December 1, 1998

COMMISSION VOTING RECORD

DECISION ITEM: SECY-98-185

TITLE: PROPOSED RULEMAKING - REVISED REQUIREMENTS FOR THE DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

The Commission (with all participating Commissioners agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of December 1, 1998.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of December 1, 1998.

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John C. Hoyle
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDRDCS

VOTING SUMMARY - SECY-98-185

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON		X			X	10/15/98
COMR. DICUS				X		11/10/98
COMR. DIAZ		X			X	9/29/98
COMR. McGAFFIGAN		X			X	9/1/98
COMR. MERRIFIELD				X		11/5/98

COMMENT RESOLUTION

In their vote sheets, Chairman Jackson and Commissioners Diaz and McGaffigan disapproved the staff's recommendation and provided some additional comments. Commissioners Dicus and Merrifield did not participate in this item. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on December 1, 1998.

Commissioner Comments on SECY-98-185

Chairman Jackson's Comments on SECY-98-185

I disapprove the staff's proposal to publish the proposed rule amending 10 CFR Part 70. The staff should take an approach to stakeholder interaction on the proposed rule like that used for the revision of Part 35, such as placement of the draft rule text onto the Internet and iterate as comments come in over a four month period of time. At the end of the four months, the staff should revise its draft rule and present it to the Commission for review. To guide the staff in its review and revision of the rule text, I provide the following comments:

- I support the need for an ISA. The staff should decide what is fundamental for our regulatory purposes for inclusion as part of a license or, minimally, as an executive summary which would be docketed and updated, as appropriate. I also support the requirement for the licensee to develop baseline criteria, a preliminary ISA, and a decommissioning ISA.

- I oppose inclusion of a backfit provision in Part 70, based on the belief that minimal increases in safety at modest cost could be justified on a cost benefit basis.

- The staff should clarify the basis for its use of chemical safety and chemical consequence criteria in the rule in terms of how it ties into nuclear safety.

- Regarding the industry's concern about the prescriptive nature of the Standard Review Plan (SRP), I agree with the staff's position of publishing an SRP that clearly delineates one acceptable approach to meet the regulations. Licensees always have the option of devising their own custom program to demonstrate compliance with the regulations. I believe the lack of a published acceptance criteria, that sets out clear expectations, creates confusion and may be more costly to licensees. Nonetheless, the staff should examine whether the SRP can be made to match the performance based nature of the regulations a bit more.

Commissioner Diaz's Comments on SECY-98-185

As discussed below, several aspects of the proposed rulemaking presented in SECY-98-185 require further refinement before it is ready to be promulgated for public comment. Accordingly, I disapprove the issuance of the notice of proposed rulemaking for 10 CFR Part 70. I agree with Commissioner McGaffigan that the staff should submit a revised proposed rule to the Commission for approval four months from the date of the final SRM , and that they should be empowered to publicly discuss all relevant documents with stakeholders during this revision period. In addition to incorporating insights gained during the public comment period, the staff should consider the following issues in developing its revised proposal.

While it is clearly a step forward to require each Part 70 licensee to perform an Integrated Safety Analysis (ISA), it is not necessary to incorporate the ISA into the facility license. To support the intended use of the ISA as a tool to make safety and licensing decisions, it would be sufficient for a licensee to docket the results of the ISA, thereby making it publicly available. This approach would permit licensees to make timely updates to the ISA to take advantage of the current state of the art of risk assessment methodologies without having to seek license amendments. Additionally, a requirement to docket ISA results would permit the establishment of a Part 70 change process that is in harmony with the revised change process that is under development for power reactor licensees. Ultimately, the flexibility fostered by this approach will enhance safety while reducing burden on the NRC and licensees by allowing both to focus their attention on those issues of greatest safety impact to the benefit of the ratepaying public.

One particular aspect of ISAs that the staff should consider relates to the application of new technologies. In soliciting public comments, the staff should request input on how updated ISA methodologies should be employed in the licensing of new technologies for use within either new or existing facilities.

The incorporation of consequence criteria for purely chemical hazards is problematic, in that it may result in NRC regulation overlapping with other federal, state and local entities that have jurisdiction over such hazards. We should maintain our primary focus on the NRC's nuclear and radiological safety mandate, and address other matters, as appropriate, within the context of Memoranda of Understanding with other government agencies.

Concerning the implementation of a backfit provision in Part 70, the proposed rule should provide for an appropriately formulated provision that would be immediately effective.

Finally, I am concerned about the prescriptiveness of some of the program requirements outlined in the draft Standard Review Plan provided with SECY-98-185. Although this guidance is nominally not compulsory, past experience with similar types of guidance leads me to believe that there would be a high likelihood of their becoming de facto regulatory requirements. In addition, such prescriptiveness in program requirements would tend to act as a forcing function on the allocation of NRC resources toward verifying compliance with programmatic requirements, rather than toward monitoring a licensee's day to day safety performance. In summary, I believe that the proposed prescriptive programmatic requirements are not justifiable within the context of a risk informed regulatory fabric, and, in this vein, the staff should carefully reconsider the necessity of such guidance.

Commissioner McGaffigan's Comments on SECY-98-185:

I commend the staff for submitting the rulemaking package including appropriate guidance documents to the Commission as scheduled, and I believe that the staff was responsive to the earlier staff requirements memorandum (SRM) on this rulemaking. However, based on further consideration of these important issues, the information provided in this paper, and the very informative Commission briefing recently provided by the staff and the Nuclear Energy Institute (NEI), I disapprove publication of the proposed rule for Part 70 and offer the following comments for the staff's consideration.

While I fundamentally agree with certain concepts included in the proposed rule, such as the performance of an Integrated Safety Analysis (ISA) and the

identification of certain significant consequences, I no longer agree with others--such as the need for results of the ISA to be included in the license, which brings with it the need for what appears to be an unworkable 10 CFR 50.59-like change process, and the lack of clarity regarding the roles of NRC and other Federal and State agencies with respect to chemical safety. Based on the Commission briefing, it appears that further convergence between the staff and industry is possible through further discussion following issuance of the SRM on this paper. For these reasons, I do not support publishing a proposed rule that I do not support, that will be appropriately met with significant negative public comment and that would certainly have to be significantly revised and likely republished for comment. Publishing a proposed rule now is less efficient and more costly than taking the time now to revisit these key issues. Therefore, I suggest to my fellow Commissioners that the staff be directed to submit a revised proposed rule to the Commission for approval four months from the date of the final SRM and that they be empowered to discuss all relevant documents with stakeholders (NEI, DOE, and others) in public, including use of the Internet, during this revision period. Below, I provide specific comments on certain key elements of the rule.

Integrated Safety Analysis: I agree that Part 70 should require licensees to perform, document, maintain and update an ISA. However, I fundamentally disagree with the proposed requirements in 10 CFR 70.62 to submit ISA results and non-significant changes to the ISA to the NRC for review and approval. I am concerned with the resource impact on NRC for the review and approval of the ISA results in the absence of a convincing health and safety basis and the resource impact on NRC licensees for submitting the ISA and continuously making determinations on potentially hundreds of operation changes each year regarding whether the change should be submitted to NRC. It is also unclear whether on a cost-benefit basis this provision can be fully justified. To some degree, NRC's goal of ensuring that an ISA is performed has and will be met because industry agrees with the requirement to perform and maintain an ISA, and most of the affected licensees have begun the process. It is also my understanding that an NRC basis for inspection and enforcement exists as long as the rule requires licensees to perform, maintain and update the ISA and make it available for NRC review. In addition, it was apparent during the briefing that there is not a clear understanding between staff and industry as to the "safety threshold" associated with ISA changes that would be required to be submitted to NRC for approval. This issue is moot if the ISA is not submitted to NRC in any shape or form. However, the rule does need to capture those few significant changes that are submitted currently as a result of license conditions.

Changes to site structures, systems, components and activities of personnel: As discussed above, NRC should be made aware of certain significant changes to the safety program. However, I do not support the language in the proposed 10 CFR 70.72(b)(1) which states that licensees may make changes to their programs without Commission approval if the change results in, at most a "minimal increase in the likelihood or consequences of an accident previously evaluated in the ISA." I believe that the word "minimal" is subject to interpretation and therefore problematic, as was discussed during the recent briefing. In fact, if the final rule is revised to eliminate submittal of the ISA in its entirety, I would argue that the threshold for change approvals by NRC should be relatively high consistent with the current practice in regulating fuel cycle facilities.

Backfit: I do not support the inclusion of the proposed backfit provision in Part 70. While I believe that the cost-benefit test is an important element of any backfit provision, I do not support the current language in 10 CFR 50.109 or similar language that would require a backfit to provide a "substantial increase" in overall protection. I would argue that there have been and will be requirements that result in modest increases in safety at minimum or inconsequential cost that can be justified on a cost-benefit basis. However, I would support a requirement that any new backfit pass a cost-benefit test, without the substantial increase test.

Consequences of concern and chemical consequence criteria: I agree that the rule should contain criteria for protection against the occurrence of certain consequences and require reporting of certain significant events to NRC because of their potential to impact worker or public health and safety. However, with regard to chemical safety and consequence criteria, I do not support the proposed rule. The regulation of chemical safety at NRC-licensed facilities is clearly a complex issue that involves NRC, EPA and OSHA as well as the States. This issue also warrants further discussion with affected agencies and industry to fully understand their respective authorities and the degree to which those authorities are implemented. I am sensitive to staff efforts to date to fully implement the current Memorandum of Understanding with OSHA. However, while the MOU prescribes a cooperative NRC/OSHA effort to ensure worker protection at NRC-licensed facilities, it is ambiguous on the specific roles of NRC and OSHA for ensuring chemical safety. In addition, although Congress expressed concern in 1987 that NRC's regulatory program was too narrowly focused on radiological safety, Congress did not provide NRC with clear statutory authority to expand its oversight role to address chemical safety. There also remains some question as to NRC's current authority under the Atomic Energy Act or the National Environmental Protection Act to ensure chemical safety. As a result, the proposed rule appears to go beyond NRC's current authority and therefore, I do not support it. I hope that these important issues can be clarified through open discussion in the coming months; however, I seriously doubt that NRC can justify expanding its current role.

Baseline design criteria and preliminary ISA: I considered these requirements within the context of requiring the performance and maintenance, but not the submittal, of an ISA to NRC. I fundamentally agree with the need for baseline design criteria and the conduct of a preliminary ISA for new processes and new facilities; however, the submittal of these documents appears moot if the rule does not require submittal of the results of the ISA. In that case, the rule should require the development of baseline design criteria and performance of a preliminary ISA but not require submittal of this information to NRC.

Decommissioning ISA: Although this issue was not raised during the recent briefing, I am concerned with the potential impact of 10 CFR 70.62(b), which requires licensees to "perform an ISA of the decommissioning process, correct any unacceptable vulnerabilities identified in the ISA, and submit the results to NRC for approval before beginning such decommissioning activities." It is unclear from the rulemaking package whether this requirement is in addition to that imposed by NRC's 1997 cleanup rule (Part 20), which applies to Part 70 as well as other licensees. While the requirement to perform a decommissioning ISA has some similarity to requirements imposed on Part 50 licensees during decommissioning (specifically, the post-shutdown decommissioning activities report required by 10 CFR 50.82), Part 70 facilities do not pose the same level of risk to workers or the public or environment as Part 50 licensed facilities, and thus I question whether the proposed 10 CFR 70.62(b) can be justified on a health and safety or cost-benefit basis.