

OFFICE OF THE SECRETARY  
CORRESPONDENCE CONTROL TICKET

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**ACTION OFFICE:** OGC/EDO

**AUTHOR:** Mr. Scott Nelson  
**AFFILIATION:** PUB CIT  
**ADDRESSEE:** Annette Vietti-Cook  
**SUBJECT:** Concerns Orders Revising Design Basis Threat, Nos. EA-03-086 and EA-03-087

**ACTION:** Appropriate  
**DISTRIBUTION:** RAS, RF, SECY to Ack

**LETTER DATE:** 06/25/2003  
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**PUBLIC CITIZEN LITIGATION GROUP**

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June 25, 2003

By Telecopier

Annette Vietti-Cook  
Secretary  
Office of the Commission  
U.S. Nuclear Regulatory Commission  
ATTN: Rulemakings and Adjudications Staff  
Washington, DC 20555-0001

Re: Orders Revising Design Basis Threat, Nos. EA-03-086 and EA-03-087

Dear Ms. Vietti-Cook:

By EA-03-086, its "Order Modifying Licenses" dated April 29, 2003, the Commission revised and superseded the design basis threat for each operating nuclear power plant, as specified in 10 C.F.R. § 73.1. See 68 Fed. Reg. 24,517 (May 7, 2003). Simultaneously, the NRC issued orders EA-03-087 to Category 1 fuel cycle facilities operated by Nuclear Fuel Services, Inc., and BWX Technologies, Inc., which similarly modified the design basis threat in 10 C.F.R. § 73.1 for those facilities. In issuing these orders, the Commission amended a duly promulgated regulation without complying with the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553. The Commission's action constituted rulemaking under the APA because the orders modified the requirements for operation of all operating nuclear power plants and Category 1 fuel cycle facilities. Absent compliance with the procedures specified by the APA, including notice and an opportunity for public comment, issuance of a substantive rule is unlawful. See *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003).

Public Citizen, Inc., objects to the Commission's issuance of the new design basis threat rule in violation of the APA's procedural rulemaking requirements and intends to seek judicial review unless the Commission immediately commences an appropriate rulemaking process. At a minimum, that would necessitate the withdrawal of the finality of the order (though it could be reissued as an interim measure subject to the rulemaking process), the issuance of a notice of proposed rulemaking, and the provision of a meaningful opportunity for public comment. Because our opportunity for seeking judicial review is triggered by the issuance of the unlawful order, see *NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), time is of the essence, and we intend to file a petition for review no later than June 30, 2003, unless we receive a firm commitment from the Commission that it is willing to engage in a lawful rulemaking process.

Sincerely yours,

  
Scott L. Nelson

cc: Samuel J. Collins, Director, Office of Nuclear Reactor Regulation  
Dennis C. Dambly, Assistant General Counsel for Materials Litigation and Enforcement

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**FAX COVER SHEET**

**Date:** June 25, 2003

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**From:** Scott L. Nelson, Public Citizen Litigation Group

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