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DOCKET NUMBER
PETITION RULE PRM 30-63
(65 FR 40548)

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemakings and Adjudications Branch

Re: Request for Comments on Petition for Rulemaking Filed by the Natural Resources Defense Council (65 Red. Reg. 40548, June 30, 2000)

Dear Ms. Vietti-Cook:

The following comments on the above-referenced Petition for Rulemaking are being submitted by the law firm of Morgan, Lewis & Bockius, LLP. The Natural Resources Defense Council (NRDC) has filed a petition requesting that the Nuclear Regulatory Commission (NRC) promulgate a rule providing that:

No licensee [sic] shall be issued to, or retained by, any person who, or any organization whose principal owner, officer, or senior manager, has engaged in, or has knowledge or evidence pertaining to, but fails to promptly report that knowledge or evidence to the NRC, bribery of, or extortion by, any Federal, State or other regulatory official involved in the review or approval of, or continuing oversight over, the license activities, or license applications; or any person who, or any organization whose principal owner, officer, or senior manager, has acted in any manner that flagrantly undermines the integrity of the regulatory process of the NRC or that of an Agreement State.

The NRDC rulemaking petition is contained in an April 20, 2000 letter from Dr. Thomas Cochran to NRC Chairman Meserve. Dr. Cochran's letter specifically refers to the NRC's decision, after issuance of a Demand for Information and a Request for Additional Information, not to take further action against Mr. Khosrow B. Semnani as a result of payments made by Mr. Semnani to a former State of Utah official. Morgan Lewis represented Mr. Semnani in responding to the Demand for Information. Based on that

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experience (and our experience in representing a broad range of NRC and Agreement State licensees on NRC regulatory matters), we would like to provide our views on the petition for the NRC's consideration. For the following reasons, we believe that the petition should be denied.

First, there is no need for the NRC to adopt a rule of the type proposed by the NRDC. The NRC already has the authority to consider the character and integrity of applicants and licensees - - including acts reasonably bearing upon an applicant or licensee's willingness and propensity to adhere to applicable requirements - - in deciding whether to grant, deny or revoke licenses or to take various enforcement actions. Section 182a of the Atomic Energy Act states that license applications "shall . . . specifically state such information as the Commission . . . may determine to be necessary to decide . . . the character of the applicant . . ." 42 U.S.C. § 2232(a). The Commission and its adjudicatory boards have explicitly recognized this authority. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118 (1985); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659 (1984).

In Three Mile Island, the Commission stated:

A generally applicable standard for integrity is whether there is reasonable assurance that the Licensee has sufficient character to operate the plant in a manner consistent with the public health and safety and applicable NRC requirements.

Three Mile Island, 21 NRC at 1136. In South Texas Project, the Licensing Board noted that "[a]ll parties appear to agree that character . . . [is a] fundamental requirement for a license applicant. The character . . . requirements are implicit in, and hence stem from, the Atomic Energy Act." South Texas Project, 19 NRC at 669.

The NRDC rulemaking petition does not explain why a new rule is required in light of existing NRC authority. Nor does the NRDC petition identify a regulatory "gap" that needs to be filled. In such cases, the NRC has routinely denied rulemaking petitions. For example, in 1999, the Nuclear Information and Resource Service (NIRS) submitted a petition requesting that the NRC require that nuclear facilities ensure the availability of backup power sources to power reactor and facility safety systems in the event of a Y2K incident. In denying the NIRS's petition, the NRC concluded that "existing regulatory requirements" and NRC oversight, in concert with licensee commitments and programs to address Y2K issues, provided "reasonable assurance of adequate protection to public health and safety." Nuclear Information and Resource Service, 64 Fed. Reg. 45,909, 911 (1999). A related NIRS petition requesting that nuclear power plant facilities conduct a full-scale emergency planning exercise due to potential Y2K issues was also denied. In that instance, the NRC found that the proposed rule would be "counterproductive to the ongoing Y2K readiness

efforts.” The NRC added that, “current emergency preparedness regulations” provided for proper industry contingency planning. Nuclear Information and Resource Service, 64 Fed. Reg. 45,911 (1999). Therefore, the petition should be denied.

Second, NRDC seeks to eliminate all NRC discretion or judgment in evaluating relevant circumstances and making enforcement decisions by creating an inflexible litmus test. The NRC has wisely refrained from adopting a prescriptive regulation for judging character. Adaption of the proposed rule would automatically impute the conduct of any senior manager to the corporation or other entity holding the license, and it would do so in all cases. As a matter of precedent and good public policy, it is important that the NRC retain the ability and flexibility to evaluate individual circumstances and make judgments on the basis of all relevant considerations including the sufficiency and timeliness of corrective actions. In Three Mile Island, the Commission recognized that:

acts bearing on character generally should not be considered in isolation. The pattern of licensee’s relevant behavior, including corrective actions, should be considered.

Id. at 1137.

Furthermore, in its enforcement process, the NRC considers on a case-by-case basis whether the acts of an individual should be imputed to the licensee. While there are occasions where the NRC chooses to take action both against the individual and against the licensee, there are also instances where the NRC concludes that the appropriate response is to limit the enforcement action to the individual. The NRC has emphasized in the Enforcement Policy that each matter being considered for enforcement action should be reviewed on its own merit. NUREG 1600, Section IV, p. 10. In doing so, the NRC has recognized that “[e]nforcement actions inherently involve the exercise of informed judgment on a case-by-case basis, and the ordering of enforcement priorities is left to the agency’s sound discretion.” Advanced Medical Systems, Inc., (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff’d, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995).

Third, the NRDC petition would also mandate that licenses be denied or revoked if an individual “flagrantly undermines the integrity of the regulatory process of the NRC or that of an Agreement State.” This aspect of the petition is too vague, and if adopted and applied, would raise serious questions of adequate notice and due process. The petition does not explain the scope of such a proposed provision or how it would be applied in practice.

Fourth, contrary to 10 CFR § 2.802, the petition provides no supporting basis for the rulemaking request. Section 2.802(c) requires that petitioners provide information to the NRC to explain the need for and rationale behind the proposed rule change. Petitioners should “note any specific cases . . . where the current rule is unduly burdensome, deficient,

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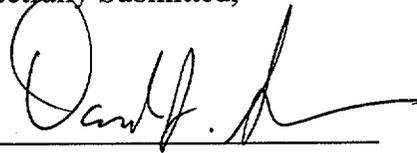
or needs to be strengthened.” 10 CFR § 2.802 (c)(3). While NRDC objects to the result in the Semnani matter, it fails to address why existing requirements are inadequate.

Finally, mindful of the NRDC’s specific statements regarding Mr. Semnani in its April 20 letter, and of the fact that it cited 10 CFR § 2.206 (requests for enforcement action) rather than 10 CFR § 2.802 (petitions for rulemaking) as the basis for its request, any attempt to apply such a rule based on past conduct of a licensee would violate the prohibition against retroactive rulemaking. The United States Supreme Court has repeatedly expressed its disfavor of retroactive rules. See, e.g., Lynce v. Mathis, 117 S. Ct. 891 (1997); Landgraf v. USI Film Prods., 511 U.S. 244 (1994); and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). In Bowen, the Supreme Court stated that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” 488 U.S. at 208. The Atomic Energy Act contains no such express provision, and fundamental legal and equitable principles of fairness, estoppel and repose militate against retroactive rulemaking authority. Furthermore, NRDC specifically stated that the decision to take no further action against Mr. Semnani might establish an “extremely dangerous precedent from a regulatory perspective.” This statement clearly implies NRDC’s own recognition that any rule that might be adopted in this area should be applied only to future activities and conduct. Neither Mr. Semnani, nor any other official or manager of an NRC licensee should be subject to a rule adopted after the conduct to which the rule would apply has occurred.

In short, the rule proposed by NRDC is unnecessary, would deprive agency decision-makers of necessary discretion in making enforcement decisions, is impermissably vague and if applied to prior conduct would violate the prohibition against retroactive rulemaking.

For the reasons stated above, Morgan Lewis recommends that the NRC deny the rulemaking petition in its entirety.

Respectfully Submitted,



Donald J. Silverman



Daryl M. Shapiro