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P. Kadambi



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Critical Mass Energy Project

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March 7, 2000

N. Prasad Kadambi
Office of Nuclear Regulatory Research
Nuclear Regulatory Commission
Two White Flint North
Room 4 D5, Mail Stop 4 A9
11555 Rockville Pike
Rockville, MD 20852-2739

Dear Dr. Kadambi:

Thank you once again for the opportunity to participate in the roundtable workshop on Performance Based Regulations on March 1st. Please accept this letter as additional formal comments on the proposed High Level Guidelines we discussed at that meeting. I look forward to continuing the discussion with you and your working group.

Public Citizen has grave concerns about the Nuclear Regulatory Commission's proposed High Level Guidelines for Performance Based Regulation, particularly as they will relate to nuclear waste regulations. We believe it important to point out to you at this time that your guidelines, as proposed, will only serve to further erode what little public confidence may exist in the NRC and its ability and willingness to create a publicly informed and accepted regulatory option to protect public health and the environment. NRC's efforts on many fronts to reduce regulatory burden and allow flexibility for licensees to adopt the most cost-effective measures are combining to leave the public with the impression that public health and environmental protection are last on the priority list. For example, changes to 50.59 and 72.48 regulations will make it easier for licensees to make changes without going through an amendment process. This change in policy leaves the public out of the process, and changes the focus from safety to cost.

We are deeply concerned because it is clear that the nuclear industry is looking for any way possible to shirk the responsibility for the legacy of waste it has created (and continues to create). The push to license Yucca Mountain as a permanent repository, the move to allow designing and building of storage casks before they are certified, the plan to promulgate 72.48 to make it easier for licensees to change their procedures, the search for the cheapest method to decommission plants, and the push to "recycle" radioactive materials into the marketplace all show that the NRC is willing grant the industry's wish to dump its responsibility on the public. The industry is not clamoring to be more creative so that it can better protect the people who live around nuclear reactors and nuclear dumps and along nuclear waste transportation routes—the industry is screaming to be bailed out and relieved of the burden of dealing

with its own mess.

During your presentation, you listed three objectives of a performance based regulatory approach:

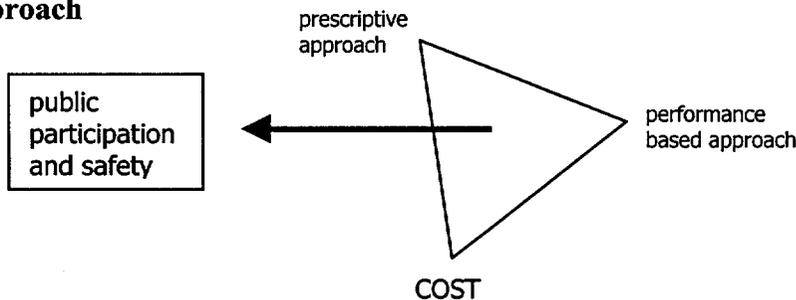
- Provide an appropriate focus on the responsibility of licensees in regard to ensuring public health and safety
- Focus NRC and licensee resources where they make the most contribution to safety
- Provide licensees with greater flexibility in meeting regulatory requirements

I am glad to note that we can agree on at least one of your objectives. We believe that the responsibility for ensuring public health and safety should be on the licensees, with NRC providing the appropriate oversight and enforcement to make sure that the responsibility stays with the licensees. The second objective, however, raises some concerns because it is inappropriate to take a utilitarian approach to public health and safety. It is not acceptable for you to “sacrifice the infant to save the tribe” to refer to a much-used philosophical example. In other words, it is unacceptable for the NRC to accept licensees’ claims that they must make choices where public health and safety are concerned and only take actions that are economically feasible. If the nuclear industry cannot afford to protect the public, then it should be shut down.

With regard to providing licensees greater flexibility, one idea that seemed to recur during the workshop discussion was that prescriptive regulations inhibit creativity. While it may be true that there is less (financial) incentive for a licensee to develop creative ideas for how to operate safely, it is not the case that prescriptive regulations actually inhibit this activity. If a licensee develops a better method, that licensee can file a license amendment, which allows for public participation in the process of making the change. Further, if a prescriptive approach is not conservative enough (e.g., the regulation calls for monitoring a vent once a week), the licensee is in no way prohibited from being more conservative (i.e., monitoring that vent once a day). It is difficult to believe that, given the flexibility a performance based approach will supposedly provide, licensees will strive to achieve the highest standards of safety. Instead, it seems very likely that they will strive to cut corners and meet the regulations with as little effort and cost as possible. Mr. Ray noted in the workshop that NRC must be careful not to “incent perverse behavior” with its proposed guidelines and the regulations that would follow from them. We agree with this statement, and frankly cannot see any possibility that these guidelines will not encourage and allow perverse behavior by licensees. Further, we believe that it is true that tougher enforcement and regulations can lead to more creative thinking on the part of the licensees.

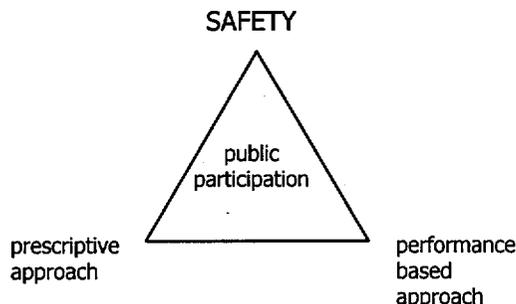
I believe that my concerns can be illustrated graphically, and I would like to attempt to do so here. I believe that the proposed guidelines as they currently stand create an unbalanced regulatory approach, where cost is the focus instead of public safety, public participation is prevented, and both safety and participation are threatened by efforts to deregulate the nuclear industry:

Proposed approach



Instead of writing guidelines with the purpose of moving toward a performance based approach and easing licensee burden, you should write guidelines with the purpose of moving toward a focus on safety and increasing public participation. I believe that if that were your goal, the picture that would be drawn would show a balanced regulatory approach, with safety at the apex and public participation at its core:

A better approach



Many of my concerns stem from the fact that your proposed “high level” guidelines actually seem to be focused on the reactor side of NRC regulations; however, the effect of these guidelines will be seen on the materials and waste side of the regulations as well. I could understand when you and others at the workshop were giving examples of just how the “bright line” would be drawn for performance based regulations on the reactor side, but it is not at all clear to me how you will be able to draw this bright line on the waste side. It is important here to note that you are proposing to **change** a regulatory approach on the reactor side, but you are **creating** a regulatory approach on the waste side. With the prospect of a high level dump at Yucca Mountain looming on the horizon, the public can only fear what this regulatory approach will mean for the transportation campaign and the waste site if it is approved.

Once a waste canister or package or transportation cask leaks, there is no mitigation. There is no margin of safety—public health and the environment are threatened as soon as the system is compromised. Further, “Defense-In-Depth” on the waste side is a very different philosophy than it is on the reactor side. Instead of providing redundancy, Defense-In-Depth provides only sequential effects in a waste environment. In other words, there are never two parts of the system that perform the same function—instead there are a series of parts that are designed to “catch” the radiation as it escapes from the primary canister. It is clear that there is no way to prove that a waste dump is safe, even under ideal circumstances, and so it seems even more impossible to prove that a “margin of safety” exists to protect the public if a part of an already flawed system fails.

If the NRC is truly concerned about focusing responsibility on the licensee and improving (or even maintaining) public confidence these guidelines will not work. It seems the NRC has two choices: either write guidelines that are focused in each area of regulatory authority, or rewrite the proposed guidelines so that they make sense for all areas. Below, I will outline a few suggestions for the NRC to consider if it insists on adopting these high level guidelines.

First of all, I would suggest that you change your initiative from a “performance based regulatory initiative” to a “public safety initiative.” Within that framework, an objective could be to “maintain regulatory burden” (i.e., the goal is not to increase burden) while increasing public safety, rather than the current objective of “reducing regulatory burden” while “maintaining public safety.” This shift in focus—in and of itself—would go a long way to increase public confidence in the NRC.

Because it seems unlikely that you will be willing to totally rewrite your guidelines, I will attempt to confine my suggestions to changes that can be made within the current outline. That is, I will work within the three major sections of "Viability," "Regulatory Improvement," and "Consistency with Other Regulatory Principles." As such, I will create an outline that encompasses my comments for your review.

I. Guidelines to Assess Viability

- A. Improvement to public safety and confidence.
 - a. Regulatory changes will make a direct improvement in licensee practices so that public safety is improved.
 - b. Regulatory changes create opportunities for the public to participate in an open and transparent process to understand, assess, and influence final decisions about proposed changes in regulations and/or licensee practices
- B. Maintenance or Improvement of environmental safety.
 - a. No new threats to the environment are created and current threats are mitigated.
- C. Measurable or Calculable Parameters
 - a. Regulations will include objectives/parameters that can be directly measured or objectively calculated.
 - b. Regulations will include objectives that are directly related to safety and confidence (see A, B)
 - c. Regulations will include objectives that are readily accessed in real time or on a logically periodic basis.
- D. Licensees will be expected to propose creative or innovative approaches to regulations to improve public safety within the framework of the public participation process.
- E. A framework will exist to ensure that an adequate safety margin exists
 - a. Parameters ONLY IF it is verifiably true that time will be available to correct any problems
 - b. Regulations will include enforcement measures that inform the public of the problem and the mitigation process, shut down and/or punish the licensee if the time limit is exceeded, and require proof that the out-of-compliance components have been replaced or completely repaired.

II. Guidelines to Assess Performance-Based Regulatory Improvement

- A. Improves Safety and Increases Public Confidence
 - a. Improvement to safety can be demonstrated through modeling and public confidence will be increased by increased public participation and increased process openness and transparency. Success stories will be shared with the public in order to show how the system can work.
- B. Maintains Environmental Safety, Common Defense, and Security
 - a. No new threats to environmental safety, common defense, or security will be created, and current threats will be removed.
- C. Increases NRC effectiveness, efficiency, and realism
 - a. Regulations will allow NRC to more effectively ensure public and environmental safety, monitor licensee activities, and promote public participation
 - b. Regulations will provide more efficient means of collecting data, enforcing regulations, and communicating with the public.
 - c. Regulations will require real-life scenarios and real-life testing to model licensee performance.
- D. Overall net benefit
 - a. Licensee burden shall only be reduced if public safety is improved.
 - b. Change does not increase costs to the public or threaten public safety (i.e., public burden must be maintained or improved).

- c. Change is easily understandable and amenable to simplified analysis.
- E. Incorporation into regulatory framework
 - a. Regulatory change will not decrease public or environmental safety in another area.
 - b. Regulatory change will not set a precedent to decrease public's ability to participate in regulatory process.
 - c. Regulatory change will not cause other regulatory changes without appropriate level of public involvement.
- F. Accommodate New Technology
 - a. New technology is used to increase public safety, NRC's ability to monitor licensee activities, and the public's ability to access information about licensee and NRC activities.
 - b. Failed or expensive technology is replaced with better technology in a timely manner to ensure public safety.
- G. Balances regulatory burden with the need for public and environmental safety.
 - a. Regulations will not unnecessarily further burden the licensee; however, burden will be assessed within the framework of increasing public safety and confidence.

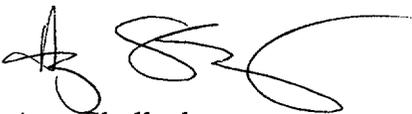
III. Guidelines to Assess Consistency with Other Regulatory Principles

- A. Consider Overriding NRC Goals, Principles, and Approaches
 - a. Regulations will strive to ensure public safety, public confidence, environmental safety, and licensee responsibility.
 - b. Defense in Depth will be demonstrated and uncertainties will be thoroughly explored and explained to the public as part of the participatory process.

As you can see, these suggestions keep the focus on public safety and public participation. We are not opposed to providing licensees opportunities for creativity and innovation; however, we believe it is critical to provide those opportunities within the framework described above.

Thank you for your consideration of these comments. Please feel free to contact me if you would like any further information or clarification.

Sincerely,



Amy Shollenberger
Senior Policy Analyst

Public Citizen is a non-profit research, lobbying, and litigation organization founded by Ralph Nader in 1971. Public Citizen advocates for consumer protection and for government and corporate accountability, and is supported by 150,000 members throughout the United States.