

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: Chairman Gregory B. Jaczko  
SUBJECT: SECY-11-0155 –PROPOSED CHANGES TO THE  
ENFORCEMENT POLICY ASSOCIATED WITH  
CONSTRUCTION ACTIVITIES

Approved in Part X Disapproved in Part X Abstain   

Not Participating   

COMMENTS: Below    Attached X None   

  
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SIGNATURE

12/15/11  
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DATE

Entered on "STARS" Yes X No

## **Chairman Jaczko's Comments on SECY-11-0155, "Proposed Changes to the Enforcement Policy Associated with Construction Activities"**

I approve, in part, and disapprove, in part, the staff's recommendation. I commend the staff for considering potential enforcement policy revisions in conjunction with the development of the Changes during Construction (CdC) process. The purpose of the CdC process is to allow LWA and COL licensees to implement changes that require a license amendment while the NRC reviews the amendment request.

The draft Interim Staff Guidance outlining this process, COL-ISG-025, "Interim Staff Guidance on Changes during Construction Under 10 CFR Part 52" (ISG), is nearing completion. As the draft ISG explains, new nuclear power plants must be constructed in accordance with the current licensing basis (CLB). If licensees wish to depart from the CLB, they first conduct a screening process to determine whether the change meets specified requirements that allow the change to be made without obtaining a license amendment. If not, prior NRC approval of the amendment is required. This screening process is set forth in our regulations in 10 C.F.R. § 50.59 and the 50.59-like provisions in the Part 52 Appendices for certified designs (collectively referred to as "50.59" below).

If an amendment is required, the draft ISG process allows the licensee to obtain a finding of "no objection" from the staff. The purpose of this finding is to allow the licensee to proceed with installation and testing while the NRC reviews the necessary amendment request. The ISG explains that the finding is not a pre-approval of the amendment on the merits. If the amendment request is denied, the licensee must return the facility to the CLB. The ISG, as a guidance document, cannot relieve licensees from our regulatory process for determining whether a modification requires prior NRC approval of a license amendment. Likewise, the ISG cannot provide an alternate means of satisfying 50.59 requirements. For this reason, I disapprove the proposed language following the initial sentence in the first paragraph under Section 2.2.6, Construction because it presumes that the ISG "permits" departures from the CLB.

Licensees that do not obtain NRC approval before implementing changes that require a license amendment are in violation of 50.59 and subject to enforcement. In the event that extenuating circumstances warrant a departure from our usual enforcement process, our enforcement policy gives the staff discretion to reduce or refrain from taking enforcement action. This enforcement discretion should be used sparingly, when extraordinary circumstances are present. It should not be used to give tacit approval of an alternative means to satisfy regulatory requirements. In my view, that is what the proposed language in Section 2.2.6 and 3.9 would do, by giving a roadmap to licensees on how to violate our regulations with impunity.

If the 50.59 process needs greater flexibility for COL holders during construction, it should be revised in an open and public manner through our rulemaking process, not through the development of enforcement discretion criteria. In the meantime, licensees may obtain relief only if our regulatory requirements for granting exemptions or waivers have been satisfied. The staff should work with stakeholders to make the exemption review process as efficient as possible by developing standard templates for exemption requests and for staff review.

Aside from my objection to using enforcement discretion as proposed, I see serious flaws in the guidance which has been proposed for permitting enforcement discretion before the "no objection" finding under the ISG. The purpose of enforcement discretion is to give the staff the

flexibility to consider special circumstances when determining the appropriate enforcement sanction to impose. But the language proposed would limit our enforcement options by saying that in *all cases* in which a *licensee* determines that it has met the discretion criteria, the NRC *will not* treat the violation as a willful or a continuing violation while reviewing the licensee's submittal. I do not support a policy that limits our enforcement options, particularly based on the licensee's assessment of compliance instead of our own.

For these reasons, I disapprove the enforcement discretion guidance proposed for COL holders beginning with the second sentence in 3.9(c). I approve the other proposed revisions to clarify the policy and improve consistency, including the remaining portions of Section 3.9.

  
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Gregory B. Jaczko

12/13/11  
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Date