

May 3, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers */RA/*
Executive Director for Operations

SUBJECT: PLANNED CHANGES TO THE REVIEW PROCESS FOR 10 CFR 2.206
PETITIONS

In the Commission Tasking Memorandum, Topic Area IV.F, "2.206 Petitions," the NRC staff committed to identify and implement measures to improve the staff's responsiveness to stakeholders in reviewing 10 CFR 2.206 petitions. The information in this memorandum provides the Commission with a status update on the staff's planned changes to the process used to review 2.206 petitions. The staff believes the planned changes address maintaining safety, public confidence, effectiveness and efficiency, and timeliness concerns.

Background

10 CFR 2.206 was promulgated in 1974 to provide a mechanism by which any member of the public could raise health and safety concerns and petition the NRC to take specific enforcement actions. Enforcement actions include the imposition of requirements by order, such as the modification, suspension or revocation of a license, and the imposition of civil penalties. 10 CFR 2.206 has remained essentially unchanged since it was promulgated.

Historically, the majority of petitioners' requests have been denied, either partially or totally. There are a number of reasons for this. In the past the staff considered a request for action to be denied if the staff was already taking the action before the petition was submitted. More recently the staff has recognized that this practice affected public confidence and the staff now acknowledges such a request as granted. Other common reasons for denials include: (1) insufficient justification for the requested enforcement action and (2) the requested action was not within the scope of 10 CFR 2.206 (i.e., not enforcement action). Noting that the majority of petitions filed have been denied, affected petitioners have criticized NRC practices and processes for handling petitions and called into question the adequacy and viability of the petition process.

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Some specific concerns about the petition process expressed by stakeholders in recent years include timeliness, poor communications, and lack of opportunities for petitioner input. In December 1996, the staff instituted a pilot program to develop an improved process for responding to petitions. The program placed emphasis on timeliness and the early involvement of management to promote earlier coordination among the NRC offices involved in developing the response. In 1997, on the basis of the results of this pilot program, the staff revised Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions."

Although timeliness improved, stakeholder feedback, primarily from petitioners, continued to be largely negative. Issues raised by stakeholders included poor communications, a perception of failure of director's decisions to fully address petitioners' concerns, absence of an opportunity for petitioners to provide input to or appeal staff decisions, and a general lack of confidence in the process.

On the basis of a limited stakeholder survey conducted in January 1999 and staff experience with the process, the staff revised MD 8.11 again in July 1999. The most significant revision was the addition of a provision to offer the petitioner an opportunity to address the Petition Review Board (PRB) convened by the assigned NRC office, either by telephone or in person. The primary purpose of this change was to ensure that the PRB better understands the bases for the requested actions and obtains any further clarification for the PRB members to use in formulating recommendations concerning the petition and any request for immediate action. The PRB consists of a chairperson (usually a manager from the assigned office), the petition manager, cognizant technical review and projects management, and the Offices of Enforcement (OE) and Investigations (OI) representatives, if appropriate. In addition, the Office of the General Council (OGC) normally participates in an advisory role. Each office to which a petition may be assigned (i.e., the Offices of Nuclear Reactor Regulation (NRR), Nuclear Materials Safety and Safeguards (NMSS), and Enforcement), has its own PRB. The functions of the PRB are to: determine whether the petitioners' requests satisfy the criteria for their concerns to be addressed using the process contained in 10 CFR 2.206; address any requests for immediate action; and agree on the review scope and schedule. When the PRB meets with the petitioner, it does so to gather information that supports these functions. Licensees are also invited to participate in PRB - petitioner interactions.

In the July 1999 revision the staff also renamed the "informal public hearing" discussed in MD 8.11, as the "10 CFR 2.206 Petition Meeting" to reduce confusion about the format of these meetings. Other changes in this revision focused on improving staff communications with the petitioner during the petition review process. However, despite these changes, the staff continued to receive negative feedback from petitioners, mostly because the process did not include any provision for a petitioner to appeal, or request staff reconsideration of, a director's decision. The staff recognized that the July 1999 revision dealt only in part with stakeholder concerns. Therefore, the staff initiated action to develop the longer-term process improvements.

Recent Staff Initiatives

In late 1999, the staff embarked on a more rigorous approach to obtaining, evaluating, and addressing stakeholder concerns. As a first step, on October 7, 1999, the staff published a request for comments on MD 8.11 in the *Federal Register* (64 FR 54654). A copy of MD 8.11 was placed on the NRC Web page. On December 15, 1999, during the comment period, the staff met with representatives of the Union of Concerned Scientists (UCS) and Public Citizen (PC), who had already developed their concerns and recommendations. A representative of the Nuclear Energy Institute (NEI) also attended this meeting and provided the industry's perspectives. The staff was informed that this meeting constituted the UCS and PC response to the *Federal Register* notice.

Some of the stakeholders' concerns were based on a misinterpretation of the regulation. For example, stakeholders believed that the regulation required the NRC to either institute a proceeding in accordance with 10 CFR 2.202, or deny the petition. OGC clarified these misunderstandings to the satisfaction of the stakeholders. UCS and PC also reiterated concerns about the timeliness of the director's decisions. The staff agreed to continue efforts to improve timeliness. However, the participants all agreed that some of the process changes raised by the stakeholders will lengthen the processing time. The major comments that remained from the December 15th meeting are as follows:

1. The petitioners wanted to address the PRB after it had developed its recommendations concerning any immediate actions and whether the petition met the screening criteria contained in MD 8.11 for treatment under 10 CFR 2.206.
2. The criteria for a technical meeting between the staff and the petitioner are set so high that they are very rarely met.
3. Petitioners have no opportunity to appeal director's decisions, while licensees have formal appeal avenues for amendments and other staff actions.

Finally, at this meeting, the participants discussed some preliminary ideas for process improvements to address some of the major concerns.

The comment period on the *Federal Register* notice ended on January 31, 2000. By letter dated January 31, 2000, NEI provided the only written comments received in response to the *Federal Register* notice. The NEI comments were generally supportive of the process changes that were discussed at the meeting on December 15, 1999. The staff held a public meeting on February 10, 2000, to discuss the comments received. Representatives from NEI, PC, and the law firm of Winston and Strawn attended the meeting. The industry representatives again stated general support for the staff initiatives and asked the staff to include appropriate steps to ensure licensees remain involved in the process.

In addition to the sources of comments discussed above, the staff reviewed comments concerning the 2.206 petition process that were provided (1) during the Commission meeting with stakeholders on December 16, 1999, and (2) in the Center for Strategic and International

Studies' panel report, "The Regulatory Process for Nuclear Power Reactors; A Review," published in August 1999. These comments were also considered by the staff in developing the planned process changes.

Planned Significant Changes to the Review Process

The staff is planning three significant changes to the 2.206 petition review process:

1. The review process, as revised in July 1999, offers petitioners an opportunity to meet with the PRB, either in person or by teleconference, before the initial PRB meeting. The purpose of this meeting is to allow the petitioner an opportunity to provide elaboration and clarification of the petition and any requests for immediate action. The staff is planning to provide an opportunity for petitioners to meet with the PRB after the PRB has discussed the petition, as well as before. The purpose of a meeting at this stage is to allow the petitioner to comment on the PRB's recommendations regarding acceptance or denial of the petition and any requested immediate actions. As is currently the case, the licensee would also be invited to participate.

This additional opportunity will allow the petitioner to be informed of the PRB's recommendations and, if the petitioner disagrees with the recommendations, to provide clarifying information related to the petition. The PRB would then evaluate the clarified information to determine whether its original recommendations should be modified. If new information is presented, the PRB may also determine that the new information should be treated as a separate petition. This revised approach ensures that the PRB has all the necessary information for its final recommendations and that the petitioner has an opportunity to provide input before the recommendations are implemented.

Notwithstanding the addition of the opportunity for the post-PRB meeting interaction, the current opportunity for pre-PRB meeting interaction would be retained as an option. In some situations, a meeting at the beginning of the PRB process is a necessary and valuable input to the PRB deliberations. In other situations, such a meeting would have little or no value. But if the PRB has determined that the petition, or portions of the petition, do not meet the threshold criteria for consideration under 10 CFR 2.206 or the PRB recommends denying any immediate action requests, the post-PRB meeting interaction would be beneficial. In unusual cases, both pre- and post-PRB interactions might be appropriate.

With respect to this change, the staff would consider each incoming petition on a case-by-case basis and maintain the flexibility for petitioner-licensee-PRB interactions as appropriate.

2. Eliminate the criteria in MD 8.11 that must be satisfied before a technical meeting can be offered during the staff's review of the petition.

Petitions submitted under 10 CFR 2.206 are expected to be clear and complete, i.e., providing the staff with all of the information necessary to evaluate the petition. However, in some cases the staff has found it beneficial to meet with the petitioner to discuss certain technical aspects of the petition. MD 8.11 currently contains criteria to

determine whether or not to conduct such a meeting. All of the parties involved agreed that these criteria are at a high threshold. The staff notes that when meetings have been held, the criteria may have not been met, but the meeting was held at the discretion of the staff. The criteria were originally created in 1996 and were relaxed somewhat in the July 1999 revision to MD 8.11. The staff plans to eliminate the criteria and instead indicate that technical meetings with the petitioner will be held whenever the staff believes that such a meeting (whether initiated by the petitioner or the staff) would be beneficial to the staff's review of the petition. This measure will eliminate the current confusion about the need to meet the criteria and instead place the decision to hold a meeting with those best able to evaluate the need.

Technical meetings and petitioner meetings with the PRB held in conjunction with 10 CFR 2.206 petition reviews are not considered public meetings in the context of MD 3.5. Technical meetings will be given as much advance public notice as possible, but staff decisions on restart or any immediate action request will not be delayed due to the logistics of arranging for or noticing meetings. Petitioner presentations to the PRB are typically conducted by teleconference and are set up as soon as possible following receipt of the petition in order to meet timeliness goals. Such meetings are normally not noticed; however, public observation is permitted.

3. Provide a copy of the proposed director's decision to the petitioner and the licensee for comments.

Although the Commission has the option to formally review director's decisions, the regulation does not allow a petitioner to request such a review (see 10 CFR 2.206(c)(2)). Therefore, the petitioner has no mechanism within the framework of the regulation by which he or she can appeal the director's decision on the petition. Some stakeholders indicated that this situation supports the view that petitioners are not given the same opportunities to challenge staff positions as are licensees in other regulatory processes. Remaining within the limits of the current regulation, the staff plans to allow the petitioner and the licensee to provide comments to the staff on the proposed director's decision before it is issued in final form. The proposed director's decision would also be placed in the public document room. Because the petitioner and licensee are commenting on a proposed director's decision, the Commission's review period provided by 10 CFR 2.206(c)(1) does not begin at that point. The intent of the new provision in the process is to allow the petitioner and the licensee an opportunity to review the proposed director's decision and raise any issues they believe involve factual errors. The staff would then reconsider any affected portions of the proposed director's decision. Many of the same staff members involved in the preparation of the proposed decision would be involved in the review of the comments. However, because the staff's disposition of the comments would be included in the final director's decision, NRC management would have an opportunity to evaluate the staff's handling of the comments prior to the director's decision being finalized. Significant new information provided by the petitioner at this stage will be reviewed by the PRB and might be treated as a new petition.

If this process change does not provide the desired results, another option would be to change the rule to allow petitioners to appeal director's decisions. This option is not being

pursued at this time for several reasons. First, a formal appeal process would require a rulemaking proceeding which may go beyond what is necessary to address the issue of greater petitioner involvement in the process. Providing an opportunity for comments on a proposed director's decision does not require a rule change and can be implemented almost immediately, and the stakeholders with whom this option was discussed indicated that it may satisfy their concern. Second, changing the regulation to provide for a formal appeal to the Commission would further formalize a process that, from its inception, was intended to be an extremely informal process in contrast to other, more formal and "legalistic" processes, such as the adjudicatory process. Third, a formal appeal process would require greater, direct involvement of the EDO or the Commission, depending on the nature of the appeal, and would have much greater resource implications than that of simply allowing comments on a proposed director's decision. Finally, adding a formal appeal process clearly would adversely affect the timeliness of resolving 2.206 petitions and thus would exacerbate the timeliness issue, which has been a source of criticism by stakeholders.

These three planned changes to the process for handling 10 CFR 2.206 petitions were discussed in principle with external stakeholders during the meetings on December 15, 1999, and February 10, 2000. Both the members of the public and the representatives of industry agreed that they believed the changes would improve the process and potentially address the stakeholder's concerns with the process. The stakeholders expressed support for the proposal to provide the proposed director's decision for comment, however, they noted that, if necessary, the option of a rule change to add an appeal process would be revisited. The staff believes that these changes support maintaining safety because petitioners will have greater input into the final director's decisions.

The current timeliness goal of issuing the director's decision within 120 days after the acknowledgment letter will be revised by the staff as necessary to accommodate the changes when the staff develops the details of the revised process in MD 8.11.

In a March 31, 2000 meeting, Mr. Lochbaum made comments pertaining to his view that progress in improving the 10 CFR 2.206 review process was lacking. While the staff disagrees with this view, it contacted Mr. Lochbaum to attempt to ensure that all his concerns had been addressed.

Resource Implications

The resources for the present staff efforts to improve the 10 CFR 2.206 process will be handled within existing budgeted resources for Fiscal Year 2000. Each of the planned changes to the process will require a recurring additional expenditure of staff resources that will be reprogrammed within existing budgets. The first two changes are expected to significantly increase the number of meetings between the staff and the petitioners. The final change will require resources to evaluate and disposition petitioner comments. The total increase in direct resources expended on 10 CFR 2.206 petitions is expected to be 2.9 full-time equivalent (FTE) positions, with 2.3 FTEs attributed to NRR, 0.4 FTE attributed to NMSS, and 0.2 FTE attributed

to OGC. This increase will roughly double the resources currently budgeted for the review of 10 CFR 2.206 petitions. Resource expenditures by OE for the petition review process are not expected to increase significantly because current resource expenditures are low. The staff will use the Planning, Budgeting, and Performance Management process to allocate resources to accommodate the changes.

Future Actions

The staff will brief the Commission on the planned changes to the process in a Commission meeting on May 25, 2000. Stakeholders will participate in the meeting and we expect that they would be prepared to discuss the staff's proposals. After evaluating comments received during that meeting, the staff plans to complete a revision to MD 8.11 and publish a *Federal Register* notice by July 31, 2000, inviting comments on the draft revision. The revision will also involve a major rewrite and reorganization of the contents of MD 8.11 to improve clarity and usability. The staff will then resolve any comments received on the draft revision before issuing the completed revision by October 20, 2000. Pending the revision, the staff plans to implement these changes on an interim basis starting in June 2000.

The NRC staff is currently evaluating the use of risk information in the allegations program (see SECY-99-273, "Impact of Changes to the Inspection Program for Reactors on Implementing the Allegation Program," dated November 23, 1999). When a final decision is made with respect to this issue, the staff will consider whether a similar application of risk information to 10 CFR 2.206 petitions should be made and, as appropriate, discuss related process changes with the Commission.

Interoffice Coordination

This memorandum has been coordinated among NRR, NMSS, OGC, OE, and the Office of the Chief Financial Officer and comments from each office have been incorporated.

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