALs and based on this evaluation, has developed the enclosed guidance. This guidance will replace the guidance currently included in the NRC Enforcement Manual on the issue of CALs.

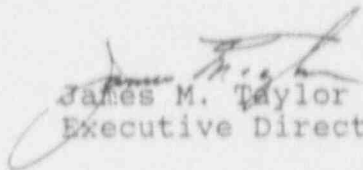
In summary, the guidance: 1) provides examples of situations where it may be appropriate to issue a CAL, 2) provides an expanded discussion of when an order should be issued instead of a CAL, 3) removes the existing position limiting CALs to 30 days, 4) states that CALs should be considered for long-term shutdowns, 5) addresses the issue of noncompliance with the commitments in a CAL and provides the staff with enforcement options if certain required information is not provided, 6) requires that CALs be coordinated between the regional office and appropriate program office, 7) requires that CALs be tracked by the issuing office, and 8) includes a standard format letter for a CAL that requires a licensee to provide certain information to the NRC pursuant to Section 182 of the Atomic Energy Act. While

the standard language tends to make the CAL a more formal document, the guidance taken as a whole, preserves the valuable flexibility of the CAL process.

The Office of Information Resources Management has reviewed this staff guidance and has determined that the responses directed by the standard format letter for a CAL are not subject to the clearance procedures of the Office of Management and Budget established by the Paperwork Reduction Act.

Coordination:

The Office of General Counsel has no legal objection to this paper.


James M. Taylor
Executive Director for Operations

Enclosure:

Staff Guidance on the Use of
Confirmatory Action Letters

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4.9. Confirmatory Action Letters (CALs)

CALs are an important administrative mechanism used to supplement the agency's enforcement program. They are addressed in Section VI.D of the NRC's Enforcement Policy. CALs are letters issued to emphasize and confirm a licensee's agreement to take certain actions in response to specific issues. The Enforcement Policy provides that the NRC expects licensees and vendors to adhere to any obligations and commitments addressed in a CAL and will not hesitate to issue appropriate orders to ensure that the obligations and commitments are met.

CALs are normally used for emergent situations where the staff believes that it is not necessary or appropriate to develop a legally binding requirement, in light of the agreed-upon commitment. CALs are flexible and valuable tools available to the staff to resolve a wide variety of issues with licensees in a timely and efficient manner. For example, it may be appropriate to issue a CAL to a materials licensee when it is outside of a particular license condition where the license condition neither 1) includes guidance what to do in the situation, nor 2) includes a time period to restore compliance, such as the time period in a technical specification's action statement for a reactor licensee. A CAL would be useful in this type of situation to confirm compensatory actions that, if implemented, would provide sufficient assurance that activities would be safely conducted such that an immediate shutdown of a facility might not be necessary. (Normally a CAL in this situation would be reserved for materials licensees. A Notice of Enforcement Discretion would be the appropriate tool for reactor licensees if the issue is addressed by a license condition.)

CALs may also be issued to confirm the following types of actions for both material and reactor licensees (note that this is not an exhaustive list):

- In-house or independent comprehensive program audit of licensed activities
- Radiological safety training
- Procedural improvements
- Equipment maintenance
- Equipment operation and safety verification
- Temporary suspension of licensed activities
- NRC approval prior to resumption of licensed activities
- Root cause failure analyses
- Improved control and security of licensed material
- Operation in compliance with NRC regulatory requirements
- Transfer of licensed material
- Future submittal of license amendment requests
- Employee training to address recent event at licensee's facility
- Commitment to honor an Augmented Inspection Team (AIT) or Incident Investigation Team (IIT) quarantine request

- Specific actions in response to an unsatisfactory operator requalification program

CALs should only be issued when there is a sound technical and/or regulatory basis for the necessity of the desired actions discussed in the CAL. Specifically, CALs must meet the threshold defined in the Enforcement Policy, i.e., "to remove significant concerns about health and safety, safeguards, or the environment." In other words, the issues addressed in a CAL should be at a level of significance such that if the licensee did not agree to meet the commitments in a CAL, the staff would not hesitate to issue an order. Orders, rather than CALs, should be issued to address very significant issues (see additional discussion below).

Even though a CAL by definition confirms an agreement by the licensee to take some described action, it may, at times, require some negotiation with the licensee prior to issuance, just as may occur in negotiating a Confirmatory Order. The licensee must, however, agree to take the action. An order should be issued instead of a CAL when it is apparent that the licensee will not agree to take certain actions that the staff believes are necessary to protect the public health and safety.

The decision of whether to issue a CAL or an order should be based on the nature of the action to be taken by the licensee. Each situation should be evaluated on a case-by-case basis. As previously stated, orders rather than CALs should be issued to address very significant issues. In those instances where time is a critical factor, a CAL can be issued followed by the issuance of an order. Since CALs do not establish legally binding requirements, orders must be used whenever there is a need to ensure that an enforceable requirement is in place. For example, use of a CAL is not sufficient if the staff wants a legally binding requirement for NRC approval prior to resumption of licensed activities. Orders should be issued instead of CALs where there is an integrity issue, where there is some likelihood that a licensee may not comply with a commitment, or where the staff lacks the reasonable assurance that the CAL will effect the desired outcome. CALs are not to be used to remove an individual from, or restrict his or her ability to perform, licensed activities. Such action must be achieved through the use of an order, not just to ensure enforceability, but because individual rights are affected and the opportunity for a hearing must be given both to the licensee and the affected individual.

Although the time involved in fulfilling a commitment should not be the sole determining factor of whether to issue an order versus a CAL, orders should be considered through consultation between the regional office, the appropriate program office, and the Office of Enforcement (OE) for long-term suspensions (i.e., long-term shutdowns for performance problems where the NRC wants to be involved in the restart decision). If speed of issuance is a concern, then a CAL is a suitable instrument to confirm

immediate suspension and the start of activities associated with a longer term suspension of licensed activities. In these cases, an order (usually a Confirmatory Order) should subsequently be considered through consultation between the regional office, the appropriate program office, and OE.

From time to time, licensees elect to submit letters to the NRC addressing actions that they intend to take in reaction to safety issues. In these cases, the staff may, depending on the significance of the issues involved, elect to issue a brief CAL accepting the licensee's letter and commitments. Items 1, 2, and 3 in section 4.9.2 may, as appropriate, merely reference the licensee's letter.

4.9.1. Noncompliance

Other than the reporting provisions pursuant to Section 182 of the Atomic Energy Act¹, CALs do not establish legally binding requirements. However, failure to meet a commitment in a CAL could be addressed through the issuance of a Notice of Deviation. In addition, an order or a Demand For Information could be issued where the licensee's performance, as demonstrated by the failure to meet its commitments in a CAL, has caused or may cause the staff to lose its reasonable assurance that the NRC can rely on the licensee to meet the NRC's requirements and protect the public health and safety. As previously stated, in accordance with the provisions of the Enforcement Policy, commitments in a CAL could be made NRC requirements through the issuance of an order, violations of which could serve as the basis for further enforcement action.

Issuance of a CAL does not preclude the NRC from taking enforcement action for violations of regulatory requirements that may have prompted the issuance of the CAL. Such enforcement action is intended to emphasize the importance of safe operation of activities in compliance with regulatory requirements and that licensees are not expected to use this process as a routine substitute for compliance. However, the NRC would not normally take additional enforcement action for those violations that continue after a CAL has been issued where compensatory actions have been accepted by the NRC.

¹Pursuant to Section 182 of the Act and the NRC's implementing regulations, CALs may require a licensee to notify the NRC if its understanding of its commitments differs from what is stated in the CAL, if it cannot meet the corrective actions schedule, and when corrective actions are completed. Failure to provide such required notification may be treated like any other violation of a requirement.

4.9.2. Preparation of CALs

CALs should be prepared utilizing the standard format as shown in Appendix B. CALs should include the following elements.

1. A brief discussion of the specific issues with which the NRC has concern, including how and when they were identified.
2. A brief statement documenting the communication between the licensee and the NRC regarding the agreed-upon actions. This statement should include when the communication took place, the names and positions of the principal individuals involved in the communication, and whether the communication took place pursuant to a telephone conversation or a face-to-face meeting. Face-to-face meetings should also include the location of the meeting, i.e., regional office, licensee's facility, etc.
3. A clear description of the agreed-upon actions and, where warranted and appropriate, the date(s) when actions will be completed.
4. A statement that requires the licensee to notify the NRC if its understanding of the issues and its commitments addressed in the CAL differs from what is stated in the CAL.
5. A statement that requires the licensee to notify the NRC if for any reason it cannot complete the actions within the specified schedule. It should also require that the licensee inform the NRC of the modified schedule.
6. A statement that requires the licensee to confirm completed actions.
7. A statement that issuance of the CAL does not preclude issuance of an order formalizing the commitments in the CAL or requiring other actions nor does it preclude the NRC from taking enforcement action for violations of NRC requirements that may have prompted the issuance of the CAL.
8. A statement that failure to meet the commitments in a CAL may result in enforcement action.
9. A statement that the action is not subject to the Paperwork Reduction Act of 1980.
10. A statement that the letter and any licensee response will be placed in the Public Document Room.

In addition to the standard elements, it may be also be appropriate in some cases to confirm an agreement that a licensee not resume operation until the NRC has verified that the specified actions have been completed, and has approved resumption in writing.

4.9.3. Coordination of CALs

CALs issued by the region must be coordinated with the appropriate program office (NRR or NMSS) by telephone prior to issuance. Unless the program office requests, CALs do not normally require program office concurrence. Similarly, CALs issued by NRR or NMSS must be coordinated with the appropriate region. This coordination will help to provide consistency between the regions and program offices in response to similar issues and provide program oversight and assistance.

Unless OE requests, CALs do not require coordination with or concurrence of OE.

4.9.4. Signature Authority

The Regional Administrator, or designee, should sign all CALs issued by the region. Delegation of signature authority should not be below Division Director or acting Division Director.

The Director, NRR and the Director, NMSS, or their designees, should sign all CALs issued by NRR or NMSS respectively. Delegation of signature authority should not be below Division Director or acting Division Director.

4.9.5. Distribution

Upon issuance, CALs should be distributed to (1) OE, (2) the appropriate Deputy Executive Director for Operations, (3) the appropriate program office (NRR or NMSS) for those CALs issued by the region, and (4) the appropriate region for those CALs issued by NRR or NMSS.

4.9.6. Tracking Responsibilities

The issuing office (i.e., region, NRR, or NMSS) is responsible for tracking the CALs it has issued, including how many CALs have been issued, to whom and why they were issued (i.e., a brief description of the issues), and when all corrective actions were or will be completed. The region will assign CAL tracking numbers based on the region number, the year of issuance, and the sequential CAL number in that region for that year, e.g., 2-92-008. NRR and NMSS will assign CAL tracking numbers similarly, e.g., NRR-92-006, NMSS-92-003. The issuing office should maintain a list

summarizing this information suitable for auditing actions associated with CALs.

4.9.7. Closure of CALs

The issuing office is responsible to close each CAL by issuing a letter to the licensee acknowledging the completion of actions and, as appropriate, stating that the corrective actions will be reviewed in subsequent inspections. Whether an inspection is necessary to close a CAL will be determined on a case-by-case basis and will depend on the circumstances of the case.

4.9.8. Press Releases

Press releases are not routinely issued to address the issuance of a CAL. If a region believes that a press release is appropriate, it should be coordinated with Public Affairs.

FORM : Confirmatory Action Letter

Docket No. _____
License No. _____
CAL No. X-XX-XXX

(Name of Licensee)
(Address)

SUBJECT: CONFIRMATORY ACTION LETTER

[This paragraph should provide a brief discussion of the specific issues with which the NRC has concern, including how and when they were identified.]

Pursuant to a telephone conversation (meeting) between (names and positions of principal individuals representing the licensee) and (names and positions of principal individuals representing the NRC) on (date), (in the Region office) (at your facility) it is our understanding that you have taken (or will take) the following actions (which will be completed by the dates specified):

[Each commitment should be listed separately and should clearly specify the agreed-upon actions to be taken.]

Pursuant to Section 182 of the Atomic Energy Act, 42 U.S.C. 2232, and 10 CFR 2.204, you are required to:

- 1) Notify me immediately if your understanding differs from that set forth above,
- 2) Notify me if for any reason you cannot complete the actions within the specified schedule and advise me in writing of your modified schedule in advance of the change, and
- 3) Notify me in writing when you have completed the actions addressed in this Confirmatory Action Letter.

Issuance of this Confirmatory Action Letter does not preclude issuance of an order formalizing the above commitments or requiring other actions on the part of the licensee. Nor does it preclude the NRC from taking enforcement action for violations of NRC requirements that may have prompted the issuance of this letter. In addition, failure to take the actions addressed in this Confirmatory Action Letter may result in enforcement action.

The responses directed by this letter are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosures will be placed in the NRC Public Document Room.

Sincerely,

Regional Administrator
(Director, NRR)
(Director, NMSS)