



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION III
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JUL 20 1987

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MEMORANDUM FOR: James Lieberman, Director, Office of Enforcement
FROM: A. Bert Davis, Regional Administrator, Region III
SUBJECT: MATERIAL FALSE STATEMENT (MFS) RULE

In your recent memorandum you requested our comments on a proposed insert into the statements of consideration and revision of Supplement VII of the Enforcement Policy. Enclosed is a marked-up copy of your proposal with our specific comments. In addition to those comments we have two general comments:

1. The explanatory information in the proposed addition to the Statements of Consideration is difficult to understand in the absence of an explanation of the conceptual regulatory changes affected by the new rule.
2. The proposed definition of "licensee official" which includes all licensee personnel above and including first line supervision results in Supplement VII being too inflexible in the assignment of severity levels. For example, a deliberate violation involving incomplete information by a radwaste foreman would be categorized at the same severity level as a similar violation committed by a corporate president; Severity Level I. This definition of "licensee official" effectively removes the discretionary flexibility provided in Section III of the Enforcement Policy regarding the assignment of severity levels to violations involving willfulness.

If you have any questions regarding our comments, please contact Jack Grobe (FTS 388-5548) or Bruce Berson (FTS 388-5732) of my staff.

A. Bert Davis

A. Bert Davis
Regional Administrator

Enclosure: As stated

cc w/enclosure:
J. M. Taylor, DEDO
J. G. Keppler, OSP
S. R. Connelly, OIA
B. B. Hayes, OI
T. E. Murley, NRR
H. L. Thompson, NMSS
S. M. Sohinki, OGC
Regional Administrators

INSERT FOR STATEMENT OF CONSIDERATION

IV. Enforcement Policy

The Commission's existing material false statement policy is currently reflected in the General Statement of Policy and Procedure for NRC Enforcement Action, 10 CFR Part 2, Appendix C. (Enforcement Policy) Modifications to this policy to reflect the new rules and the changes to Commission policy announced here are being published concurrently with these new rules.

A violation of the regulations on submitting complete and accurate information whether or not considered a material false statement can result in the full range of enforcement sanctions. The labeling of communication failures as a material false statement will be made on a case by case basis and will be reserved for the most flagrant or egregious violations. Violations involving inaccurate or incomplete information will be categorized based on the guidance in the Enforcement Policy, Section III (Severity of Violations) and the revised Supplement VII. Consistent with the existing supplement, willful communications failures or communications failures regarding very significant information are categorized at a Severity Level I or II, and other significant communication failures will be categorized at a Severity Level III. Less significant failures will be categorized at a Severity Level IV or V as appropriate. Guidance on taking enforcement action for incomplete or inaccurate information and the failure to provide significant information identified by a licensee is found in revised Section VI of the Enforcement Policy.

* Absent ~~careless~~ ^{or deliberateness} careless disregard, unintentional incomplete or inaccurate unsworn oral statements will normally not be subject to enforcement action unless it involves significant information provided by a licensee official. ^{1/} However, enforcement action may be taken for

Do we consider unsworn oral statements from non-supervisors if willfully made

^{1/} A licensee official means first line supervision or above as well as licensed individuals, Radiation Safety Officers, and persons listed on a license as authorized users of licensed material.

an unintentional incomplete or inaccurate oral statement provided to NRC by a license official or others on behalf of a licensee whether or not under oath or affirmation if a record was made of the oral information and provided to the licensee thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the licensee.

* The Commission recognizes that unsworn oral statements may in some situations be inherently less reliable than written or sworn statements. However, the Commission must be able to rely on oral communications from licensee officials concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement made by a licensee which was unintentionally inaccurate or incomplete regarding a significant matter, consideration will be given to such factors as the degree of knowledge that the person should have given his or her position, training, and experience, the opportunity and time available prior to the communication to assure the accuracy or completeness of the information, the degree of negligence, if any, involved, the formality of the communication, the reasonableness of NRC reliance on the information, the importance of the information which was wrong or not provided, and the reasonableness of the explanation for not providing complete and accurate information.

Where a correction of an inaccurate or incomplete statement has been made, the decision to issue a citation for the initial inaccurate or incomplete statement will be dependent on the circumstances including the ease of detection of the error, the timeliness of the correction, whether

the NRC or the licensee identified the problem with the communication, and whether the NRC relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the licensee prior to reliance by the NRC or NRC raising a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete submittal. On the other hand if the misinformation is identified after the NRC relies on it or after some question is raised regarding the quality of the information then some enforcement action normally will be taken even if it is in fact corrected. However, if the initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or advance of technology, a citation would not be appropriate if, when the new information became available, the initial submittal was corrected.

* The failure to correct inaccurate or incomplete information which the licensee does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, ~~the severity of~~ an unintentional inaccurate or incomplete submission may be treated as a more severe matter if the licensee later determines that the initial submittal was in error and does not correct it or if there were clear opportunities to identify the error. If information not corrected was recognized by a licensee as significant, a separate citation may be made for the failure to provide significant information. In any event,

in serious cases where the licensee's actions in not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness, the Commission may exercise its authority to issue orders modifying, suspending, or revoking the license.

INSERT FOR ENFORCEMENT POLICY

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.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Section 552 of Title 5 of the United States Code, the following statement of policy is published as Appendix C to 10 CFR Part 2 as a document subject to codification to be effective immediately.

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, 76 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 2.300-2.309 also issued under Pub. L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). 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). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

2. Section VI "Public Disclosure of Enforcement Actions" of 10 CFR Part 2, Appendix C is renumbered Section VII.
3. Section VII "Responsibilities" of 10 CFR Part 2, Appendix C is renumbered Section VIII.
4. A new Section VI entitled "Inaccurate and Incomplete Information" is added to 10 CFR Part 2, Appendix C to read as follows:

A violation of the regulations on submitting complete and accurate information, whether or not considered a material false statement, can result in the full range of enforcement sanctions. The labeling of communication failures as a material false statement will be made on a case-by-case basis and will be reserved for the most flagrant or egregious violations. Violations involving inaccurate or incomplete

information or the failure to provide significant information identified by a licensee will be categorized based on the guidance in Section III "Severity of Violations" and Supplement VII.

* Absent ~~at least~~ ^{or deliberateness} careless disregard, unintentional incomplete or inaccurate unsworn oral statements will normally not be subject to enforcement action unless it involves significant information provided by a licensee official. A licensee official for purposes of application of the Enforcement Policy means ~~X~~ first line supervision or above as well as licensed individuals, Radiation Safety Officers, and persons listed on a license as authorized users of licensed material. However, enforcement action may be taken for an unintentional incomplete or inaccurate oral statement provided to NRC by a licensee official or others on behalf of a licensee whether or not under oath or affirmation if a record was made of the oral information and provided to the licensee thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the licensee.

The Commission recognizes that unsworn oral statements may in some situations be inherently less reliable than written or sworn statements. However, the Commission must be able to rely on oral communications from licensee officials concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement made by a licensee which was unintentionally inaccurate or incomplete regarding a significant matter consideration will be given to such factors as the degree of knowledge that the person should have given his or her position,

training, and experience, the opportunity and time available prior to the communication to assure the accuracy or completeness of the information, the degree of negligence, if any, involved, the formality of the communication, the reasonableness of NRC reliance on the information, the importance of the information which was wrong or not provided, and the reasonableness of the explanation for not providing complete and accurate information.

Where a correction of an inaccurate or incomplete statement has been made, the decision to issue a citation for the initial inaccurate or incomplete statement will be dependent on the circumstances including the ease of detection of the error, the timeliness of the correction, whether the NRC or the licensee identified the problem with the communication, and whether the NRC relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the licensee prior to reliance by the NRC or NRC raising a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete submittal. On the other hand if the misinformation is identified after the NRC relies on it or after some question is raised regarding the quality of the information then some enforcement action normally will be taken even if it is in fact corrected. However, if the initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or advance of technology, a citation would not be appropriate if, when the new information became available, the initial submittal was corrected.

The failure to correct inaccurate or incomplete information which the licensee does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, the severity of an unintentional inaccurate or incomplete submission may be treated as a more severe matter if the licensee later determines that the initial submittal was in error and does not correct it or if there were clear opportunities to identify the error. If information not corrected was recognized by a licensee as significant, a separate citation may be made for the failure to provide significant information. In any event, in serious cases where the licensee's actions in not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness, the Commission may exercise its authority to issue orders modifying, suspending, or revoking the license.

5. Supplement VII of Appendix C to Part 2 is revised to read as follows:

SUPPLEMENT VII - SEVERITY CATEGORIES

MISCELLANEOUS MATTERS

A. Severity I - Violations involving for example:

1. Material information provided to the Commission which is incomplete or inaccurate (a) deliberately ^{with} the knowledge of a licensee official

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that the information is incomplete or inaccurate, or (b) if complete or accurate at the time the information should have been submitted, would have likely resulted in regulatory action such as an immediate order required by the public health and safety;

*

We should clarify if we only are considering situations which would result in significant (eg. order) regulatory action or lesser significant actions.

2. Material information which the NRC requires be kept and which is incomplete or inaccurate due to falsification by or with the knowledge of a licensee official;

3. Information which the licensee has identified as having significant implications for public health and safety or the common defense and security ("significant information identified by a licensee") and which is deliberately withheld from the Commission;

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4. A knowing and intentional failure to provide the notice required by Part 21; or
5. Action by senior corporate management in violation of section 210 of the ERA against an employee.

B. Severity II - Violations involving for example:

1. Material information provided to the Commission which is incomplete or inaccurate (a) by a licensee official with careless disregard for the completeness or accuracy of the information, or (b) if complete and accurate at the time the information should have been submitted,

would have likely resulted in regulatory action such as a show cause order or a changed regulatory position;

2. Material information which the NRC requires be kept and which is incomplete or inaccurate due to careless disregard for the accuracy of the information on the part of a licensee official;

What is the difference between these terms

3. "Significant information" identified by a licensee" and not provided to the Commission due to careless disregard on the part of a licensee official;

4. Action by plant management above first-line supervision in violation of section 210 of the ERA against an employee; or

5. A failure to provide the notice required by Part 21.

C. Severity III - Violations involving for example:

1. Material information which is incomplete or inaccurate provided to the Commission resulting from inadequate actions on the part of the licensee officials and not amounting to a Severity Level I or II violation;
2. Material information which the NRC requires be kept and which is incomplete or inaccurate because of inadequate actions on the part of licensee officials and not amounting to a Severity Level I or II violation;

3. Significant information provided to the Commission which is incomplete or inaccurate and not amounting to a Severity Level I or II violation, for example information which if complete and accurate at the time the information should have been submitted, would have likely resulted in a reconsideration of a regulatory position or substantial further inquiry such as an additional inspection or a formal request for information;
4. Significant information which HRC requires be kept which is incomplete or inaccurate and not amounting to a Severity Level I or II violation;
5. Failure to provide significant information identified by a licensee" to the Commission and not amounting to a Severity Level I or II violation,
6. Action by first-line supervision in violation of section 210 of the ERA against an employee; or
7. Inadequate review or failure to review such that, if an appropriate review had been made as required, a Part 21 report would have been made.

D. Severity IV - Violations involving for example:

1. Inadequate review or failure to review under Part 21 or other procedural violations associated with Part 21 with more than minor safety significance;
2. Material information which is incomplete or inaccurate provided to the Commission of more than a minor safety concern but not amounting to a Severity Level I, II, or III violation; or
3. Information which the NRC requires be kept and which is incomplete or inaccurate and of more than minor significance but not amounting to a Severity Level I, II, or III violation.

E. Severity V - Violations involving for example:

1. Minor procedural requirements of Part 21;
2. Material information which is incomplete or inaccurate provided to the Commission and the incompleteness or inaccuracy is of minor significance; or
3. Information which the NRC requires be kept which is incomplete or inaccurate and the incompleteness or inaccuracy is of minor significance.