U.S.NRC

United States Nuclear Regulatory Commission

Protecting People and the Environment

Public Participation in NRC Regulatory Decision-Making

January 31, 2013

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Protecting People and the Environment

Overview and Introduction

Bill Borchardt
Executive Director for Operations
January 31, 2013

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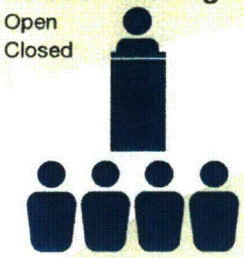
Agenda

- Overview - Bill Borchardt
- Commission policy on public participation in NRC staff meetings - Darren Ash
- 10 CFR 2.206 petitions for enforcement action - Darren Ash
- Petition for rulemaking process - Darren Ash
- Regional public outreach - David Lew
- NRC Interactions with States and Tribes - Darren Ash
- Adjudicatory processes - Bradley Jones

Public Participation and Interaction

Public Meetings
Open
Closed



General Inquiries
Phone
Mail
Email
In person

Information Meetings
Scoping
Preliminary
Counterpart
Information Exchanges

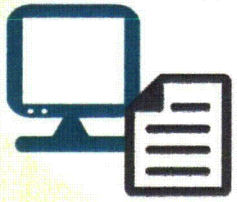
Education and Business Outreach
Minorities groups
Small Business
Vendors/Contracts
Recruitment

Media Outreach
Press Conferences
Press Releases
Editorial Boards
Interviews

Public Comments
Regulations.gov
Mail
Email
Fax
Verbally at public meetings

Resident Inspectors in the community

2.206 Petition
electronic or hard copy



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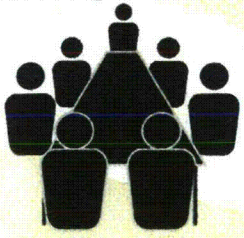
Website
www.nrc.gov

Adjudicatory Hearings

Advisory Committee Meetings

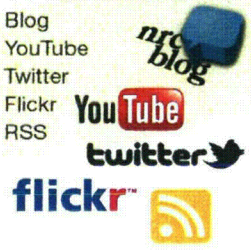


Public Document Room
Phone
Email
In person

Conferences
International
Trade
Industry

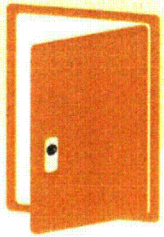
Emergency Preparedness
Federal
State
Local

Social Media
Blog
YouTube
Twitter
Flickr
RSS

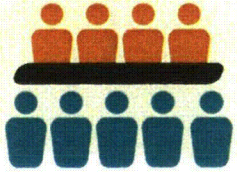


Visitors to the Agency

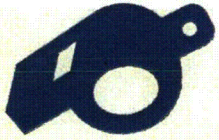
Open Houses



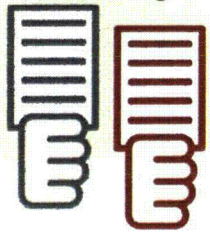
Congressional Hearings



Allegations



Petitions for Rulemaking



Federal Register Notices

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Commission policy on public participation in NRC staff meetings, 10 CFR 2.206 petitions for enforcement action, and Petition for rulemaking process

Darren Ash
Deputy Executive Director for
Corporate Management
January 31, 2013

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Public Participation in NRC Staff Meetings

- NRC staff responds to direct and Public Meeting Feedback Form input
- Feedback is analyzed and shared
- Webstreaming, teleconferencing, and other tools are effective ways to increase participation in our meetings

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10 CFR 2.206 Petitions

- Anyone may request that the NRC take enforcement-related action against an NRC licensee or certificate holder
- There are numerous opportunities for the petitioner to participate in the process and NRC makes documents publicly available
- NRC takes substantive action on a petition nearly 40% of the time
- NRC is revising the 2.206 Management Directive

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Petition for Rulemaking Process

- Anyone may petition the NRC to develop, change, or rescind one of its regulations
- NRC invites public comment for a 75-day comment period
- Draft proposed rule would streamline the NRC's petition for rulemaking process (SECY-12-0160; November 30, 2012)

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Region I Public Outreach

David Lew
Deputy Regional Administrator, Region I
January 31, 2013

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Region I Public Outreach

- Outreach and engagement is a priority
- Public engagement in Region I activities
  - Public meetings at sites at least annually
  - Frequent engagement with public by staff including resident inspectors
- Technology helps us stay connected with the public

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NRC Interactions with States and Tribes

Darren Ash
Deputy Executive Director for
Corporate Management
January 31, 2013

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Interactions with States and Tribes

- NRC works with all States and Native American Tribal governments
- All States work with NRC on policy and liaison efforts; Agreement States are our partners in reporting events, and developing rules
- NRC is seeking comments on draft agency procedures for consulting with Native American Tribes

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NRC Adjudicatory Processes

Bradley Jones

Assistant General Counsel for

Reactor and Materials Rulemaking

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NRC Adjudicatory Processes

- Introduction
- Standing Requirements
- Contention Standards
- Timing of Hearing Opportunities
- Interlocutory Reviews

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Standing Requirements

- Judicial Concepts of Standing
- Persons living or frequenting areas within 50 miles of a reactor

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Contention Standards

10 CFR 2.309(f) essentially provides that each contention must include:

a specific statement of the issue of law or fact to be raised or controverted

- a brief explanation of the basis for the contention
- a demonstration that the issue raised is within the scope of the proceeding
- a demonstration that the issue raised is material to the findings the NRC must make in the action
- alleged facts or expert opinions that support the contention with references
- a showing that a genuine dispute exists by referencing portions of the application that are disputed

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Timing of Hearing Opportunities

- Notice Of Opportunity To Request A Hearing Is Published After Application Is Accepted
- Typically Application Available For Some Time Before Notice Is Published

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Interlocutory Reviews

(Appeals to Commission before the end of the hearing process)

- Current Process Focuses On Whether There Will Be A Hearing
- Alternatives Could Allow Consideration Of Hearing Content (Admissibility of Individual Contentions)

Public Participation in NRC Regulatory Decision Making

Ellen C. Ginsberg
Nuclear Energy Institute
Vice President, General Counsel and Secretary

January 31, 2013

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Key Messages

- Balancing ***all*** stakeholder interests is critical
- Adjudication is only one of the many opportunities for stakeholder input on safe and environmentally sound operation
- Rulemaking provides for greater participation than issuance of an order

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Balancing All Interests

- Balance must be struck between public's interest in having sufficient opportunity to air relevant safety and environmental issues and the industry's interest in efficient and focused regulatory reviews and expeditious agency action
- Adjudications require significant consumption of NRC, applicant, and intervenor resources
- Commission's adjudicatory framework – including contention admissibility – is based on substantial agency experience balancing those interests

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Court Review of NRC Adjudicatory Procedures

- First Circuit Upholds Adoption of Revised Hearing Procedures (2004)
  - Significant changes included limiting cross examination, reducing discovery procedures
- First Circuit Opines on Contention Admissibility Requirements (2013)
  - Court rejects "backdoor challenge" to the decision made by the NRC in 1989, at the prompting of Congress, to toughen the standards for getting a hearing on contentions (imposing requirement that to be admissible a contention must provide sufficient information . . . to show that a genuine dispute exists).
  - Congress was concerned and called for change because "***[s]erious hearing delays -- of months or years -- occurred, as licensing boards admitted and then sifted through poorly defined or supported contentions***."
  - "[M]aterials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged," *Calvert Cliffs 3 Nuclear Project, LLC*, 72 N.R.C. 720, 750 (2010); "otherwise, the aims of the rules and of Congress would be thwarted."

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Contention Admissibility

- Requirement to identify **specific issues** and provide **minimal basis** relieves all parties of the burden of having to develop evidence and prepare a case to address vague or undefined claims
- Data demonstrates that threshold is being met and contentions raising **genuine disputes** on **material issues** are being admitted

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Hearing Requests Granted on COL Applications

Overview of Hearings on COL Applications		
Hearing Opportunity	**Hearing Request**	**Hearing Granted**
Bell Bend	Bell Bend	Bellefonte
Bellefonte	Bellefonte	Calvert Cliffs
Calvert Cliffs	Calvert Cliffs	Comanche Peak
Comanche Peak	Comanche Peak	Fermi
Fermi	Fermi	Levy
Grand Gulf	Harris	North Anna
Harris	Levy	South Texas
Levy	North Anna	Turkey Point
North Anna	South Texas	Vogtle
South Texas	Summer	
Summer	Turkey Point	
Turkey Point	Vogtle	
Vogtle	W.S. Lee	
W.S. Lee		

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What the Data on Contentions Does Not Tell Us

- Licensing process is iterative or dynamic
- Staff often adjusts or refocuses its review based on submitted contentions
- Applicants may enhance their applications in response to submitted contentions
- Applicants and intervenors often settle

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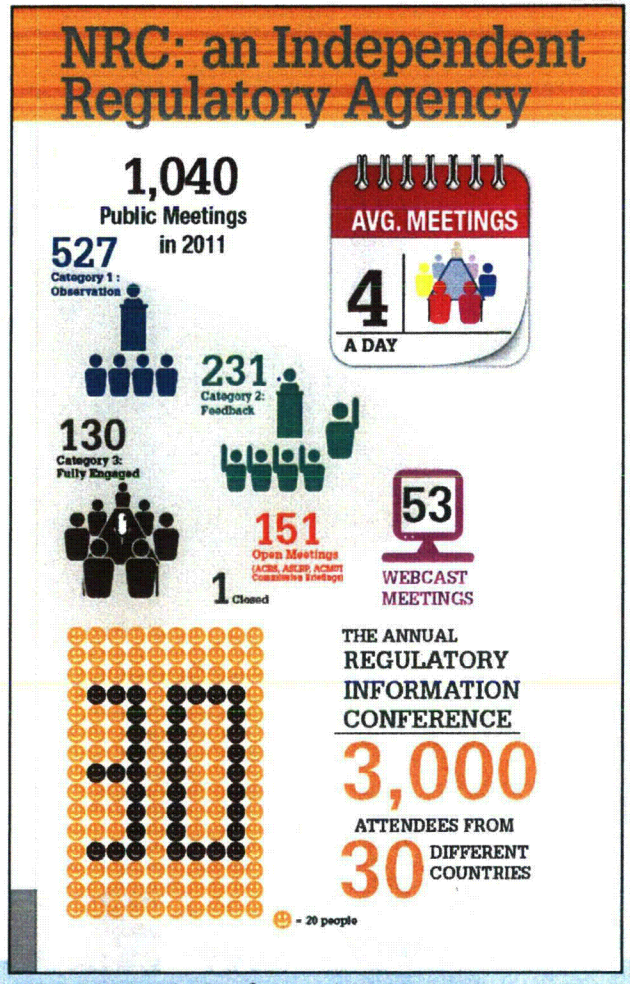
Multiple Avenues to Air Issues

- Formal
  - National Environmental Policy Act
  - 10 CFR 2.206 petitions
  - Petitions for rulemaking
  - Other agency rulemakings
  - Allegations program
- Informal
  - Communication with Commissioners and Staff
  - Conferences/Meetings/Presentations



NRC 2012-2013 Information Digest

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Data Confirms Use of 2.206 Petitions

- Since January 1975, NRC has considered 387 2.206 petitions
  - 245 denied
  - 142 granted in whole or in part or petition otherwise prompted Staff action or petition was already being addressed by the staff
- Data demonstrates grant of substantive relief for approximately 35% of all 2.206 petitions

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Rulemaking

- Rulemaking is appropriate for generic issues as it provides for extensive participation by stakeholders
- Rulemaking can be done expeditiously without sacrificing extensive stakeholder interaction
  - *E.g.*, aircraft impact assessment, FFD alternative work hours, waste confidence
- Commission direction on regulatory basis development, early guidance, etc. is a positive step forward
- Management oversight is critical

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Rulemaking/Orders

- Industry concern regarding agency's recent use of orders in place of rulemakings
  - Both orders and rulemakings are permissible under the AEA/APA
  - Rulemaking offers greater opportunity for public participation
  - NRC may offer guidance on implementation as part of the rulemaking package
  - Licensing boards are not the appropriate bodies to rule on generic policy issues

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Potential Improvements in Transparency

- Engage in more stakeholder interaction prior to initiating rulemaking
  - Adhere to Commission direction regarding regulatory basis development for rulemakings
- Develop guidance in parallel with rule
- More Commission supervision on higher priority rules
- Fuller consideration of need for and impact of "omnibus" rules

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Conclusions

- Industry fully supports meaningful and efficient stakeholder interaction
- Adjudication is not the only means of public participation
- Commission should avoid using the adjudicatory process as a substitute for issuing direction on generic policy issues
- Adjudicatory procedures reasonably balance opportunity with efficiency

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pillsbury

Public Participation in NRC Regulatory Decision Making

Jay E. Silberg

Pillsbury Winthrop Shaw Pittman LLP

January 31, 2013

Historical Perspectives

- Balancing of interests
  - Meaningful public participation vs. resolving licensing matters in a timely and efficient manner
- Issue predates TMI, and postdates TMI
- Commission has ample authority to strike the right balance

Atomic Energy Act

- "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding" sec. 189.a
- Procedures patterned after FPC, FCC, ICC
- "The words themselves do not provide a test for deciding difficult cases." (Marks & Trowbridge, 1955)

Original Concepts for Public Participation

- Notwithstanding statutory direction, early Commission process aimed more at education than adjudication
- Uncontested hearings, limited appearances, on-site hearings, real-time answers to the public's questions

Intervention Standards

- Section 189.a "was not the last word on the subject of intervention". (*Cities of Statesville v. AEC*, D.C. Cir. 1969)
- Petition "shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by Commission action, and the contentions of the petitioner." 10 CFR 2.714 (1962)

Licensing Delays Long Recognized

- "The giant delays that now plague such proceedings . . . "*Ecology Action v. AEC*, (2d Cir. 1974)(Friendly, J.)
- 1972 Rulemaking
  - "widely shared concern about the ability of the Commission's licensing process, as currently structured, to cope with the demands being placed on it"

- "there are increasing delays in completing the decisional process"
- "positive necessity for expediting the decision-making process and avoiding undue delays"
- "new responsibilities would be place on those permitted to intervene in connection with making and supporting allegations"
- "it would not be sufficient merely to make an unsupported allegation" Statement of Considerations (1972)

- Revised 2.714
  - Petition to intervene "shall be accompanied by a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene and setting forth with particularity both the facts pertaining to is interest and the basis for his contention with regard to each aspect on which he desires to intervene."

BPI v. AEC, D.C. Cir. 1974

- D.C. Circuit rejects claim that requiring intervenor to identify specific aspects and bases for contention with particularity violates sec. 189.
- Commission permitted to require "particularization for the basis for the contention"

1978 Revisions

- Contentions no longer filed with intervention petition
- Requirement removed for affidavit to accompany petition
  - "seriousness and accuracy of petitioner's contentions are adequately ensured by the requirement that all testimony at hearing must be given under oath."
  - but no requirement that intervenor present testimony at hearing.

NRC Hearings in Agency Context

- AEC/NRC hearing processes patterned after those of older agencies – FCC, ICC, CAB, etc.
- Adjudicatory with all the trappings
- Over time, those agencies have -
  - disappeared
  - switched to less adjudicatory, "legislative" style hearings
- NRC hasn't kept pace

NRC Approach to Public Participation

- Numerous opportunities available beyond hearings
  - ADAMS – documents available in real time
  - Open, noticed meetings – live, dial-in, web-cast
  - Comment opportunities
  - Accessibility of Staff
  - 2.206 petitions
  - Rulemaking petitions
  - Social media

Areas for Improvement?

- Certainly
- It's not a static world
- Self-critical assessments
  - like NRC expects of licensees
- But don't necessarily assume system is broke

- More Commission oversight of ASLB's
  - Judicious approach to interlocutory appeals.
- More timely actions
  - Third parties rulemaking petitions
  - Better and better-communicated prioritization

THE BIG MOAT

How NRC Rules Suppress Meaningful Public Participation In NRC Regulatory Decision-making

Prepared Statement of
Christopher Paine [1]
Nuclear Program Director
Natural Resources Defense Council

Before the

Nuclear Regulatory Commission
Rockville, Maryland
January 31, 2013

Chairman McFarlane, members of the Commission, thank you for this opportunity to present the views of the Natural Resources Defense Council regarding the Commission's standing and contention admissibility requirements. In doing so, I will not limit my remarks to these requirements alone, but rather comment on their role within the wider web of restrictive NRC rules that reduce meaningful public participation in the Commission's efforts to ensure nuclear safety, and thereby, I believe, hinder those efforts.

In all candor, my first instinct was to turn down your invitation to appear today, as I found it difficult to summon the conviction that anything I, or any other public interest representative says today will have a beneficial impact. But NRDC has a long history of constructive engagement, even as the Commission in recent decades has come to resemble a medieval fortress, surrounded by a wide and deep moat of rules to keep unruly citizens at bay.

Other meetings like the present one have been held over the years, accompanied by rhetoric about the importance of "public participation" to the Commission's work, but in that period the rules governing public participation have only become *more* exclusionary, the last major revision being in 2004, when the Commission curtailed the use of trial-type procedures in adjudicatory public hearings.

I think we may have divergent views about what the phrase "public participation" means. Judging by their public statements and actions over the last quarter century, the dominant view among Commissioners and Staff seems to be that "public participation" is either a legal necessity foisted on the agency by the vestiges of the original Atomic Energy Act of 1954, or a useful component of an overall public communications strategy geared to reassuring the public that nuclear power plants—even aging obsolescent ones—are safe. In this view, public participation in informational and "limited-appearance" type meetings, where NRC representatives listen and occasionally respond to citizen safety and environmental concerns, is intended to give the public

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[1] For further information, contact: cpaine@nrdc.org

a reassuring glimpse into the regulatory process ongoing in the background, in which the NRC's vigilance and expertise will continue to keep nuclear power plants safe.

Since the plant license holder or applicant usually mobilizes its own employees and boosters in the community to attend such meetings, the NRC can almost always count on a polarized audience voicing generalized and sometimes not terribly well-informed sentiments, pro and con, about nuclear energy. Little if any informed discussion of specific nuclear safety or environmental issues occurs in such meetings. Nor do I believe that NRC Staff leave such meetings with a heightened respect for the contribution of the public to the licensing process.

Unlike many other federal agencies with statutory mandates that include the public—via citizen suit provisions—as a *partner* in achieving compliance with the statute, the Commission's statutory authority does not assign a direct role to the public in enforcing its regulatory requirements, which by law must ensure adequate protection of the public health and safety against radiation hazards from the licensed civilian uses of nuclear energy. Instead, the role envisioned under the AEA is for members of the public, including representatives of state, local, and tribal governments, to bring their concerns regarding compliance with the NRC's statutory mandate and regulatory requirements *into the Commission's licensing and rulemaking processes, where these concerns can be fairly adjudicated.* Unfortunately, as demonstrated by the Staff's near perfect alignment with industry in opposing citizen petitions to intervene in licensing proceedings, the Commission today seems to have strayed quite far from the intent of this statutory framework, which was designed to allow contending views of nuclear hazards and risks to be fully explored and adjudicated in a quasi-judicial proceeding.

I. Current NRC Rules are Hostile to Public Participation in Licensing Proceedings

In setting forth the basis for our view that there is a pervasive bias in NRC rules against public intervenors, I begin with the hearing request process itself. Following the Notice of Opportunity for hearing in the *Federal Register*, a prospective petitioner who believes [s]he may have an affected interest in the proceeding has only *60 days* in which to: (1) study the voluminous license application and draft environmental report; (2) investigate any safety and/or environmental concerns they have identified in the report; (3) document his/her standing to pursue these concerns; (4) draft admissible safety and/or environmental contentions; (4) seek out technical declarations from experts to support these contentions, (5) hire expert legal counsel to frame "with specificity" the contentions and their legal bases in ways that satisfy all the "strict-by-design" pleading requirements of 2.309 (f). All this, within 60 days. It's little wonder that few prospective public intervenors are able to surmount these initial obstacles, and most don't even try.

Meanwhile, long before the hearing notice, the Staff will have been engaged with the Applicant in a multi-month to multi-year iterative coaching process with respect to the forthcoming application, including numerous exchanges of proprietary documents not available to the Petitioner. But despite its superior access to information and expertise regarding the application, the Staff is excused from taking a position on the application until it issues its final environmental report and final safety evaluation, which often occurs *a year or more after* the first notice of opportunity for hearing is filed.

So the Petitioner –the prospective party to the proceeding with the least information about the docketed application—is required to demonstrate *in advance,* with *"particularity,"* and *prior to discovery or mandatory disclosures of any kind,* that it has a case of sufficiently substantive merit that it should be allowed to proceed to a hearing. This is a high burden and one that has been contentiously wrangled over in numerous ASLB and Commission decisions. Meanwhile the Staff, which is far better informed about the application, is allowed to withhold *significant elements of its analysis* regarding the application.

While it's true that once a contention is accepted, the Staff is under obligations to produce documents pursuant to both 10 C.F.R. § 2.336(b) and§ 2.1203, such a situation emerges only after Staff has joined industry in opposing admission of the contention in the first instance. And while some of what transpires between applicant and staff prior to the admission of a contention is potentially available, albeit through unreliable searches on ADAMS, the significant burdens of tracking items of interest in a sea of paper rests entirely on the public (and for the long stretch of time when it's not apparent whether the application will even be filed). And reiterating the point above, the Staff generally joins the Applicant in opposing the petitioners' proposed contentions for failing to satisfy each of the requirements (i)-vi in §2.309 (f). Further, even when the Staff agrees with the Applicant's position in all significant respects, Staff is entitled to file its own briefs and motions aimed at excluding the petitioner, to which the petitioner must respond, so it is two-against-one from the very outset.

With the Staff and applicant both working to demonstrate the petitioners' inability to satisfy the "strict-by-design" contention admissibility requirements of 10 C.F.R. § 2.309(f), the rules of the game as described above place heavy burdens and expense on any citizen petitioner, but especially on those without financial resources and specialized legal representation. Other inequities exist as well. On the one hand, the content of a petitioner's initial pleading is essentially frozen based on the limited information available to it within the 60-day window (following a hearing opportunity notice), a window that is realistically somewhat shorter given the need to "fly-speck" the petition into final form so that it is not tripped-up by technicalities. On the other hand, it is common that the docketed application continues to evolve, as the applicant responds to Requests for Additional Information (RAIs) from the Staff, and/or the Applicant amends the application to fill gaps in the version that was initially accepted for docketing.

There are no restrictions on when, or how many times, an applicant may file a license amendment, or when the Staff must complete its safety and environmental reviews, or the number of supplements it may file to its environmental analysis. But under the current rules, any admitted or prospective intervenor desiring to take issue with a late-filed license amendment, or additional information supplied by the Applicant, bears the asymmetrical burden of having to file a motion with the Board, typically within ten days of the "triggering event," justifying each such "late-filed" contention by addressing eight separate factors that the Board must "balance" in determining whether or not it should be admitted.

Assume for a moment that a petitioner surmounts all these hurdles and convinces a licensing board to grant standing and at least one admissible contention – a fairly rare event, statistically

speaking. What happens then? Under current rules, the Applicant is entitled to an immediate interlocutory appeal of the board's ruling to the Commission on the question of whether the petition should have been wholly denied (but the intervenor has no right to appeal unless the entire petition was denied, essentially leaving rejected contentions for review only after the entire hearing process has been completed), and here again the Staff is allowed to weigh-in as though it were a separate party, but invariably, aligning itself with the applicant.

This second round of double-teaming means more briefing and more legal expenses for petitioners who, should they finally prevail on these preliminary matters, still find themselves just at the starting line of a proceeding on the substantive merits of their contention(s), but having already spent many tens of thousands of dollars. All this unproductive procedural wrangling consumes many months or even years, taxing the resources of all parties involved, but especially citizen intervenors, while taxpayers (via applicants' tax-deductible litigation expenses), electricity users, including intervenors (via electricity rates) and mandatory fees from license holders finance a veritable beehive of legal talent to represent nuclear licensees and the Staff.

While it should be obvious that NRDC believes a major reform of NRC rules affecting intervenors is called for, this does not seem a likely prospect. But as a matter of elemental fairness, I commend to you this immediate and simple reform: in matters where the Staff agrees with any other party, including the Applicant, the Staff be compelled to file joint motions and briefs, thus reducing the inequitable burden on the petitioner to respond to multiple slight variations in the same basic arguments for excluding petitioners from the licensing process. This rule already applies to all intervenors, regardless of whether they are private citizens, sovereign states, local governments or Indian Tribes by requiring that they be consolidated for all purposes on any issue on which they take the same position.

II. The Commission's NEPA Regulations Deprive States, Local Jurisdictions, Indian Tribes and Ordinary Citizens of the Due Process Rights Guaranteed Them Under NEPA and the APA

Now I would like to draw your attention to a violation of due process buried within the current rules. It involves the Commission's treatment of the NEPA. In the case of almost every other agency I can think of, draft and final environmental impact statements must be produced on a timetable that allows the environmental considerations explored therein to be commented upon by the public and considered on a schedule that meaningfully informs agency decision-making with respect to the proposed action. CEQ rules prohibit the *ex post facto* use of environmental impact statements to justify decisions already taken.

As you know, this requires the agency to determine—early in the agency's decision process and with public input—the appropriate scope of its required environmental analysis, after which it prepares a draft statement for public comment outlining various reasonable alternatives for implementing its proposed action that would either prevent, reduce, or mitigate harmful environmental impacts, and identifying the agency's preferred alternative, if it has one. Then typically at least 30 days prior to any formal "Record of Decision" to move forward with implementing the proposed action, the Agency must issue a final environmental impact

statement that responds to the public comments received, and identifies any changes to the draft analysis or preferred alternative.

In contrast to this typical federal agency procedure—which guarantees, to those who can show they might be harmed by an agency action predicated on a flawed NEPA analysis, the right to challenge it in federal district court—the Commission's rules *routinely deny this right* to any state or local jurisdiction, membership organization, or private citizen who has not *previously gained party status at the outset of the licensing proceeding* with at least one admissible contention based on a "genuine dispute" with the *applicant's environmental report* on a "material issue of law or fact." The obvious logical and legal difficulty here is that the applicant is not bound by NEPA, and thus all arguments regarding the admissibility of the contention must be framed *as though* the Licensee's environmental report were *the future draft* of an EIS prepared by NRC Staff.

Aside from broadcasting the rather unflattering impression that *licensees* rather than NRC staff are actually the ones preparing the regulator's own "hard look" at the environmental consequences of its licensing actions, this onerous requirement compels already overcommitted and underfinanced state and local officials, and others who are primarily concerned about local and regional environmental impacts, to commit significant legal resources to gain entry into the licensing process at the outset—in some case years earlier than necessary—if they want to protect their future appeal rights under NEPA. Comments on the EIS from non-parties to the proceeding, who are boxed out of pursuing their environmental concerns in the Court of Appeals, are particularly susceptible to being ignored by the Commission

While State and local officials and tribes, within whose jurisdictions the license applicant's facility is located, are granted standing by rule, this does not help them that much, as they and all other persons with environmental concerns must still surmount all the previously enumerated procedural hurdles to achieving an admissible contention, even if they have less interest or expertise or resources to expend in the nuclear safety aspects of the proceeding. But once again, this is only the beginning of their burden.

When an actual draft or final EIS is eventually produced by NRC Staff, parties to the proceeding may file new or amended contentions regarding this new document only to the extent that there are "data and conclusions in the NRC draft or final [EIS], environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." This requirement would appear to put a potentially *error-inducing* premium on the Staff's EIS to demonstrate *consistency* with an Applicant's flawed environmental report, thereby insulating the EIS from further challenges. In other words, flaws not previously identified by intervenors in the ER *may actually be preserved and replicated* in the EIS, with the official endorsement of the NRC's own rules.

If they fail to satisfy this (dysfunctional) criterion, public intervenors may file new or amended contentions "only with leave of the presiding officer," upon a showing that the contention is based on information that was not "previously available," is "materially different than information previously available," and has been submitted "in a timely fashion based on the

availability of the subsequent information."[2] We fail to see the beneficial purpose to be served by such nit-picking exclusionary rules. Why does the Commission require exclusionary rules that sweep issues off the table before your ASLB panels can adjudicate them? Indeed, such rules artificially constrain adjudication of the merits of environmental issues surrounding the start-up or extended operation of nuclear power plants and other production and utilization facilities. A proliferation of procedural rules designed to bat away issues before they can be considered on their merits lends credence to the supposition that the Commission is afraid to let ASLB judges do the work that Congress envisioned for them.

III. Current NRC Rules Infringe Upon the Letter and Clear Legislative Intent of the Atomic Energy Act (AEA)

Twenty-four years have passed since the Commission adopted rules curtailing the public's access to the reactor licensing process. A number of public interest organizations objected to these rule changes and challenged them at the time, leading to a unanimous Court of Appeals ruling in 1989 that the Part 52 rules contravened the plain language of Sections 185 and 189 of the Atomic Energy Act (AEA), by illegally depriving the affected public of the right to be heard on significant new safety issues before newly-constructed power plants are permitted to operate.

This unanimous panel decision was later reversed by a split 6 – 4 vote of the full Court of Appeals in 1991, with five of the six majority votes coming from Reagan-Bush appointees to the Court. The majority found that because the AEA "provides no unambiguous instruction as to how the 'hearing' is to be held," the Commission therefore has broad discretion to determine what issues should be heard at each stage of the licensing process, and can rely on prior administrative determinations that a plant is safe as the basis for eliminating public hearing rights. In the majority's view, this discretion to deny a public hearing extends even to consideration of significant new safety issues that the Commission itself determines could not have been raised in prior proceedings. Such consideration can be ensured, the majority reasoned, because "Part 52 employs § 2.206 not as a means for requesting enforcement," [where the court agreed petitions "do fall within the unreviewability presumption of *Heckler v. Chaney*"] "but as an integral part of the licensing process itself." Thus, "we think that Commission action on § 2.206 petitions authorized by Part 52 is judicially reviewable." [3] Because we have not yet reached the post-construction phase for a reactor with a COL license, this unusual feature of the court's ruling has yet to be tested.

Fortunately for the public, the *en banc* majority did not rule on the validity of a Staff-proposed interpretation of Sec. 189—that the affected public receives a "hearing" within the meaning of Sec. 189 whenever a 2.206 petitioner sends a letter to the Commission and receives a response back!

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[2] 10 C.F.R. § 2.309 (f) (2), (i) – (iii).

[3] *Nuclear Information and Resource Service v. NRC*, 969 F.2d 1178-80 (D.C. Cir. 1992) (en banc), cited in E. R. Glitzenstein, "The Role of the Public in the Licensing of Nuclear Power Plants," in *Controlling the Atom in the 21st Century*, D.P. O'Very, C. E. Paine, and D.W. Reicher, eds. Westview Press, 1994, at 173-174.

NRDC's view is that both the letter and legislative history of the AEA of 1954 establish that, in partial compensation for the exclusive authority granted the federal government to regulate the radiation hazards from licensed civilian nuclear power generation, Congress intended Sec. 189 (a) (1) (a) to confer upon states, municipalities, and indeed "any person whose interest may be affected by" the Commission's licensing and rulemaking proceedings, an opportunity upon request to be admitted as parties to those proceedings in order to adjudicate their concerns.

> "In *any* proceeding under this chapter, for the granting, suspending, revoking or amending of any license or construction permit, or application to transfer control, and in *any* proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees...the Commission *shall* grant a hearing upon the request of any person whose interest may be affected by the proceeding, and *shall* admit any such person as a party to such proceeding." [4]

The italicized portions of the excerpt clearly indicate that Congress intended this public hearing opportunity to be a *non-discretionary duty* of the Commission. The provision does not say the Commission "may" grant hearing requests from persons whose interests may be affected by its licensing and rulemaking proceedings. And it does not say the Commission "may" admit them as parties to licensing proceedings. In both instances it says the Commission "shall" do so.

Moreover, if Congress had intended to give the Commission unlimited discretion to pile up exclusionary rules transforming the plain language meaning of the word "request" into "a request meeting any and all tests that the Commission chooses to apply," *thereby effectively denying persons with affected interests access to licensing proceedings*, why would Congress have specifically authorized [Sec. 192] the creation of "one or more atomic safety and licensing boards" to assist the Commission in conducting these very proceedings?

Can any Commissioner today honestly opine that in authorizing creation of the ASLB structure, the intent of Congress was to have the boards spend a large part of their time adjudicating, not the merits of substantive nuclear safety issues, but rather the public's inability to surmount an ever expanding series of procedural obstacles to gaining a hearing? Such an interpretation of the Commission's statutory mandate makes no historical or political sense, and is contrary to the plain language of the statute.

Congress further directed that on each panel, one member "shall be qualified in the conduct of administrative proceedings," and the other two "shall have technical or other qualifications as the Commission deems appropriate to the issues to be decided." Clearly, Congress intended these boards to be conducting the important work of adjudicating substantive contested safety issues brought to the Commission's attention via the public hearing process created under Sec. 189. Instead, boards today are compelled to spend much of their time determining what part, if any, of a prospective party's petition will fit through the eyes of multiple procedural needles.

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[4] 42 U.S.C. 2239

IV. The Myth of the Vampire Intervenor

The arguments above notwithstanding, we are obviously cognizant of the fact that, responding to the economic, managerial and regulatory failures of the first nuclear build-out in the 1980's, Congressional nuclear power proponents in the early 1990's adopted the mistaken view that the root cause of these failures was protracted delay in plant licensing caused by public intervention in the hearing process. As documented in your own General Counsel's background memo prepared for this meeting, members and staff of the Commission at the time did much to promote this fashionable, but factually and historically incorrect view.

Specifically, the memo fails to cite a single documented historical instance in which the number of public hearing days occasioned by public intervention in a license proceeding significantly delayed the granting of a license. Instead, tagging public intervenors as the root cause of delay is stipulated as an onerous reality to which the Commission was forced to respond, as though it were irrefutable truth. We suggest today that it's high time to dispense with the myth of the vampire intervenor.

While I am certain an examination of the historical record can turn up examples of frivolous or ill-informed contentions, I think everyone in this room is aware that the vast preponderance of delays encountered in the last nuclear build-out were the result of: (1) real and significant problems with the design and construction of the units; (2) the filing of incomplete applications, thereby triggering numerous revisions, amended contentions, and long delays while the applicants supplied information responsive to the Staff's queries and filled intervenor-identified gaps in the license applications; (3) chaotic record-keeping of inspection and test results essential to a determination that the plant would be safe to operate; (4) the need to incorporate post-TMI safety upgrades; (5) the Commission's insistence on postponing resolution of emergency planning issues to the operating license phase (6) managerial incompetence on a grand scale by TVA and other utility organizations with no prior experience with nuclear power. One could go on and list even more reasons, *none of which have to do with the basic mechanics and scheduling of public participation in the licensing process.*

Far from obstructing Commission efforts to ensure nuclear safety, public intervenors have made, and—if allowed renewed meaningful opportunities to participate—would continue to make significant contributions to nuclear safety. A number of ASLB judges have gone on record over the years in support of this exact point.[5]

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[5] A former chief of the Atomic Safety and Licensing Board, B. Paul Cotter, Jr., outlined the value of public participation in 1981: "(1) Staff and applicant reports subject to public examination are performed with greater care; (2) preparation for public examination of issues frequently creates a new perspective and causes the parties to reexamine or rethink some or all of the questions presented; (3) the quality of staff judgments is improved by a hearing process which requires experts to state their views in writing and then permits oral examination in detail...and (4) Staff work benefits from [prior] hearings and Board decisions on the almost limitless number of technical judgments that must be made in any given licensing application." "Memorandum to Commissioner Ahearne on the NRC Hearing Process," May 1, 1981, at 8. as quoted in E. R. Glitzenstein, "The Role of the Public in the Licensing of Nuclear Power Plants," in

V. Legislating the Part 52 Rules – A Self-Inflicted Wound for Nuclear Safety

While the vampire intervenor is a myth, proponents in the Senate in the early 1990's correctly perceived that absent new statutory authority, a future Court of Appeals might find the *combined effect* of then recent Commission rule changes – the tightened Part 2 rules on contention admissibility (August 1989) and Part 52 rules limiting public opportunities to contest construction and operation of new power plants (April 1989) – to be in violation of Sec. 189 (a). So they used the Energy Policy Act of 1992 to amend Sec. 189 to conform it to Part 52's curtailment of the public's right to a post-construction hearing, with respect to "all proceedings involving a combined license for which an application was filed after May 8, 1991." [6]

There is no doubt that the 1992 *Energy Policy Act* modifications to the AEA altered the public's ability to get an adjudicatory hearing on contested issues when the matter involves the suitability for operation of new reactors constructed pursuant to a COL license.[7] The bar to adjudication of *nuclear safety issues* in this context is now so high that the rules actually jeopardize adequate protection of the public health and safety.

Once again, *within only 60 days* from the publication of a notice of intended operation in the Federal Register, a person seeking a hearing must not only meet all the Commission's usual "strict by design" contention admissibility requirements, but must also, *before discovery of any kind*, "show, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety."

Even if the unlikely event a petitioner is able to surmount these demanding hurdles, the amended statute says the Commission is free nonetheless to "either deny or grant the request" for a hearing—a decisive departure from the original hearing mandate under Section 189 (a)—and the statute itself contains no additional criteria on which to base a claim that the Commission has abused its discretion in rejecting such a request.

Controlling the Atom in the 21st Century, D.P. O'Very, C. E. Paine, and D.W. Reicher, eds. Westview Press, 1994, at 161. In 2008, Judge Michael Farrar, an NRC Judge for over thirty years, reaffirmed the valuable contribution public participation can make to the licensing process: "The Petitioners were instrumental in focusing the Board's attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages." In the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility), LB-08-11, Docket No. 70-3098-MLA, at 49 (June 27, 2008) (Farrar, J., concurring).

[6] 42 U.S.C. 2235.

[7] Public hearing opportunities for all other licensing proceedings remain governed by the provisions of Section 189 (a) (1) A, which opportunities the Commission seems determined to erode by prejudicial employment of its rulemaking powers.

The Part 2 contention admissibility rules continue where the statute leaves off, further specifying that any request for a post-construction COL hearing "must include the specific portion of the report [from the licensee to the Commission] required by 10 CFR§ 52.99 (c) which the requestor believes is inaccurate, incorrect, and/or incomplete. If the requestor identifies a specific portion of the § 52.99 (c) report as incomplete, and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing." [8]

There are a number of obvious Catch 22's with this particular requirement. The content of the §52.99c report is not specified by statute, and is only vaguely described in the rule, so it is difficult to imagine how a requestor could objectively demonstrate that any "specific portion" of the report is "incomplete," other than to claim that certain ITAAC results are entirely missing from the "report." In fact, § 52.99 (c) actually refers to this "report" merely as a "notification" that "must contain sufficient information to demonstrate that the prescribed inspections, tests, and analyses have been performed and the prescribed acceptance criteria have been met."

While this "notification" is supposed to be provided no later than 225 days before the scheduled date for initial fuel loading, it might easily be comprised of just a table or checklist showing when the required "inspections, test, and analyses" were conducted, and a brief comparison of the quantitative or qualitative results obtained with the agreed acceptance criteria. In other words, it may convey very little substantive information about *how* the ITAAC were satisfied, the specific inspection, test, and analytical methods used, or the sensitivity of these allegedly "passing" results to plausible variations in input parameters that could be experienced in real world reactor operation – for example, the specific gas pressures and mixtures of nitrogen-to-hydrogen used to leak-test piping or penetration seals in the primary containment may not match the gas/pressure conditions that would be experienced in an accident.

Moreover, under § 52.99 (c) (2), the required "notification" need only describe the "specific procedures and analytical methods" *to be used* in completing all necessary "inspections, test, and analyses" by any date "*prior to operation*" [emphasis added]. However, any petitioner, meanwhile, must file a hearing request within 60 days of a notice of intended operation, which in turn by statute must be filed "not less than 180 days before the date scheduled for initial loading of fuel into the plant."

So in the best case, a petitioner for a hearing will have an additional 225 -180 = *45 days* to make sense out of the ITAAC "notification" report, on top of the usual 60 days to surmount all the other various hurdles to presenting an admissible contention by the hearing request deadline at 120 days prior to scheduled initial loading of the fuel. However, some or possibly even a large number of ITAAC results (that by rule must be specifically contested to gain a hearing) need only be completed "prior to operation," and thus *may not even be available to the petitioner within the 60-day window for preparing a request.*

[8] 10 C.F.R. §2.309 (f) (1) (vii)

Moreover, by rule a post-construction hearing request *may not be granted* if it is predicated on demonstrating nonconformance with an ITAAC that the Commission previously found, when it issued a COL license, to have been met earlier in a "referenced early site permit or standard design certification," which itself may have been granted 15 years before the COL license.[9]

Under these rigidly constrained terms, the Commission is free *to bypass any post-construction hearing request raising a safety issue that is either outside the scope of acceptance criteria specified in the COL, or invokes criteria that the Commission has previously deemed to have been satisfied in a standardized design or early site permit proceeding.* This blinkered approach ignores an obvious and crucial variable – the passage of time can decisively alter both site environmental and emergency planning zone conditions, as well as our technical understanding of nuclear safety and security vulnerabilities.

For example, under current rules, *years-to-decades may elapse between the original design certification or grant of an Early Site Permit, and any notice of intended operation.* In the intervening years, significant new information might well have emerged showing that some modification to the site or the design is needed to ensure adequate protection of public health and safety or (in the face of terrorist threats) the common defense and security.

But in such a case, members of the public seeking to adjudicate their safety concern before a licensing board are invited to submit a 2.206 petition for enforcement action to the Staff, in response to which the Staff is obliged, "before the licensed activity allegedly affected by the petition commences," to "determine whether any immediate action is required." Even if the requestor's petition is *granted*, the rule provides that "fuel loading and operation under the combined license will not be affected...unless the order is made immediately effective." [10]

In sum, the Commission's legal framework for contested post-construction hearings for COL-licensed facilities is designed to *discourage* and *prevent* "public involvement" in the licensing proceeding, even in the face of serious safety concerns.

VI. Boxing Out the States

The "strict-by-design" contention admissibility requirements, combined with the Commission's significant curtailment in 2004 of the right to employ trial-type procedures in adjudicatory hearings, raise an interesting question regarding the Commission's hearing obligations to the States.

Under Sec. 274 (l) of the AEA, the Commission is directed to "afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise

[9] 10 C.F.R. 52.103, referencing 52.97 (a) (2)
[10] 10 C.F.R. 52.103 (f)].

the Commission as to the [pending license] application without requiring such representatives to take a position for or against the granting of the application." Of course, state officials can only engage in such activities if *there is* an adjudicatory hearing process in which to exercise their "reasonable opportunity," the hearing opportunity includes "witnesses," and State representatives are allowed to "interrogate" them.

It would be interesting to know how many state officials today would agree that the contention admissibility requirements in § 2.309 (f) afford them a "reasonable opportunity" to participate in the type of adjudicatory hearing that Congress under this paragraph *was clearly assuming would be available to State representatives pursuant to Sec. 189 (a).* Indeed, the current requirement under § 2.309 (d) (2) that a State desiring to participate as a party in a licensing proceeding must "show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact" *contradicts the right of States under Sec. 274 (l)* of the AEA to participate "without requiring such representatives to take a position for or against the granting of an application."

Moreover, should the State representatives become admitted parties to an NRC proceeding, under the Administrative Procedures Act (APA), "a party is entitled to present his case or defense *by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts*" (emphasis added). [11]

The complicated NRC rules adopted in 2004, endowing the presiding officer with increased discretion to determine when and which trial type procedures may be used in a contested proceeding, could well conflict in their concrete application with this simple guarantee of a party's rights under the APA.

VII. Conclusion

The compartmentalized, tightly-choreographed, and exclusionary character of the current licensing process—in which critical safety determinations are made in disparate, narrowly-focused proceedings with multiple trails of cross-referenced documentation, separated in time, space, and never holistically revisited—increases the risk that serious issues will be overlooked, forgotten, or indeed never identified. But unlike the last big nuclear build out, today's accretion of exclusionary rules ensures that few if any public interveners will be positioned within the process to force consideration of important safety issues that, for whatever reason, have slipped through the cracks in the Commission's regulatory scheme.

Madam Chairman, members of the Commission, your licensing Boards are there for a reason. Let them do their work, probing the work of the Applicant and the Staff with the aid of informed and conscientious public intervenors. This was the AEA's original design, and it is still the right one.

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[11] APA 5 USC 556.

Acknowledgements

The author is indebted to the writings and fellowship of intervenor attorneys Anthony Roisman, Eric Glitzenstein, Geoff Fettus, and Diane Curran, and to former NRC Commissioner Peter Bradford, for explicating the most objectionable features of the NRC's current rules governing public participation in its licensing proceedings. Any errors of fact or interpretation, are of, course, my own.

Appendix

The Big Lockout

Disempowering Citizens from Acting on Their Own Behalf through the Licensing Process Reduces Society's Capacity to:

- **Uncover and Eliminate Potential Precursors to a Nuclear Accident;**
- **Identify and Adopt New Measures to Limit an Accident's Severity and Mitigate Its Consequences; and**
- **Avoid, Contain, or Mitigate Harmful Environmental Impacts from Routine Operations.**

One way to grasp the potential cumulative impact of the NRC's rules restricting public participation is to consider a hypothetical licensing situation at a particular site as it plays out over an extended period of time. The point of this thought experiment is not to assert that the hypothesized sequence of events *will* happen or is even *likely* to happen. The NRC has monitoring and enforcement mechanisms outside the licensing process that are designed to avert such worst-case outcomes.

Rather the point is to demonstrate how the NRC's demanding contention admissibility and other requirements for participation in the licensing process, in concert with the segmented Part 52 licensing process itself, undermine the public's right to meaningfully participate in NRC licensing proceedings, up to and including judicial review of the agency's decisions, and that abetting this participation would make the scenario *less likely* to happen. In other words, the current suite of NRC rules *disempowers citizens* who are concerned enough about protecting their communities and natural resources that they seek to have their concerns adjudicated within the NRC's licensing process.

Let us stipulate that in the year 2013, "ABC Nuclear Engineering, Inc." receives a "standard design certification" in a generic rulemaking for a new modular multi-unit nuclear plant design that has never been constructed before. It is strictly a conceptual design, defined by computer simulations of core behavior and CAD modeling of its major design elements. No utility or merchant generator has either ordered or expressed any intention to build this design. The design certification expires in 2028, but can be "renewed" for another 15 year period, and stays in effect while a renewal is under review. But natural gas prices plummet and ABC puts its certified design on the shelf and waits for a more favorable price environment for nuclear.

Let us further stipulate that five years earlier, in 2008, merchant generator "DEF Nuclear, LLC" sought and received an Early Site Permit to locate a new unit at its existing site on Lake Arabella, an artificial cooling lake somewhere in the mid-South that already has two older nuclear units coming up for license extension within the next 15 years. DEF Nuclear negotiated with several vendors at the time who were seeking standard design certification, but could not come to terms on price, and some of the vendors looked incapable of delivering a producible certified design in any case. Natural gas prices plummeted and looked to stay low for a long time, so DEF Nuclear filed away its ESP, which is good until 2028. It can be renewed for another 20 year term, and the existing permit stays in effect while the renewal request is under NRC review.

Skip ahead 15 years. Natural gas prices are on the rise again, and DEF Nuclear dusts off its ESP at Lake Arabella and shops around for a unit that fits within the "environmental envelope" approved for the site 15 years earlier. Lake residents are already on edge and reeling from a peculiar experience. The two nearly 40 year old reactors have recently experienced tritium leaks, breaks in steam generator tubing, and numerous unplanned shutdowns due to faulty electrical systems that triggered the startup of backup power systems that failed to operate properly. To their surprise, when they sought a public hearing on the problems at the plant in connection with license renewal, they were told that that *their safety concerns had nothing to do with the license renewal proceeding and would not get a hearing*, but they were encouraged to write letters drawing the NRC's attention to their concerns. The letters were duly written, but nothing in particular happened in response, and the operating licenses for the two older units were duly extended for 20 years, *without any requirement or commitment to install new safety equipment.* Instead, the company pledged to vigorously pursue multiple programs for "aging management" of its safety-related systems and components. DEF Nuclear was pleased with the outcome, as it freed up corporate funds that could be directed toward building a new unit at the site.

It's now 2023. ABC Nuclear Engineering, Inc. has gone out of business, but a small group of its former employees retain the rights to its "certified design," which DEF Nuclear LLC manages to license for a song. DEF Nuclear then submits a COL application to the NRC *referencing this 10 year old design*, which it plans to build at its Lake Arabella site, *referencing its 15 year old ESP.*

Lake residents who are concerned about the construction of a third nuclear plant in their community, right next door to the old nuclear units, seek to intervene in the COL proceeding. They are relying on the concerns expressed by a retired nuclear engineer who lives at the lake, who has done some back-of-the-envelope calculations regarding the safety of this little known and never-built design. But when they seek a hearing, they are told the NRC made a final design decision certifying the safety of this design a decade ago, and *the matter of its safety cannot be reopened in a COL proceeding.*

When other experts, from the State DEQ, advise Lake residents that an additional nuclear unit drawing water from the lake for cooling will overtax its heat dissipation capacity—leading to unhealthful elevated lake temperatures during the summer months when their children are most likely to be in the water, as well as low lake levels during drought conditions that could jeopardize competing downstream uses—*they are told that this issue was resolved 15 years and is no longer a suitable subject for a contested hearing.*

When the local county board points to a significant increase in year-round population around the lake, and a major influx of summer residents, and suggests the existing county road network may not be able to handle the sudden traffic flow required for timely evacuation in a severe accident, *they are told this issue too was "resolved" many years ago in the ESP proceeding,* and cannot be reopened now.

In 2025, the NRC issues DEF Nuclear, LLC a combined license to construct and operate a new plant at the Lake Arabella site, which license "references" the design certified 12 years before and the ESP approved 17 years earlier. All the members of the NRC team that worked on the safety certification of this particular design have since retired or left the agency. Ditto for the ESP, which had progressed through so many post-docketing iterations en route to approval that public intervenors had given-up trying to keep-up with the changes. But the new design fits within the "environmental envelope" approved by the ESP, so there is no fresh consideration of the suitability of this site to accommodate *the particular characteristics* of the certified design. Construction of the new units goes ahead, but deployment is in individual silos without the massive reinforced concrete "base mat" that the 17-year old ESP assumed would mitigate the seismic hazards of this particular site.

In 2030, five years into construction, the aforementioned retired nuclear engineer hears from a Chinese colleague regarding a similar prototype design that has just started-up in China. The colleague's information raises concerns regarding the safety characteristics of the Lake Arabella units in certain off-normal operating conditions. But when Lake residents request a hearing on these safety concerns, prior to operation of the plant, they are told that they have no right to a hearing on these issues because *they have not demonstrated that the completed plant fails to meet any of the "acceptance criteria" specified in its combined license.*

The first-of-a-kind commercial plant goes into operation, but the Chinese operational test data suggests that the neutronic behavior of modular cores subjected to sudden changes in coolant flow may have been incorrectly modeled in the original design certification. Soon after connection to the grid, this lack of understanding fatefully intersects with the failure to review the plant's specific geotechnical compatibility with the ESP-approved site without the previously assumed thick concrete base mat. During a local strong local seismic event, this regulatory gap leads to local ground liquefaction, followed by immersion and shorting of buried safety-related electrical cables. This in turns triggers a loss of power to key safety systems, inability to control coolant flow, and a power surge in the reactor, followed by overheating of the core, runaway fuel-cladding oxidation, and a hydrogen explosion.

The final blow is a break in the 50 year-old dam that forms the cooling lake, the seismic resistance of which *was never reevaluated in connection with either the granting of the ESP, the license extensions for the existing units, or the combined license for the new modular plant.* A potential dam break was considered a "beyond design basis" event and outside the scope of any of *these multiple segmented license approvals extending over decades.* The dam break swiftly drains the cooling lake, triggering a loss of ultimate heat sink, and the severe nuclear accident spreads to all units at the site.

An evacuation is ordered, but the Lake area is packed with summer visitors, and evacuation routes below the dam are washed out. Boat trailers and RV's clog the remaining narrow roadways leading away from the Lake, the capacity of which was never reevaluated in light of the ESP's early "resolution" of emergency planning issues. Thousands are caught in the plume exposure pathway of the accident, and receive harmful radiation doses. The plant is destroyed, and the lake area, state park, and surrounding farmlands severely contaminated. Compensation costs to individuals and economic damage to the site and region exceed $100 billion.

January 30, 2013

For: The Commissioners

Subject: Mark Leyse's Comments for the January 31, 2013 Meeting on Public Participation in NRC Regulatory Decision-Making

THE FISCAL BENEFITS OF PUBLIC PARTICIPATION

I would like to thank the Nuclear Regulatory Commission for inviting me to participate in its January 31, 2013 meeting on public participation in NRC regulatory decision-making. I want to clarify that I am not representing the New England Coalition.

My comments on public participation will be integrated into my comments on enforcement action and rulemaking petitions. Yet I appreciate that the NRC provides teleconferencing. I think it is a great feature.

First, I will discuss enforcement action petitions. Richard Webster of Public Justice P.C. has submitted comments on such petitions and I agree with his points. I think it is constructive that petitioners are allowed to have meetings with Petition Review Boards ("PRB"); however, I think petitioners should be allowed to ask PRBs questions. Having more of a dialogue could help facilitate the resolution of potential safely issues. And I believe in cases in which PRBs claim that given safety issues have been resolved, PRBs should be required to provide documentation demonstrating that the given issues have indeed been resolved.

PRB meetings allow petitioners to clarify the safety issues they are concerned about. Having meetings with petitioners saves time—a PRB can ask questions and learn about issues which were perhaps not clearly stated; or were perhaps confusing. The process is expedited. This is one example of the fiscal benefits of public participation.

To provide an example: last year, Natural Resources Defense Council submitted an enforcement action petition on a safety issue regarding passive autocatalytic recombiners—which are intended to eliminate hydrogen in accidents. This type of recombiner can malfunction and have ignitions when exposed to elevated hydrogen concentrations—such as would occur in a severe accident. An ignition could cause a hydrogen detonation. The PRB's initial decision was to not consider the petition. Yet after a second meeting, in which the petitioner was given the opportunity to answer questions and contend that the safety issue had not been resolved, the PRB reversed its initial decision. Hence, I think meetings between petitioners and PRBs are valuable.

Next, I will discuss petitions for rulemaking ("PRM"). I have reviewed the proposed rule for expanding the authority of the Executive Director for Operations to deny PRMs. I understand that the NRC has limited resources available for processing PRMs and that the NRC is concerned that there have been a number of petitions submitted in recent years.

Among other things, it is proposed that the EDO be allowed to deny a PRM if it raises issues already raised in an enforcement action petition. I do not think that is a good idea. I realize that 23 PRMs were submitted in 2007; as it turns out, that was the same year I submitted PRM-50-84 on how crud deposits on fuel cladding would increase the maximum cladding temperature in a loss-of-coolant accident. That petition was accepted and became part of the staff's revision of Section 50.46(b)—which is now Section 50.46(c).

I would suggest that the staff review how much it cost to revise Section 50.46(c). I would wager that the cost of the revisions would have been higher (if the same end result were achieved) if I had not submitted a PRM on crud deposits. To clarify: I spent hundreds of hours researching my PRM; that is research the NRC did not have to pay for. (I am not complaining—just making a point.) Before expanding the authority to deny PRMs, I would suggest investigating the fiscal benefits of PRMs. PRMs also play a role in improving nuclear safety.

There should be more public participation in the rulemaking petition process. I think that there should be meetings between petitioners and the technical staff who review PRMs—just like there are meetings between petitioners and PRBs for enforcement action petitions. (Diane Curran of Harmon, Curran, Spielberg, and Eisenberg, LLP suggested this idea to me.) There should be publically available transcripts of such meetings; and petitioners should be allowed to ask questions. I think that such meetings would help cut the expenses of the PRM review process. Issues which were perhaps not clearly stated or were perhaps confusing could be clarified.

To provide an example: currently, technical staff are reviewing PRM-50-93, a petition I submitted in 2009, and the staff have overlooked a number of important points. They have released three interim reviews. In one review, they concluded that runaway oxidation (or thermal runaway of fuel cladding temperatures) has not commenced below 2200°F; however, in a different review, they reported data from the LOFT LP-FP-2 experiment demonstrating that thermal runaway had commenced below 2200°F. Incidentally, there is a document for an NRC safety course which states that in a postulated station blackout scenario at Grand Gulf, runaway zirconium oxidation would commence at 1832°F.

In comments on PRM-50-93, I submitted information from an OECD Nuclear Energy Agency report, explicitly stating that hydrogen generation rates recorded in LOFT LP-FP-2 and other experiments were under-predicted by computer safety models using existing zirconium-steam correlations—the correlations are inadequate. This information has been overlooked by the staff. When the staff do MELCOR calculations for Fukushima, they should keep in mind that hydrogen generation rates will be under-predicted. This is problematic for designing hydrogen mitigation systems.

Finally, the staff has done TRACE code simulations of a design basis accident experiment Westinghouse conducted—FLECHT run 9573—and the section of the test bundle that incurred runaway oxidation was not simulated. Westinghouse reported that

the section of the test bundle that incurred runaway oxidation, reached temperatures exceeding 2500°F, which is more than 80°F higher than the highest temperature predicted by NRC's TRACE simulation using the Baker-Just correlation. The Baker-Just correlation is supposed to be conservative.

One cannot do legitimate computer simulations of an experiment that incurred runaway oxidation by not modeling the section of the test bundle that incurred runaway oxidation. Hence, the staff's TRACE code simulations were a waste of money; and I understand that the NRC has limited resources available for processing PRMs. I think it would be constructive if, as a petitioner, I could meet with the staff who are reviewing PRM-50-93. Having such meetings would save time and reduce the cost of reviewing PRMs.

Respectfully submitted,

/s/

Mark Edward Leyse
P.O. Box 1314
New York, NY 10025
markleyse@gmail.com

Enclosure:
Appendix 1 A Few Issues Raised in PRM-50-93 the Technical Staff Has Overlooked, Covered Briefly

Appendix 1. A Few Issues Raised in PRM-50-93 the Technical Staff Has Overlooked, Covered Briefly

I. Runaway Oxidation (Thermal Runaway of Fuel Cladding Temperatures) Has Commenced below 2200°F

Regarding the 2200°F 10 C.F.R. § 50.46(b)(1) fuel peak cladding temperature ("PCT") limit, in NRC's October 2012 Draft Interim Review of PRM-50-93/95, NRC concludes:

> [A]utocatalytic reactions have not occurred at temperatures less than 2200 degrees F. Accordingly, the 2200 degree F regulatory limit is sufficient provided the correlations used to determine the metal-water reaction rate below 2200 degrees F are suitably conservative such that excessive reaction rates do not occur below that value.[1]

In PRM-50-93/95 and in comments on PRM-50-93/95, Petitioner submitted information stating that runaway (autocatalytic) zirconium-steam reactions ("runaway oxidation") *have* commenced when fuel-cladding temperatures were lower than the 2200°F PCT limit. For example, PRM-50-93 (pages 46-47) quotes an OECD Nuclear Energy Agency report, which states that runaway oxidation occurs at temperatures of 1050-1100°C (1922-2012°F) or greater.[2] In NRC's October 2012 Draft Interim Review of PRM-50-93/95, NRC neither discusses nor mentions such information.

Interestingly, an NRC document, "Perspectives on Reactor Safety," states that in a postulated station blackout scenario at Grand Gulf, runaway zirconium oxidation would

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[1] NRC, "Draft Interim Review of PRM-50-93/95 Issues Related to Conservatism of 2200 degrees F, Metal-Water Reaction Rate Correlations, and 'The Impression Left from [FLECHT] Run 9573' ," October 16, 2012, available at: NRC's ADAMS Documents, Accession Number: ML12265A277, p. 2.

[2] T. J. Haste, K. Trambauer, OECD Nuclear Energy Agency, Committee on the Safety of Nuclear Installations, "Degraded Core Quench: Summary of Progress 1996-1999," Executive Summary, February 2000, p. 9. (Regarding the statement that runaway (autocatalytic) oxidation occurs at temperatures of 1050-1100°C (1922-2012°F) or greater, "Degraded Core Quench: Summary of Progress 1996-1999" explicitly states that "[a] notable feature of the [QUENCH] experiments was the occurrence of temperature excursions starting in the unheated region at the top of the shroud, from temperatures of 750-800°C, which is more than 300 K lower than excursion temperatures associated with runaway oxidation by steam.")

commence at 1832°F.[3] (This information was neither provided in PRM-50-93/95 nor in comments on PRM-50-93/95.)

Furthermore, in NRC's own September 2011 Draft Interim Review of PRM-50-93/95, NRC presented data demonstrating that runaway oxidation commenced in the LOFT LP-FP-2 experiment when fuel-cladding temperatures were lower than 2200°F. (In PRM-50-93 (pages 27, 33, 41, 42), Petitioner quoted a Pacific Northwest Laboratory paper, which states that "a rapid [cladding] temperature escalation, [greater than] 10 K/sec [18°F/sec], signal[s] the onset of an autocatalytic oxidation reaction."[4] This is for cases in which there would be relatively low initial heatup rates—for example, 1.0 K/sec (1.8°F/sec)—followed by substantially higher heatup rates, caused by the contribution of heat generated by the exothermic oxidation reaction.) In NRC's September 2011 Draft Interim Review of PRM-50-93/95, NRC presented data stating that in LOFT LP-FP-2, when local temperatures reached 1477 K (2199.2°F), the heatup rates at two fuel-cladding locations (TE-5C07-042 and TE-5D13-042) were 10.3 K/sec (18.5°F/sec) and 11.9 K/sec (21.4°F/sec), respectively.[5]

Hence, NRC's October 2012 Draft Interim Review of PRM-50-93/95 overlooks data that NRC provided in September 2011 demonstrating that runaway oxidation commenced in LOFT LP-FP-2 when fuel-cladding temperatures were lower than the 2200°F PCT limit. Clearly, NRC needs to correct its erroneous conclusion that runaway oxidation has not commenced when fuel-cladding temperatures were lower than the 2200°F PCT limit.

It is noteworthy that a report regarding best-estimate predictions for LOFT LP-FP-2 states that runaway oxidation would commence if fuel-cladding

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[3] NRC, "Perspectives on Reactor Safety," NUREG/CR-6042, Rev. 2, March 2002, available at: NRC's ADAMS Documents, Accession Number: ML021080117, pp. 3.7-4, 3.7-5, 3.7-29.

[4] F. E. Panisko, N. J. Lombardo, Pacific Northwest Laboratory, "Results from In-Reactor Severe Fuel Damage Tests that used Full-Length Fuel Rods and the Relevancy to LWR Severe Accident Melt Progression Safety Issues," in "Proceedings of the U.S. Nuclear Regulatory Commission: Twentieth Water Reactor Safety Information Meeting," NUREG/CP-0126, Vol. 2, 1992, available at: NRC's ADAMS Documents, Accession Number: ML042230126, p. 282.

[5] NRC, "Draft Interim Review of PRM-50-93/95 Issues Related to the LOFT LP-FP-2 Test," September 2011, available at: NRC's ADAMS Documents, Accession Number: ML112650009, p. 4.

temperatures were to start increasing at a rate of 3.0 K/sec (5.4°F/sec);[6] this is for cases in which there would be relatively low initial heatup rates. (This information was neither provided in PRM-50-93/95 nor in comments on PRM-50-93/95.)

II. Computer Safety Models Are Unable to Determine the Increased Hydrogen Production Which Occurred in the CORA and LOFT LP-FP-2 Experiments

Regarding the CORA severe accident experiments and the Cathcart-Pawel and Baker-Just correlations, in NRC's August 2011 Draft Interim Review of PRM-50-93/95, NRC concludes:

> The results of [the] CORA [experiments] do not suggest that the Cathcart-Pawel or Baker-Just correlations are non-conservative. The assertions made by the petition with regards to Cathcart-Pawel and Baker-Just are not substantiated by the CORA data."[7]

And regarding the LOFT LP-FP-2 severe accident experiment and the Cathcart-Pawel and Baker-Just correlations, in NRC's September 2011 Draft Interim Review of PRM-50-93/95, NRC concludes:

> The results of LOFT Test LP-FP-2 do not...suggest that the Cathcart-Pawel or Baker-Just correlations are non-conservative. The assertions made in PRM-50-93/95 with regards to Cathcart-Pawel and Baker-Just are not substantiated by the results of this LOFT test."[8]

In Petitioner's comments on PRM-50-93/95 (page 5), dated April 7, 2011,[9] Petitioner quoted an OECD Nuclear Energy Agency report, published in 2001, which explicitly states that "[t]he available Zircaloy-steam oxidation correlations were not suitable to determine the increased hydrogen production in the [CORA and LOFT LP-FP-2] experiments."[10] Yet NRC's draft interim reviews of PRM-50-93/95 on

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[6] S. Guntay, M. Carboneau, Y. Anoda, "Best Estimate Prediction for OECD LOFT Project Fission Product Experiment LP-FP-2," OECD LOFT-T-3803, June 1985, available at: NRC's ADAMS Documents, Accession Number: ML071940361, p. 38.

[7] NRC, "Draft Interim Review of PRM-50-93/95 Issues Related to the CORA Tests," August 2011, available at: NRC's ADAMS Documents, Accession Number: ML112290888, p. 3.

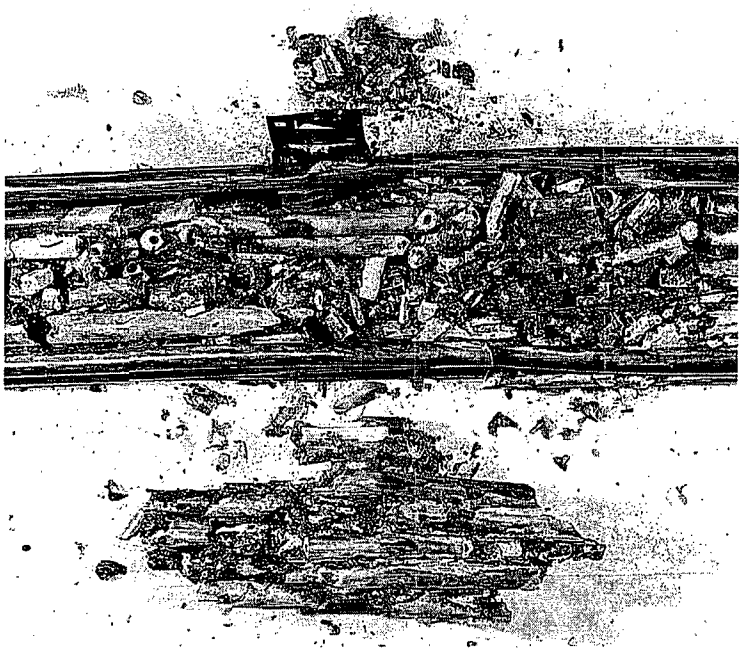
[8] NRC, "Draft Interim Review of PRM-50-93/95 Issues Related to the LOFT LP-FP-2 Test," p. 5.

[9] Mark Leyse, Comments on PRM-50-93/95, April 7, 2011, available at: NRC's ADAMS Documents, Accession Number: ML111020046.

[10] Report by Nuclear Energy Agency ("NEA") Groups of Experts, OECD Nuclear Energy Agency, "In-Vessel and Ex-Vessel Hydrogen Sources," NEA/CSNIIR(2001)15, October 1, 2001, Part I, B. Clement (IPSN), K. Trambauer (GRS), W. Scholtyssek (FZK), Working Group on the

the CORA and LOFT LP-FP-2 experiments neither discuss nor mention the Nuclear Energy Agency statement—instead NRC claims that the CORA data and LOFT LP-FP-2 data confirm that the Cathcart-Pawel and Baker-Just correlations are conservative for use in computer safety models.

III. NRC's TRACE Simulations of FLECHT Run 9573 Are Invalid because They Did Not Simulate the Section of the Test Bundle That Incurred Runaway Oxidation



Section of the Bundle from FLECHT Run 9573

In NRC's October 2012 Draft Interim Review of PRM-50-93/95, NRC discusses TRACE simulations of FLECHT run 9573 that it performed.[11] (FLECHT run 9573 was a design basis accident experiment.) NRC provides results of its TRACE simulations for the 2, 4, 6, 8, and 10-foot elevations of the FLECHT run 9573 bundle, which were the elevations where thermocouples were located on the bundle.[12]

Analysis and Management of Accidents, "GAMA Perspective Statement on In-Vessel Hydrogen Sources," p. 9.

[11] NRC, "Draft Interim Review of PRM-50-93/95 Issues Related to Conservatism of 2200 degrees F, Metal-Water Reaction Rate Correlations, and 'The Impression Left from [FLECHT] Run 9573'," pp. 7-8.

[12] F. F. Cadek, D. P. Dominicis, R. H. Leyse, Westinghouse Electric Corporation, "PWR FLECHT (Full Length Emergency Cooling Heat Transfer) Final Report," WCAP-7665, April 1971, available at: NRC's ADAMS Documents, Accession Number: ML070780083, p. 2-10.

Unfortunately, in FLECHT run 9573 there were no thermocouples located at the section of the bundle which incurred runaway oxidation—"within approximately ±8 inches of a Zircaloy grid at the 7 ft elevation."[13] (There was a steam probe thermocouple located at the 7-foot elevation.[14]) Hence, NRC's TRACE simulations did not include the section of the FLECHT run 9573 bundle that incurred runaway oxidation.

As stated in PRM-50-93 (pages 59, 60), Westinghouse reported, regarding the FLECHT run 9573 bundle, that a "[p]ost-test bundle inspection indicated a locally severe damage zone within approximately ±8 inches of a Zircaloy grid at the 7 ft elevation."[15] And, as stated in PRM-50-93 (page 60), Westinghouse reported that "[t]he remainder of the [FLECHT run 9573] bundle was in excellent condition." [16]

(Appendix A of PRM-50-93 has photographs of the "locally severe damage zone," which incurred runaway oxidation, of the bundle from FLECHT run 9573.)

It is reasonable to assume that—as in CORA-2, in which local steam starvation conditions are postulated to have occurred[17]—in FLECHT run 9573, violent oxidation essentially consumed much of the available steam, so that time-limited and local steam starvation conditions, which cannot be detected in a post-test investigation, would have occurred.

Therefore, NRC's TRACE simulations for FLECHT run 9573, using the Baker-Just and Cathcart-Pawel correlations, encompassed locations—the 2, 4, 6, 8, and 10-foot elevations of the bundle—that most likely were steam starved or partly steam starved (hydrogen produced by the zirconium-steam reaction would have also diluted the available steam). Clearly, NRC's TRACE simulations are not legitimate verifications of the adequacy of the Baker-Just and Cathcart-Pawel correlations for use in computer safety models.

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[13] *Id.*, p. 3-97.
[14] *Id.*, p. 2-13.
[15] *Id.*, p. 3-97.
[16] *Id.*
[17] S. Hagen, P. Hofmann, G. Schanz, L. Sepold, "Interactions in Zircaloy/UO_2 Fuel Rod Bundles with Inconel Spacers at Temperatures above 1200°C (Posttest Results of Severe Fuel Damage Experiments CORA-2 and CORA-3)," Forschungszentrum Karlsruhe, KfK 4378, September 1990, p. 41.

A. NRC's TRACE Simulations of FLECHT Run 9573 Did Not Include Data Taken from the Seven-Foot Elevation of the Bundle

The highest predicted temperature in NRC's TRACE simulations of FLECHT run 9573 was 1598.4 K (2417.7°F) at the 6-foot elevation, *at 18 seconds* after flooding commenced: predicted by the TRACE simulation using the Baker-Just correlation. As stated in PRM-50-93 (pages 10-11, 59, 63), Westinghouse reported that steam temperatures (measured by the seven-foot steam probe) exceeded 2500°F *at 16 seconds* after flooding commenced in FLECHT run 9573.[18] And, as stated in PRM-50-93 (pages 59-60, 60-61), Westinghouse reported that "[t]he heater rod failures were apparently caused by localized temperatures in excess of 2500°F."[19] Therefore, at locations at which heater rods stated to fail at approximately 18 seconds after flooding commenced, the localized temperatures were in excess of 2500°F—more than 82°F higher than the highest temperature predicted by NRC's TRACE simulation using the Baker-Just correlation.

As stated in PRM-50-93 (pages 66-67), Westinghouse reported, regarding the FLECHT run 9573 bundle that "[t]he steam probe thermocouple located one foot above midplane [at the 7-foot elevation] in close proximity to a Zircaloy grid indicated an extremely rapid rate of temperature rise (over 300°F/sec) beginning approximately 12 seconds after flooding and reaching 2450°F by 16 seconds after flooding."[20] (Appendix I of PRM-50-93 is a Westinghouse memorandum, dated December 14, 1970, reporting that the steam heatup rate exceeded 300°F/sec, at the 7-foot elevation.)

Hence, there is yet another reason why NRC's TRACE simulations FLECHT run 9573 were not legitimate verifications of the adequacy of the Baker-Just and Cathcart-Pawel correlations for use in computer safety models. NRC's TRACE simulations did not include data taken from the 7-foot elevation of the FLECHT run 9573 bundle, where a steam probe thermocouple measured steam temperature heatup rates that exceeded 300°F/sec.

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[18] F. F. Cadek, D. P. Dominicis, R. H. Leyse, "PWR FLECHT (Full Length Emergency Cooling Heat Transfer) Final Report," p. 3-97.

[19] *Id.*

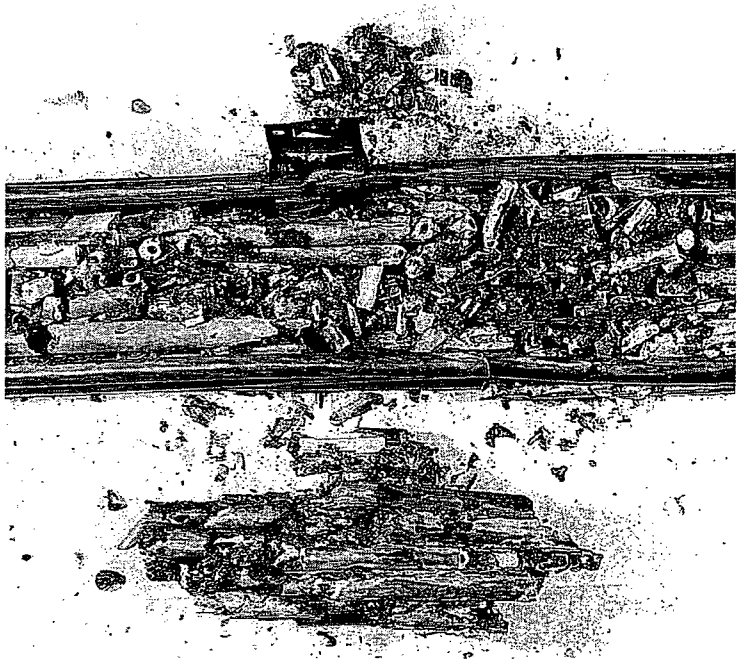
[20] Robert H. Leyse, Westinghouse, Nuclear Energy Systems, Test Engineering, Memorandum RD-TE-70-616, "FLECHT Monthly Report," December 14, 1970.

It is unfortunate that NRC has overlooked the *new information* on FLECHT run 9573—not discussed in PRM-50-76—that Petitioner provided in PRM-50-93 and in comments on PRM-50-93/95.

The Fiscal Benefits of Public Participation

January 31, 2013

Mark Leyse Consultant



Design Basis Accident Experiment: FLECHT Run 9573 (Section of the Bundle)

Comments for Commission Meeting on Public Processes – January 31, 2013
By Richard Webster, Esq., Public Justice P.C.

Core Problems of the 2.206 Process

1) **Lack of clear separation between the adjudicator (the Petition Review Board) and the NRC Staff**. E.g. At the Oyster Creek 2.206 pre-hearing on January 3, 2013, the PRB Chair stated that the Staff presentation to the PRB is an internal process that is not accessible to the public.

2) **Lack of information in the public domain**. Even though such a petition must "specify the action requested and set forth the facts that constitute the basis for the request" there is no provision for discovery.[1] Thus, the petitioner must glean all the information required from public sources. This is very difficult or even impossible if the NRC Staff reviews all relevant licensee documents on site and communicates with the licensee by conference calls.[2] It is made even harder if the staff's presentation to the PRB cannot be viewed by the public.

3) **Staff refuse to answer questions posed by the public**. The Staff treat the public as an adversary in 2.206 proceedings. E.g. At the Oyster Creek 2.206 pre-hearing on January 3, 2013, the Staff refused to answer any of the questions posed by the public about the restart decision.

4) **Lack of Appeal**. Citizens groups have become disillusioned with the 2.206 process because the NRC Staff effectively reviews its own work and the rights of appeal are very limited. It is hardly surprising that the Staff normally finds that its own actions are sufficient and justified. Furthermore, petitioners do not have a right to appeal an adverse decision to the Commission, although the Commission can review the decisions upon its own motion.[3]

5) **The "Current Licensing Basis" ("CLB") of each plant is not compiled**.[4] The failure to compile the CLB means that the public cannot find out what standards are applicable in 2.206 proceedings. Indeed, experience at the Oyster Creek license renewal proceeding showed how difficult it is to define the CLB. In that proceeding even the NRC Staff got the CLB wrong until the ASLB rejected the Staff's attempts not to apply an important requirement assuring the safety of the containment.[5] Finally, reasonable assurance of

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1. 10 C.F.R. § 2.206(a) (2013).

2 This is typical NRC practice and has been criticized before. E.g. NRC Office of the Inspector General, Audit of NRC's License Renewal Program, OIG-07-A-15, 14-15 (Sept. 6, 2007) *available at* ADAMS Accession No. ML072490486.

3. 10 C.F.R. § 2.206(b) (2013); 10 C.F.R. §2.206(c) (2013).

4. In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP-08-13, 18-19 (Docket Nos. 50-247-LR, 50 286-LR, July 31, 2008) *available at* ADAMS Accession No. ML082130436.

5. In the Matter of AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), Initial Decision (Rejecting Citizens' Challenge to AmerGen's Application to Renew its Operating License for the Oyster Creek Nuclear Generating Station) LBP-07-17,

compliance with the CLB is often cited as a reason to limit the scope of safety reviews,[6] but it is impossible to verify this assurance empirically because the CLB is so poorly defined.

6) **Process fails to build public confidence in the NRC.** There is an old maxim that "not only must Justice be done; it must also be seen to be done" in order for the public to have confidence in decisions. The 2.206 process fails in this regard because the public do not get any answers to their questions or the ability to view most of the information upon which the Board makes its decision. The current perception is that the Staff hides information from the public and often ends up rubber-stamping its own work in the 2.206 process.[7]

Suggested Solutions

Four of the six issues above could be resolved and the other two could be partially resolved by the following changes to Management Directive 8.11 and other NRC Staff practices that would not require rulemaking, as follows:

1) **Create a clear separation between the Staff and the PRB.** This could be done by using ASLB judges to comprise the PRB or appointing the Staff members that serve on the PRB as adjudicatory officers who may not receive ex-parte communications from the Staff or the licensee on matters under adjudication.

2) **Place information in the public domain.** The Staff should be instructed to ensure that licensee documents upon which they relied when making a decision that is at issue in the 2.206 process should be brought to NRC headquarters and made available through ADAMS. In addition, the Staff should be instructed to make detailed notes on any conference calls they have with the licensee and these notes should be placed on ADAMS.

3) **Clarify that the Staff presentation to the PRB should be done in the presence of the public.**

4) **Instruct the Staff to answer questions posed by the public to the best of its ability and encourage licensees to also communicate with the public.** Public appreciation and trust of the NRC would be improved if the Staff made good faith efforts to answer questions posed by the public. Similarly, licensees would be regarded with much less

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19-20, n. 20 (Docket No. 50-0219-LR, Dec. 18, 2007) *available at* ADAMS Accession No. ML073520402.

6 See NUREG-1412, Foundation for the Adequacy of the Licensing Bases, A Supplement to the Statement of Considerations for the Rule on Nuclear Power Plant License Renewal (10 CFR Part 54)

7 Of the 387 2.206 petitions that had been filed prior May 2012, hardly any provided any substantive relief. *See* In the Matter of All Operating Boiling Water Licenses with Mark I and Mark II Containments, Memorandum and Order Directing Staff to Amend Filing on 10 C.F.R. § 2.206 (June 19, 2012).

suspicious if they were prepared to explain how they had resolved issues raised by Citizens.

5) **Instruct the 2.206 Petition Manager to clearly define the CLB for the issues to be adjudicated. Make the CLB definition and documents supporting that definition available through ADAMS within a reasonable timeframe after the 2.206 Petition is received, but before the public are requested to present to the PRB.**

6) **The Commission could automatically review Directors decisions on 2.206 petitions and invite the petitioners to submit briefing on whether the decisions contain any errors.**

Providing a right to appeal to the Commission and requiring compilation of the full CLB would probably require rulemaking, but both are recommended.

COMMENTS ON PROPOSED AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (76 FED. REG. 10781)

BY: ANTHONY Z. ROISMAN
NATIONAL LEGAL SCHOLARS LAW FIRM, P.C.

MARCH 28, 2011

INTRODUCTION[1]

When the current version of Part 2 was adopted in 2004 the Commission stated:

> The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient.

69 Fed.Reg. 2182 (Changes to Adjudicatory Process) January 14, 2004 ("2004 SOC"). No fair observer of the contested hearings that have occurred since that time, particularly those involving license renewal, would say that the current version of Part 2 achieves that laudable goal. Rather, the process is marked by a chaotic hurricane of pleadings addressed, for the most part, not to the merits of the safety and environmental issues that are the appropriate focus of such hearings, but to the whether issues sought to be raised by the public meet procedural requirements such that the issues are appropriate for consideration in a hearing. The meat of the hearing, i.e. the activities that address the merits of issues such as pre-filed testimony, proposed areas of cross-

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[1] Mr. Roisman is an attorney and has represented parties before the Atomic Energy Commission and the Nuclear Regulatory Commission since 1969. He was the lead counsel for an intervening public participant in the construction permit applications for proposed Consumers Power reactors in Midland, Michigan, the proposed Public Service of New Hampshire reactors in Seabrook, New Hampshire, the Clinch River Breeder Reactor in Oak Ridge, Tennessee and in the operating license applications for Indian Point Unit 2, in Buchanan, New York and Vermont Yankee in Vernon, Vermont. He has been involved in several relicensing proceedings. He also represented public participants in numerous matters before the AEC and NRC including the rule-making hearings regarding ECCS criteria, worker radiation exposure, and the standards for implementation of the National Environmental Policy Act by the AEC. A number of these matters were eventually resolved in Federal Court where Mr. Roisman was lead counsel including Calvert Cliffs Coord. Cttee v. AEC and NRDC v. NRC (GESMO). He has written law review articles regarding NRC practices and procedures and has presented his views in meetings sponsored by the NRC including the Regulatory Information Conference. He was a Member, Nuclear Regulatory Commission Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals - 1982-83 and a Member, Nuclear Regulatory Commission Advisory Panel on Atomic Safety and Licensing Board Nominations - 1980-85. His full CV is attached. The views expressed here are Mr. Roisman's, and not his clients.

examination, motions for summary disposition and the hearings themselves, consume relatively little time compared to the time spent on addressing contention admissibility and the timeliness of new or amended contentions.

When the Commission announced the current proposed amendments to Part 2 it stated:

> This proposed rule would make changes to the NRC's adjudicatory process that NRC believes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

76 Fed.Reg. 10781 (February 28, 2011). However, while that goal is laudable, the proposed changes do little, if anything, to achieve it and fail to address the fundamental problems that plague the NRC licensing hearing process. License renewal hearings provide ample proof of the failure of the current Part 2 regulations to "promote fairness, efficiency, and openness" and, in fact demonstrate that the current Part 2 regulations are unfair, inefficient and lack transparency.

For example, the Indian Point relicensing proceeding, commenced on August 1, 2007 with the filing of a Notice of Opportunity for Hearing in the Federal Register. 72 FR 42134. However, the portion of the hearing that will address the merits of the issues raised will not begin until June 19, 2011 when under the ASLB Scheduling Order, pre-filed direct testimony from the intervenors will be due. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010). Thus, the preliminary, essentially non-substantive, skirmishing over the admissibility of contentions and amended or new contentions took 46 months. By contrast, from the point where the real meat of the hearing begins - filing of testimony - until completion of the hearings and filing of all post-hearing pleadings will take approximately 11 months assuming the hearings last three weeks and do not begin until 60 days after all pre-hearing filings occur. *Id.* The time spent on the preliminary matters related to

admissibility of contentions and the timeliness and appropriateness of new or amended contentions is not substantively productive - i.e. resolution of such issues as to whether an amended basis is timely or a contention contains sufficient specificity and basis to be admitted - and represents an enormous expenditure of time and money by all parties, an expenditure that falls particular hard on the public which does not have an economic incentive to justify expenditures and is not funded by taxes and licensing fees.

The core of the problem is that hearings are noticed when the application is still in a state of flux and before any of the work by Staff has been completed. As the applicant refines and completes the application - often adding dozens of application amendments - and as the Staff publishes draft and final impact statements and draft and final safety evaluations - new documents are disclosed and new issues are raised, compelling the conscientious intervenor to seek to amend existing contentions and their bases or to add new contentions. No one suggests that the additional work done by the applicant or by the Staff is not valuable. However, each of those changes by applicant and staff are done without any limitation or adverse consequence to them. Thus, for example, an applicant is not penalized for waiting until long after its application has been accepted for filing by Staff, to identify the particular elements of an aging management plan that it has known for years it would have to provide but that was not particularized in its application. Staff uses requests for information (RAIs) to fill in gaps in the application and each response can raise new and previously unknown issues. Again, no one suggests Staff should not seek this information or that their efforts are not productive. But, since there is no adverse consequence to either Staff or applicant when relevant information is produced in dribs and drabs during the hearing process and such serialized production of data forces an intervenor to refine

existing contentions or file new ones -a process which produces immediate objections from Staff and applicant as to virtually every proposed new or amended contention - intervenors are compelled to expend their limited resources to make their case over and over again because of the application and review process utilized by applicants and Staff.

A glaring example of the chaos created by the current system is well-summarized by the Commission in its opinion last year in *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17 (July 8, 2010) where it noted:

> The procedural history of Contentions 2, 2A, 2B, and 2C is lengthy and muddled – due, in large part, to Entergy's multiple revisions to the relevant portions of its license renewal application as it responded to multiple Staff inquiries and, in a related vein, Entergy's apparent lack of precision as to the specific subsection of section 54.21(c)(1) with which it sought to comply for the components at issue.

Id. at 23. Entergy's "multiple revisions" and "lack of precision" compelled the intervenor to file four separate versions of essentially the same contention, each of which filings was vigorously opposed as either untimely, failing to meet the requirements of 10 C.F.R. § 2.309(f)(1), or both. But Entergy suffered no consequences for its sloppy and dilatory tactics while the intervenor was forced to expended a substantial amount of its limited resources just to get one issue heard and eventually had to abandon legal representation and pursue the case *pro se*. Such a result, which is repeated over and over again in hearings under the current version of Part 2, is not consistent with the Commission's oft expressed commitment to full and effective public participation. This commitment was acknowledged by former Chairman Dale Klein, who stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are

made in consultation with the public, our Congress, and other stakeholders."[2] He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."[3]

The adverse effect of the current process on effective public participation cannot be overstated. When virtually every contention and every amendment to a contention produces a deluge of opposition from both applicants and Staff, all focused on whether the procedural technicalities of 10 C.F.R. § 2.309(f) have been met, the ability of the public to participate effectively is essentially destroyed and the value of their contribution on the merits of relevant issues is diminished dramatically. For a general analysis of the inherent unfairness of the current Part 2 regulations see "Regulating Nuclear Power in the New Millennium (The Role of the Public)" Roisman, *et al.* Pace Environmental Law Review, Volume 26 (Summer 2009) Number 2 at pp. 317-363 which is incorporated herein by reference and attached hereto.

The following proposal offers a solution to some of the problems created by the current Part 2 regulations without abandoning the Commission's goal of making the"hearing process more effective and efficient". Unlike the proposed amendments currently before the

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[2] Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), http://www.nrc.gov/reading-rm/doc-collections/commission/; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/.

[3] Klein, *supra* note 1, at Slide 11.

Commission, these proposed amendments address fundamental problems with Part 2. The essence of these proposals is to initiate the opportunity for public participation in the process at the same time as the applicant initiates its efforts to obtain a license, license amendment or any other relief or benefit from the NRC, but to postpone the date on which contentions must be filed until both applicant and Staff have completed their work and attested to that fact. The only criteria for admission as a party would be "standing" and once admitted a party would be entitled to see all documents relevant to the application whether in the possession of Staff or the applicant, to attend all meetings, to listen in on all phone calls and to initiate its own meetings and phone calls with the Staff. Within 30 days after applicant and Staff have attested to the completion of their work, contentions would be due. The current rules for contention admissibility would be tightened to require essentially all bases and all supporting evidence, except expert witness reports, to be submitted with a proposed contention. Shortly after contentions, if any, had been admitted, direct testimony, including expert witness reports, would be due and the current practice for moving from that point to hearings would be followed.

Under this approach there would be no incentive for an applicant to delay submitting all the information it intends to use to support its application and no reason for Staff to publish draft and final impact statements or safety reports until they had finished all of their work. Intervenors, having had access to all the relevant data would have no excuse for not fully presenting their case at the time they file their contentions, with the exception of expert witness reports which would await, but only by 30 days, the Board ruling on admissibility of a contention. The net effect would be that resources of intervenors, applicant and Staff would be devoted primarily to the merits of concerns raised by intervenors and much less money would be

spent on lawyers arguing over substantively irrelevant procedural technicalities. By involving intervenors in the process from the outset and imposing upon them the obligation to be knowledgeable about all the information developed during the completion of the application and NRC Staff review, there is a greater probability that issues raised as contentions will be focused on real substantive concerns and not merely on the lack of details in an application which is now often the basis for initial contentions. In addition, intervenor participation in the application and Staff review process provides ample opportunities for concerns to be addressed directly among the parties and without the formality of the hearing process, thus saving the hearing process for those issues on which the parties genuinely are unable to reach agreement.

One added advantage of the approach proposed is that the ASLB will not spend its resources on resolving non-substantive disagreements about timing of filings and the admissibility of multiple iterations of essentially the same contention. The ASLB, once it rules on standing, might be called upon to resolve a dispute about access to data during the completion of the application and Staff reviews, but such disputes are unlikely to occur if the final regulation is clear and the Commission's Statement of Considerations expresses the Commission's strong policy in favor of open access to all relevant documents. In addition, such disputes could be handled by a single ASLB member performing much the same function as a Federal Magistrate does in Federal District Court litigation.

What follows are proposed regulations to accomplish the goals outlined above. If the Commission is favorably inclined to the basic approach proposed here, these proposed regulations would benefit from more careful drafting that 1) makes the language more precise and 2) modifies other regulations that would be impacted by these proposed changes. In

addition, should the Commission decide to proceed along the lines suggested, republishing the proposed amendments to Part 2 to allow fuller participation from industry, public and governmental intervenors and NRC Staff licensing hearing participants would be beneficial. No participant in the current licensing process favors the current chaos. These proposals offer one, but not the only, option to address that chaos. For now, these are the only proposals before the Commission that address the most pressing fundamental problems in Part 2.

At the end of these proposed changes are a few comments on the current proposed changes to Part 2.

PROPOSED CHANGES TO 10 C.F.R. PART 2

PROPOSED
10 C.F.R. § 2.100A

Prior to filing an application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval and prior to contacting any employee or contractor of the NRC regarding such an application, an applicant shall file a formal notice with the NRC of its intention to file such an application, including the nature of the intended application and scope of the application, and shall publish at least a ½ page notice of intent in all daily newspapers of general distribution within the area where the facility involved is, or may be, located, with at least three national daily newspapers and on its website for a period of at least one month. The content of the notice shall be prescribed by NRC Staff and shall have as its purpose the widest possible disclosure of the applicant's intent and the nature of the intended application.

PROPOSED 10 C.F.R. § 2.100B

Upon receipt of a notice of intent pursuant to 10 C.F.R. § 2.100A, NRC Staff shall determine if the notice meets all the requirements and intent of that Section and once such a determination is made it shall have published in the Federal Register and in the same newspapers as those used by the applicant in complying with 10 C.F.R. § 2.100A, and as frequently, at least a ½ page notice of opportunity to participate in the NRC regulatory process with regard to such proposed action. The notice shall require that all persons who wish to participate in any way in the regulatory process with regard to such proposed action must file, within 30 days of the publication of the notice in the Federal Register and the newspapers, a request to participate. Such a request to participate must demonstrate that the proposed participant meets the requirements of 10 C.F.R. § 2.309(d).

PROPOSED 10 C.F.R. § 2.308A

Upon filing of the Federal Register Notice prescribed by 10 C.F.R. § 2.100B, the Commission shall designate an Atomic Safety and Licensing Board Panel to determine whether any request for participation filed is 1) timely and 2) meets the requirements of 10 C.F.R. § 2.309(d). Any person that meets those requirements shall be deemed a "participant" and shall have all the rights and responsibilities identified in 10 C.F.R. § 2.308B. The Atomic Safety and Licensing Board Panel may consider untimely filings for participant status but shall not grant such requests unless good cause is shown why the proposed participant could not have learned of the proposed action and filed a timely request to participate and, if granted participant status, the participant must take the proceeding as it finds it including the need to meet any filing requirements regarding documents and the need to comply with any time limits imposed by these regulations or the Board.

PROPOSED 10 C.F.R. § 2.308B

Once a person is determined to be a participant within the meaning of 10 C.F.R. § 2.308A, they shall have the following rights and responsibilities:

1. The participant shall receive a copy of all documents generated, received, reviewed or relied upon by an applicant, its employees, contracts or experts and by the NRC Staff or any contractor of the NRC Staff, with regard to the intended application or any issues relevant to the determination of the application within one week of when the document was generated, received, reviewed or relied upon;

2. The participant shall receive advance notice of all meetings and phone calls between the applicant, the NRC Staff or any contractor of the NRC Staff or the applicant, with regard to the intended application or the application itself and the participant shall have the right to listen in on any such call or be an attendee at any such meeting. NRC Staff may limit the number of representatives of the participant who may attend such meetings but not to less than two. These rights shall not include the right to actively participate in the call or meeting unless NRC Staff or the applicant request such participation.

3. The participant shall provide a copy to NRC Staff and the applicant of all documents with regard to the intended application or any issues relevant to the application generated, received, reviewed or relied upon by it, its employees, experts or contractors within one week of their generation, receipt, review or reliance upon the document.

4. The participant shall have the right to request either phone calls or meetings with NRC Staff with regard to the intended application or any issues relevant to the application and such requests shall be granted absent good cause for denial. An applicant may participate in any of

these meetings or calls to the same extent a participant can participate in meeting or calls pursuant to 2. above.

PROPOSED 10 C.F.R. § 2.308C

A notice of opportunity for a hearing shall be filed within 30 days after the following conditions have been met. If there is a dispute regarding whether conditions have been met, an Atomic Safety and Licensing Board Panel shall resolve the dispute:

1. Applicant files a final and complete application for the requested action, files a certification, signed by a duly authorized officer of the applicant, that the applicant has no present intent to file any additional information in the form of amendments to the application AND NRC Staff files a final Safety Evaluation Report (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to any safety issues related to the proposed application; AND

2. Applicant files a final and complete Environmental Report for the requested action, files a certification, signed by a duly authorized officer of the applicant, that applicant has no present intent to file any additional information in the form of amendments to the Environmental Report AND NRC Staff files a Final Environmental Impact Statement or Supplemental Final Environmental Impact Statement (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to, or amendments to, the FEIS or FSEIS regarding any environmental issues related to the proposed application.

PROPOSED 10 C.F.R. § 2.308D

After the Certification required by 10 C.F.R. § 2.308C an Applicant or the NRC Staff may file an amendment to the documents specified there only by leave of the Atomic Safety and Licensing Board and only upon demonstrating that it meets all of the following requirements:

(i) The information upon which the amendment is based was not previously available and could not have been previously available;

(ii) The information upon which the amendment is based is materially different than information previously available; and

(iii) The amendment has been submitted within 15 days of the availability of the subsequent information or the subsequent information has been made available to the participants in the proceeding within 15 days of its availability and a request for an extension of time to file the amendment has been filed within 10 days of availability of the subsequent information with the Atomic Safety and License Board.

PROPOSED AMENDED 10 C.F.R. § 2.309(a)

(a) General requirements. *Within 45 days of the filings required by 10 C.F.R. § 2.308C, any person who has been determined to be a participant pursuant to 10 C.F.R. § 2.308A may request a hearing on the proposed application. The request shall specify the contentions which the person seeks to have litigated in the hearing. A person who has not been determined to be a participant pursuant to 10 C.F.R. § 2.308A may also seek a hearing but must meet all the requirements applicable to a participant and must take the proceeding as it exists.* In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of

paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition limited to the contentions it determines meet the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party. (Proposed changes shown in *italics*).

PROPOSED 10 C.F.R. § 2.309(c)(3)

If an untimely request for a hearing is accepted, the requestor shall take the hearing as it finds it and shall comply with all the obligations and time requirements applicable to a participant.

PROPOSED AMENDED 10 C.F.R. § 2.309(b)(3)

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than *forty-five (45) days* from the date of publication of the notice in the Federal Register; (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(e)

(e) Discretionary Intervention. The presiding officer may consider a request for *discretionary participation* when at least one requestor/petitioner has established standing. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to *lack standing to participate as a matter of right under paragraph § 2.308A* and (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek *participation* as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance: (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(1)

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

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(ii) Provide a *full explanation* of the basis for the contention;

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(v) Provide a *full statement* of the alleged facts which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to *all the specific sources and documents that were produced pursuant to 10 C.F.R. §*

2.308B on which the requestor/petitioner intends to rely to support its position on the issue and *identify all experts to be used in support of the position on the issue along with a copy of the CV of the expert and all publications by the expert relevant to the position to be taken by the expert*;

(vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee *and/or NRC Staff* on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) and *the Final Environmental Impact Statement or Final Supplemental Environmental Impact Statement* that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application, FEIS or FSEIS fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief;

(vii) No contention of omission or failure to comply with NRC regulations or federal statutes may be filed unless either the alleged omission or failure has been identified by the Petitioner in written comments filed with regard to the Application, the draft Safety Evaluation Report, the draft Final or Final Supplemental Environmental Impact Statement during the time allowed for such comments or the Petitioner demonstrates it could not have known of the omission or failure until the filing of the final Application or the Final SER or the FEIS and FSEIS. (Proposed changes are shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(2)

(2) Contentions must be based on *all* documents or other information *made available pursuant to 10 C.F.R. § 2.308B*, at the time the petition is to be filed. The petitioner may amend contentions or file new contentions only with leave of the presiding officer upon a showing

that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In the event of an amendment to the Application, Safety Evaluation Report, Final or Final Supplemental Environmental that is allowed pursuant to 10 C.F.R. § 2.308D, amended or new contentions solely based on the § 2.308D amendment will be considered timely if filed within 90 days of the Board's Order allowing the § 2.308D amendment. (Proposed changes in *italics*).

COMMENTS ON CHANGES PROPOSED BY THE COMMISSION

Most of the proposed changes are technical modifications that will generally improve the hearing process. There are other similar changes that could be made to further clarify the process and improve fairness and efficiency. The following are a few examples of such potential improvements.

1. There is little reason to have separate language to describe the summary disposition process under Part G and Part L. It would be preferable to state that one set of criteria and one set of filing obligations applies regardless of the Part under which summary disposition is sought.

2. There is considerable confusion about the requirements of 10 C.F.R. § 2.323 regarding the time when motions need to be filed. The language would appear to apply to all motions but it

has been argued that the provision regarding the latest date by which a summary disposition motion must be filed allows summary disposition to be filed long after the "occurrence or circumstance from which the motion arises". 10 C.F.R. § 2.323(a). Summary disposition motions have the potential to considerably delay the hearing process if filed late in the proceeding. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010) at 9("The Board finds that such motions for summary disposition, if filed late in the proceeding when the parties are heavily engaged in other tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serve to narrow the scope or expedite the resolution of the adjudicatory proceeding"). Thus, such motions should be filed as early as possible. However, the 10 day filing date for motions is much too short even for routine motions, much less for summary disposition. For example, the obligation to consult imposed by § 2.323(b), if taken seriously, would be difficult to meet if a total of 10 days are allowed. The language of § 2.323(a) should be amended to set the time for filing motions at 30 days after the "occurrence or circumstance from which the motion arises" and it should be made clear that it applies to all motions. If there are motions that do not warrant that much time or need more time, the Board has the inherent authority to adjust the deadlines.

3. A problem has arisen with disclosures from the Staff in Subpart L proceedings. Staff obligations to provide document disclosures in Subpart L proceedings are controlled by 10 C.F.R. §§ 2.336(b), 2.1202(c) and 2.1203. Under these provisions the Staff is required to produce or identify by readily available location all the documents filed by the applicant, all the

documents - either pro or con - used in the review of the application and all the documents relevant to any admitted contention on which the Staff chooses to participate.[4] Contrary to these clear obligations, Staff takes the position that documents generated by consultants to NRC are not subject to disclosure. The problem is well-illustrated by the experience in the *Indian Point* relicensing proceeding. First, Staff has chosen to participate as a party on all admitted contentions in the proceeding. Nonetheless, Staff document disclosures are limited to what it perceives to be its obligations under § 2.336(b) and do not include all documents and data compilations relevant to the contentions. For example, one of the admitted contentions relates to the AMP for buried piping. Staff has numerous activities ongoing regarding the problems with leaking underground pipes.

http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html. However, Staff has produced, at most, only the underground piping documents that its reviewers are looking at as part of the Indian Point license renewal process. Not only does that practice violate the clear mandate of § 2.1202(c) but it also rewards the Staff if its review is inadequate by allowing it to avoid producing or identifying a larger group of documents relevant to the contention which it reviewers should have examined.

Moreover, Staff often does not even meet its obligations, as narrowly defined by it in §

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[4] 10 C.F.R. § 2.1202(c) provides that once Staff chooses to participate as a party as to any contention it "shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate". All parties are subject to the disclosure obligations of 10 C.F.R. § 2.336(a) which include the obligation to produce or identify by location "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions" and thus, once Staff elects to participate as a party with respect to a contention, the obligations under § 2.336(a) apply, but only with regard to that contention. Pursuant to 10 C.F.R. § 2.3, the specific provisions of § 2.1202(c) supersede the language in § 2.336(a) that excludes Staff from § 2.336(a) obligations.

2.336(b). In a recently released FSEIS for Indian Point Staff referenced work done for it by Sandia Laboratories in responding to an admitted contention related to deficiencies in the analysis of clean up costs associated with the SAMA analysis. *See* NUREG-1437, Supplement 38, Vol. 1 at 5-4 and Vol. 3 at Appendix G pp. G-22 to G-29. Sandia not only consulted with Staff but participated actively in the review of the information and prepared reports. Staff did not list any documents generated by Sandia in the course of this work in its Hearing File Index and has failed to produce any of the relevant documents for several months. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York Motion to Compel NRC Staff To Produce Documents Relied upon in Staff's Final Supplemental Environmental Impact Statement (4/22/11). Finally, at an earlier time in the hearing process, an intervenor had to resort to a Motion to Compel to require Staff to produce the computer code used by it, its consultants and applicant to conduct the SAMA analysis because Staff first refused to produce the code and then insisted it would only produce the code if the intervenor paid the $1000 licensing fee imposed on commercial users of the government-developed and funded MAACS2 Computer Code. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York's Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee In Compliance with the National Environmental Policy Act and NRC Disclosure Regulations (1/10/10).

The Commission should clarify the discovery obligations of Staff in contested proceedings making clear that 1) Staff must comply with all the disclosure obligations 10 C.F.R. § 2.336(a), just like all other parties, with respect to any contention on which NRC Staff chooses to participate as a party; and 2) with regard to its obligations under 10 C.F.R. § 2.336(b)(3) Staff

must produce all documents in its possession or the possession of its experts or consultants that were reviewed and/or generated as part of the analysis of the application.

4. Under current hearing practice all parties are allowed to respond to any motion or pleading filed by any other party unless they have been consolidated with that party pursuant to 10 C.F.R. § 2.309(f)(3). This practice has created unnecessary pleadings that delay the resolution of issues. NRC Staff is never consolidated with another party, even if they are on the same side of an issue, and thus is allowed to file a brief in support of a pleading of any other party. Public and government intervenors who have not adopted contentions are also free to file briefs in support of the pleadings of other parties. These "support" pleadings are either redundant, merely stating, in slightly different form, what the proponent has already stated or raise new arguments, in which case the opponents of the initial pleading are given an opportunity to file a supplemental opposition, thus prolonging the process. However, in light of the consultation obligations imposed by 10 C.F.R. § 2.323(b), all parties are aware of a pleading before it is filed and have an opportunity to consult regarding the merits of the pleading. A party that supports a proposed pleading can provide its input and suggestions to the proponent before the pleading is filed, thus obviating the need for a separate filing. The regulations should be amended to indicate that pleadings in support of motions are allowed only if the support pleading is making a new point and only if the filer of the supporting pleading attests that it attempted to have the proponent of the motion include the point in the initial pleading. A similar rule should apply to pleadings in opposition, requiring parties who are taking the same position in opposition to a pleading to file a single brief. This will cut down on redundant pleadings and substantially eliminate the need for supplemental pleadings.

RESPONSE TO SPECIFIC QUESTIONS

(a) Would applying NRC staff disclosures under § 2.336(b)(3) to documents related only to the admitted contentions aid parties other than the NRC staff by reducing the scope of documents they receive and review through the mandatory disclosures?

As the previous discussion indicates, NRC Staff is not currently meeting its disclosure obligations. Reducing those obligations so that their current disclosure practices more closely conform to the regulations is unwarranted. In addition, no documents are actually "produced" but merely listed on logs with ML numbers and members of the public are only burdened by Staff failure to fully produce all relevant documents and by the production of documents on logs that are often excessively cryptic. If NRC Staff would improve the quality of the information provided on the logs, the task of reviewing Staff disclosures would be simplified and expedited.

NRC Staff has a public function which will only be further diminished by reducing their disclosure obligations. Staff antipathy to disclosing the documents it generates, reviews and relies upon in doing its work is inconsistent with the Commission's frequently expressed desire for improved public participation and transparency. If Staff would organize its efforts around discrete issues and maintain running logs of the documents being used by personnel addressing those issues, whether within licensing activities or not, a task made much easier as a result of computers and electronic documents, the burden on Staff would be reduced and the disclosures to the public would be improved. Part of the reason Staff perceives that it is burdened by document production is its failure to integrate public disclosure of all, non-confidential and non-privileged, documents into its routine work. The alternative, if disclosure obligations for

hearings are reduced and if Staff continues its crabbed interpretation of its disclosure obligations, is for public participants in the NRC process to file weekly requests under FOIA for all NRC Staff documents. That is not a desirable, but it may be a necessary, process. It would be far preferable for Staff and the public if Staff embraced its duty of operating in the open and facilitated public access to relevant documents related to specific issues of public concern.

(b) Is the broad disclosure obligation imposed on the NRC staff by current Section 2.336(b) warranted in light of (a) the other parties' more limited disclosure obligations and (b) the parties' ability to find these same documents in an ADAMS search?

Since the Staff does not fulfill the disclosure obligations under Section 2.336(b) as currently written, the premise of the question is not correct. In addition, anyone who uses ADAMS on a regular basis knows that ADAMS is neither a comprehensive nor a reliable source of NRC documents. The search capabilities, while improved over the last year, are still a far cry from search capabilities with WestLaw and LEXIS. Thus, finding documents is laborious and it is difficult to effectively narrow searches to the precise information being sought. This necessitates reviewing hundreds of irrelevant documents in order to find the documents being sought. In addition, the disclosure of documents on ADAMS is inconsistent. For example, documents dated months, or even years, earlier suddenly appear on ADAMS without explanation for the delay. That makes it impossible to rely on ADAMS as a source of all relevant documents on any subject. In addition, documents are sometimes on ADAMS but, for some reason, cannot be opened or downloaded.

To be candid, the entire electronic production of documents at NRC is a mess. The

Electronic Hearing Docket is often incomplete and there is no standardized protocol for when documents will be on the EHD or which documents will be posted. For example, some of the monthly disclosure of documents by NRC Staff with regard to a particular licensing proceeded are posted to the EHD and some are not. The time after a pleading is filed and before it appears on the EHD is not standardized. Documents posted to the Hearing File by Staff are incomplete. For example, a review of the Hearing File for Indian Point relicensing lists document disclosures by Staff but do not include any privilege logs. In addition the document disclosures are merely ML numbers with no document description, not even the description provided in the monthly disclosure itself. In short, the present ongoing electronic disclosure of documents by NRC is in disarray, is not comprehensive or reliable and thus cannot be a substitute for full disclosure of documents in individual licensing proceedings by Staff.

(c) Would a shorter, more relevant privilege log aid parties to the proceeding?

This question is confusing. If it is asking would it be preferable for Staff to claim fewer documents are privileged, then the answer is certainly less. If it is asking should Staff withhold the same number of documents but disclose only some of them on a privilege log, the answer is obviously no. If it is asking should Staff be given more discretion to decide what is relevant, the answer is no, at least until the Staff has demonstrated that it is actually committed to full disclosure of all relevant documents. An improved privileged log, with more description of the nature of the document being withheld would be helpful. In addition, privilege logs used by Staff in the *Indian Point* proceeding, with the exception of the initial disclosures, have not included the recipients of the documents for which a privilege is claimed, making it hard to determine if the

privilege is validly asserted. There are many improvements that could be made to the privilege claim process by Staff but the question does not really address those. Consulting with persons who are more readily engaged in discovery in routine court litigation might improve the quality of the privilege log process. There are numerous law professors in the Washington, D.C. area who could be consulted to assist NRC in developing a more efficient and effective process for disclosing documents. The Sedona Conference would also be a good source of expertise. The present process of disclosure and privilege claims does not appear to be benefitting from persons with substantial experience with such processes outside the NRC.

(d) Would potential parties prefer to maintain the status quo?

As the preceding discussion indicates, the status quo with regard to Part 2 in general and discovery of Staff in particular, is not working. It needs to be changed in major ways.

(e) Would limiting the mandatory disclosures of documents as described in Federal Rule of Civil Procedure 26(a)(1)(A)(ii) be the preferred option?

No. A better implementation and enforcement of those obligations would be a preferred option. If, as suggested above, the entire Part 2 process were changed to provide for public intervention at the outset of the NRC process when the first suggestion of an application for a license or amendment is received by NRC, much of the disclosure problem would go away as the public participant would be able to be actively involved in the process from the outset and documents relevant to the proposal would be routinely available to the public. Thus, when a hearing notice was finally issued the obligations of disclosure that track the federal rules would

have been largely already met.

CONCLUSION

The current system does not work. Major changes, not minor adjustments, are needed to make it work. Until that happens, the NRC hearing process will not "promote fairness, efficiency, and openness".

Respectfully submitted,

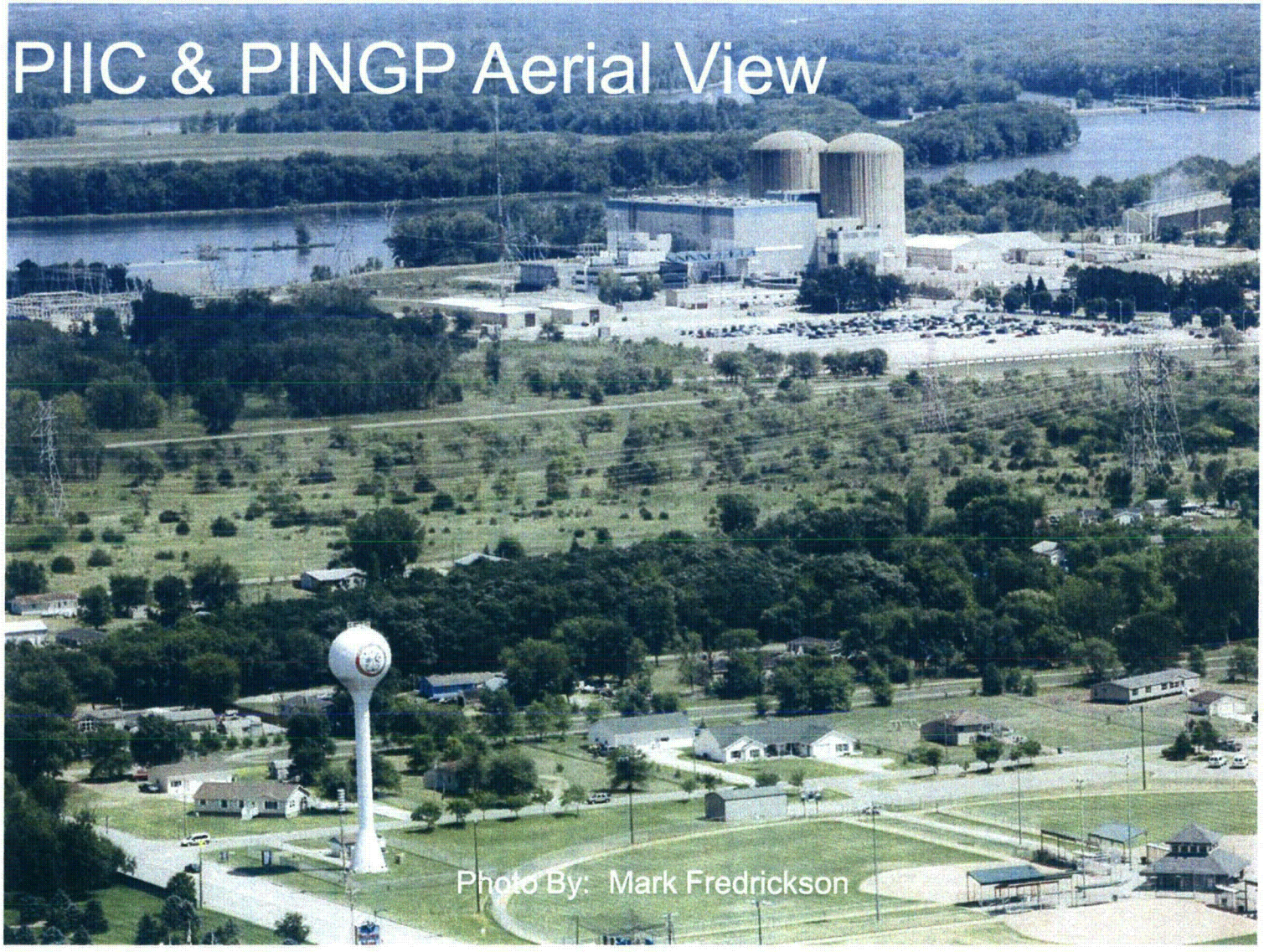
Anthony Z. Roisman

PUBLIC PARTICIPATION IN NRC REGULATORY DECISION· MAKING

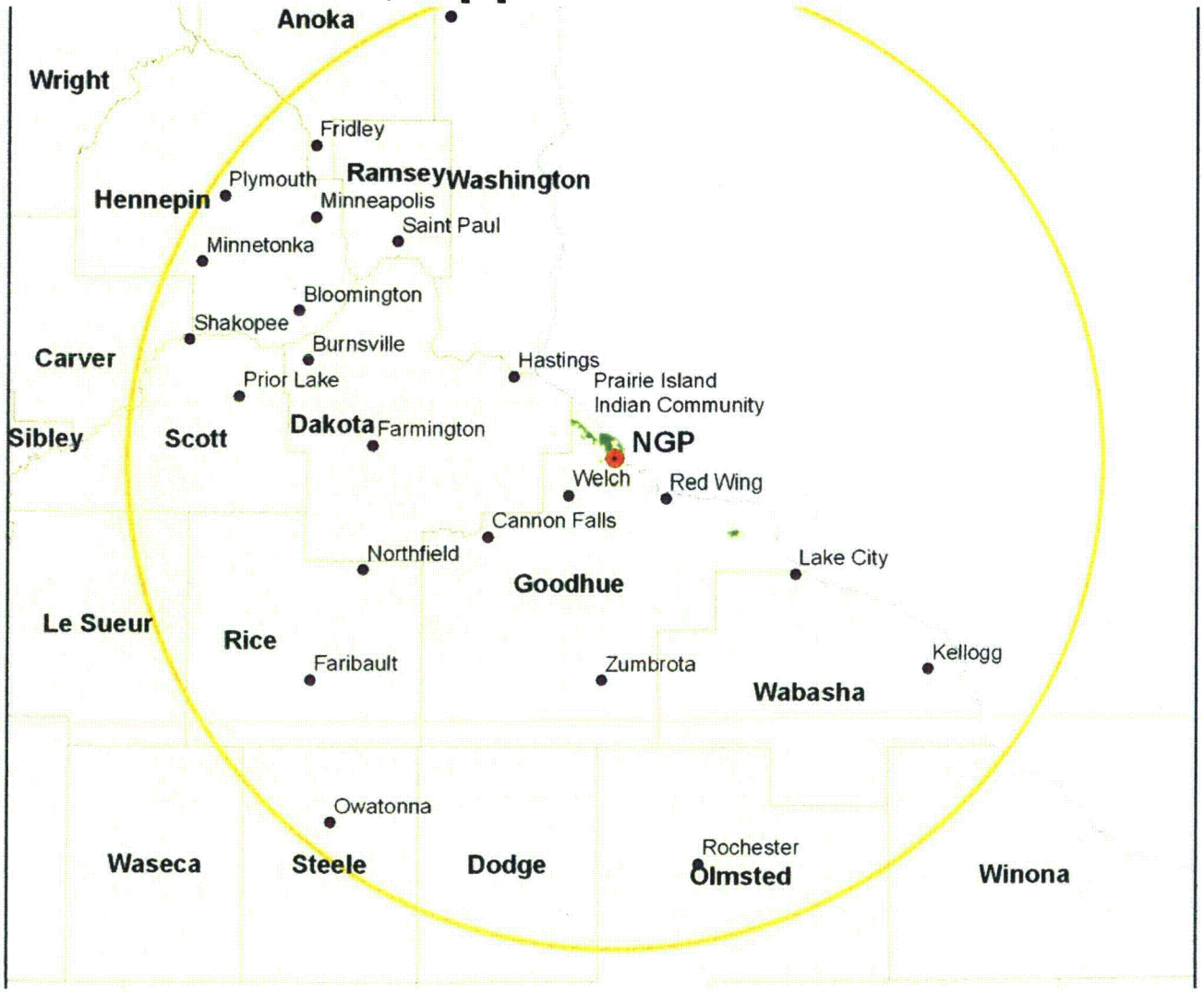
January 31, 2013

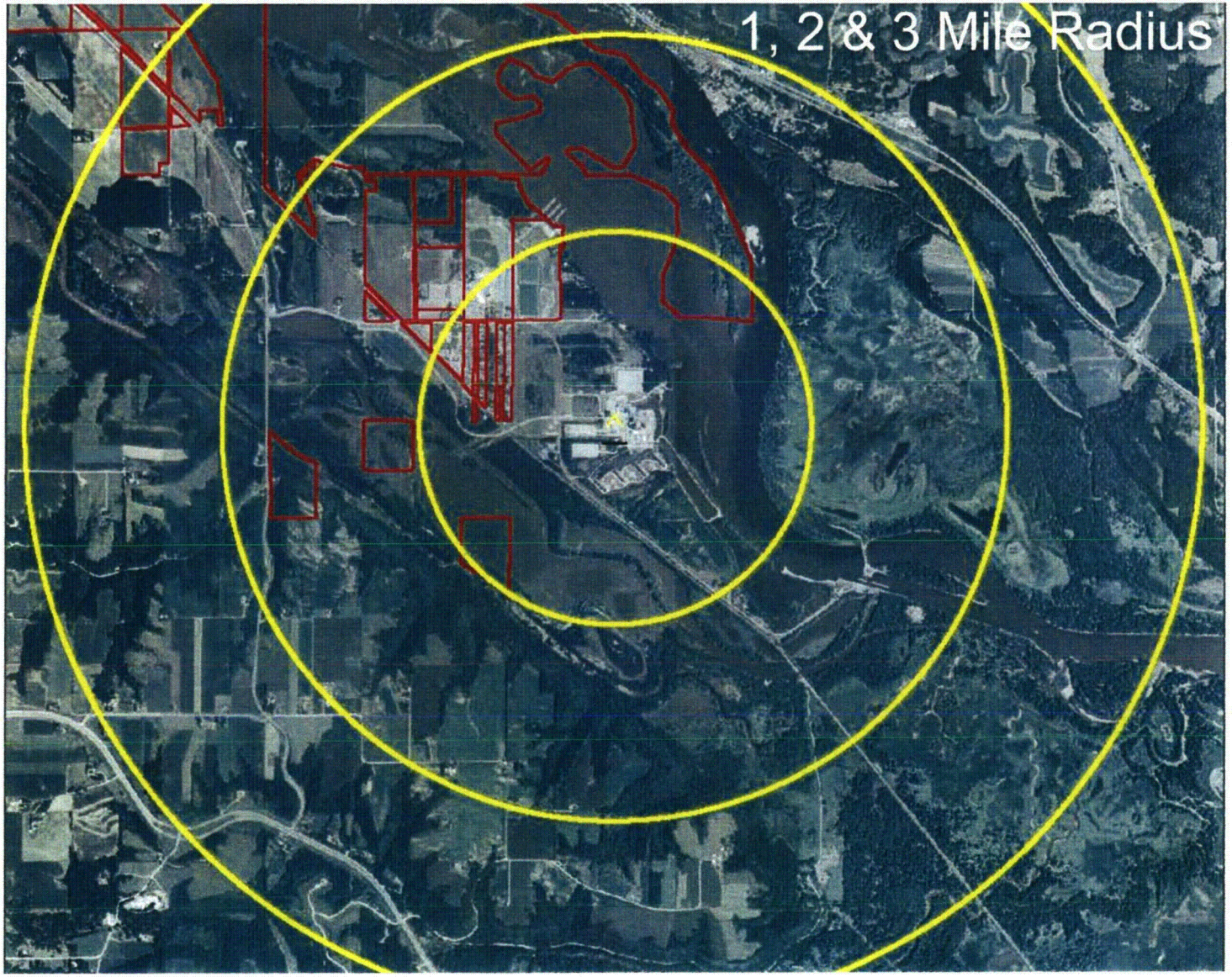
Philip R. Mahowald
General Counsel
Prairie Island Indian Community

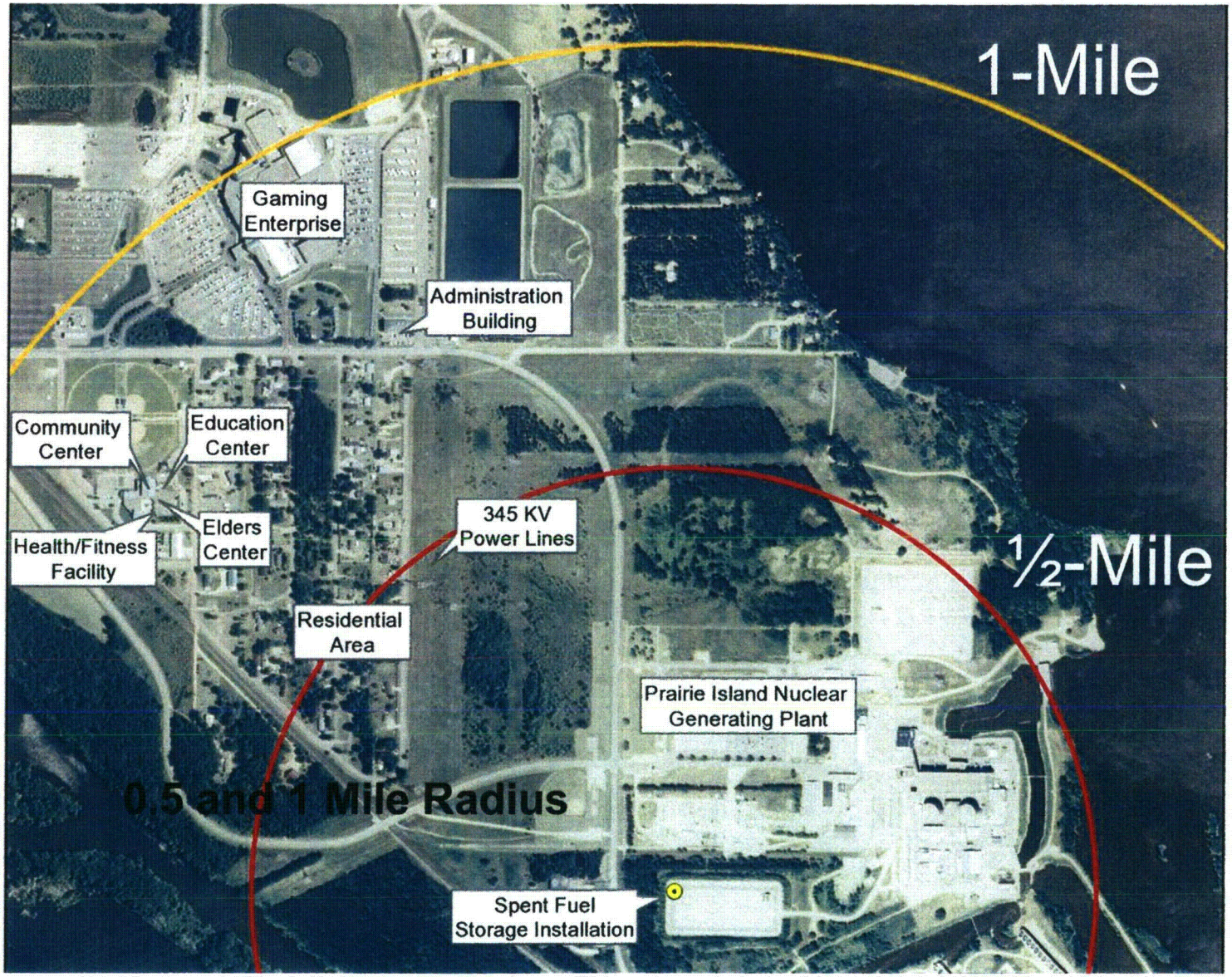
PINGP & PIIC Aerial View


PIIC & PINGP Aerial View
Photo By: Mark Fredrickson

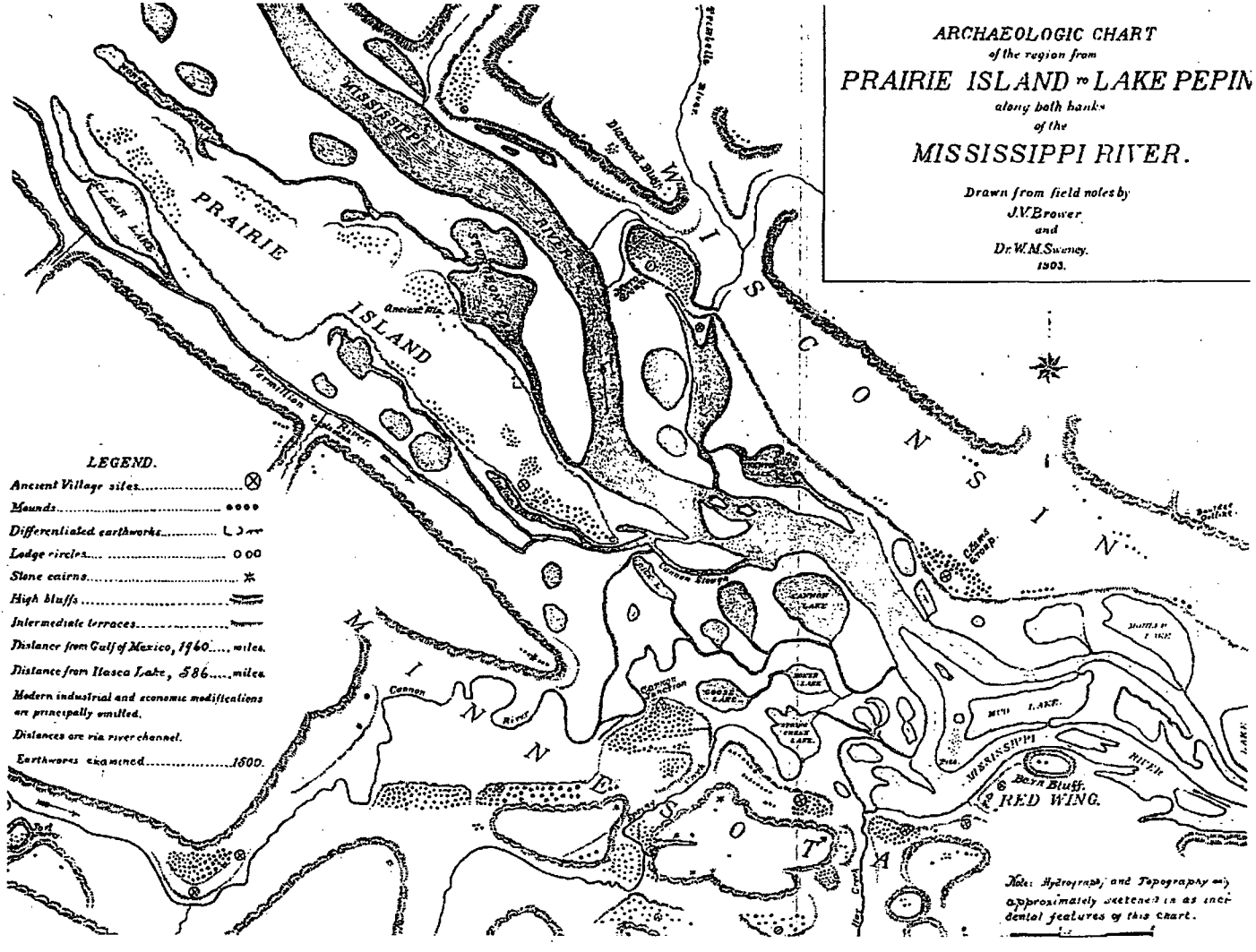
NUREG-1350, Appendix U - 50-Mile Radius



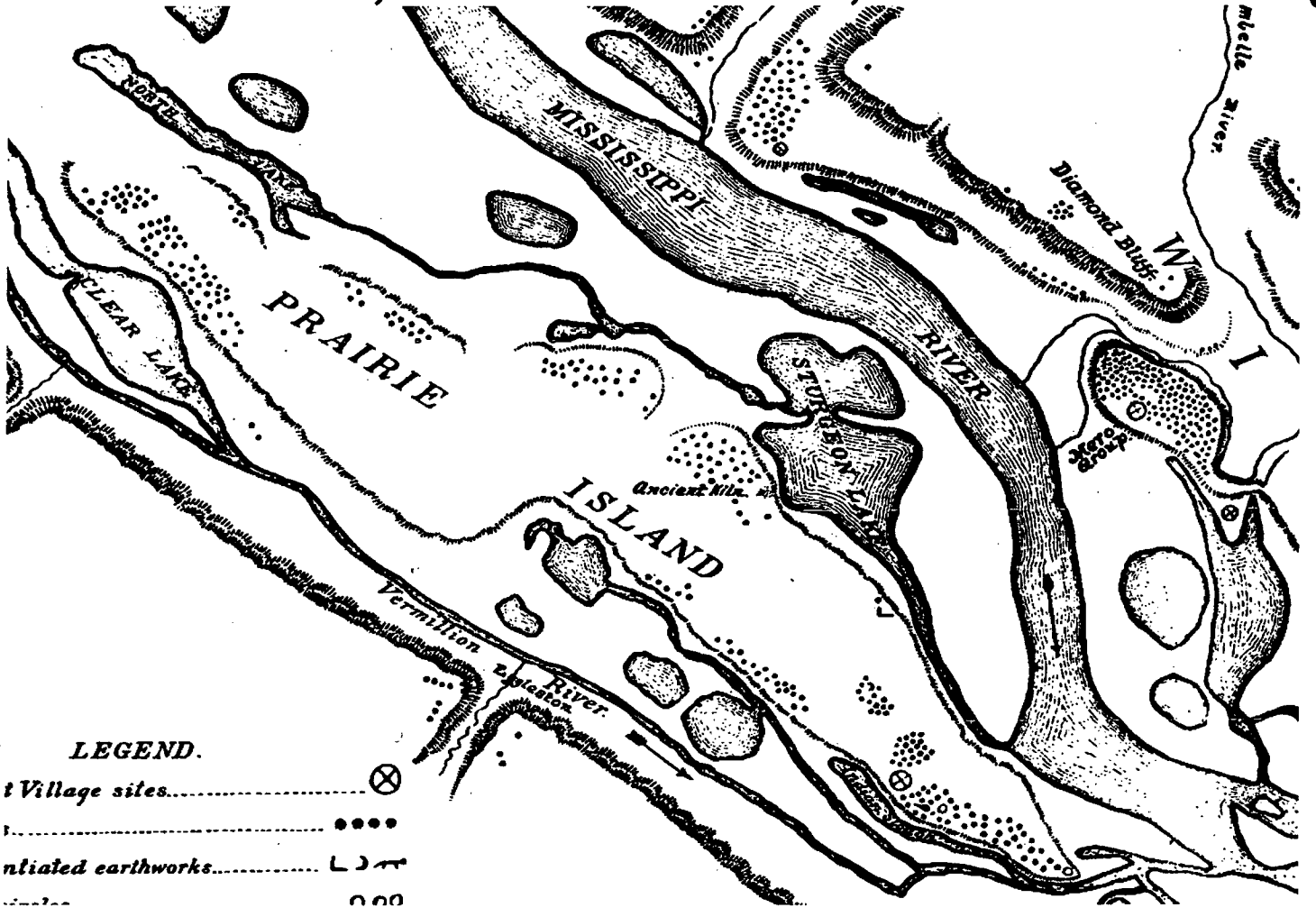

1, 2 & 3 Mile Radius


1-Mile
Gaming Enterprise
Administration Building
Community Center
Education Center
Elders Center
Health/Fitness Facility
345 KV Power Lines
½-Mile
Residential Area
Prairie Island Nuclear Generating Plant
0.5 and 1 Mile Radius
Spent Fuel Storage Installation

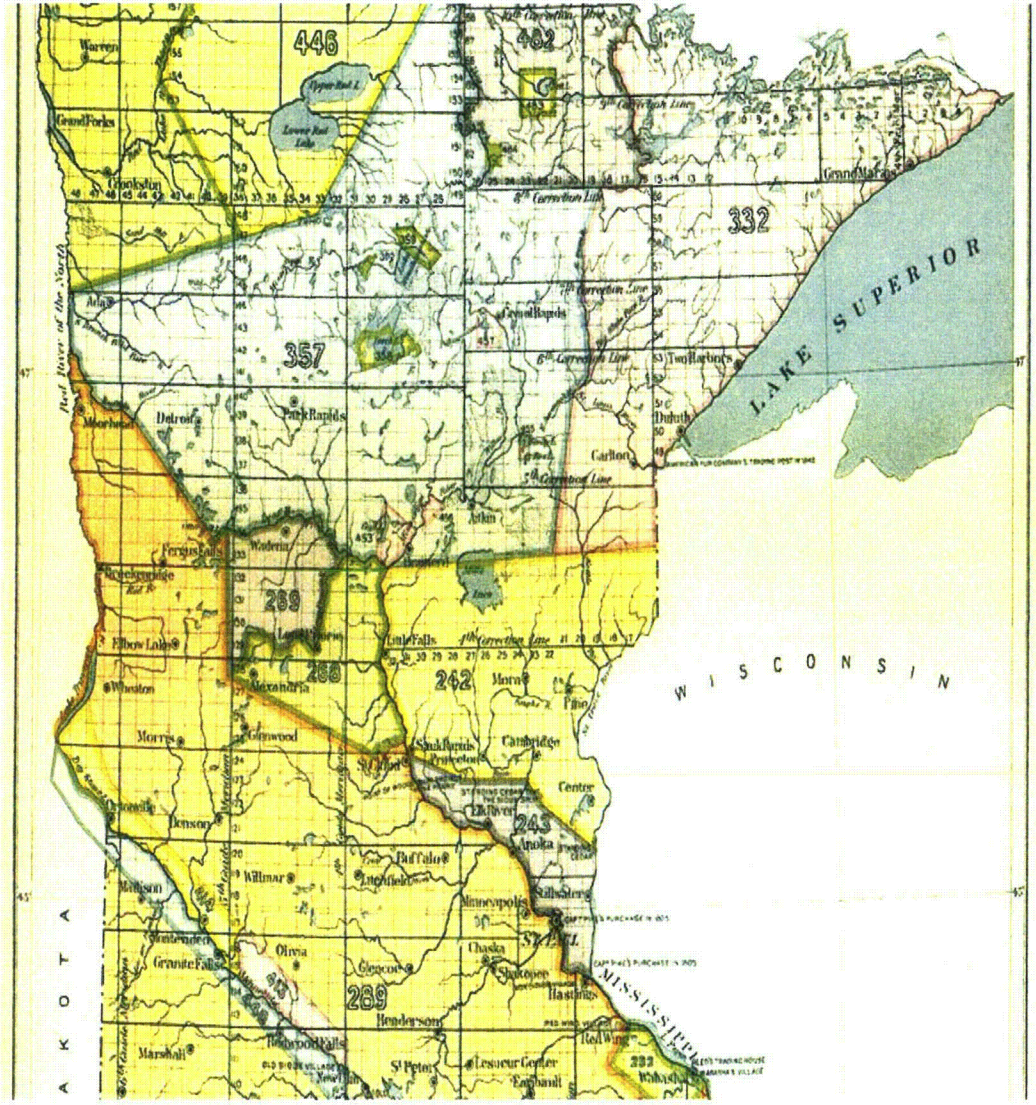
Archaeological and Cultural Resources



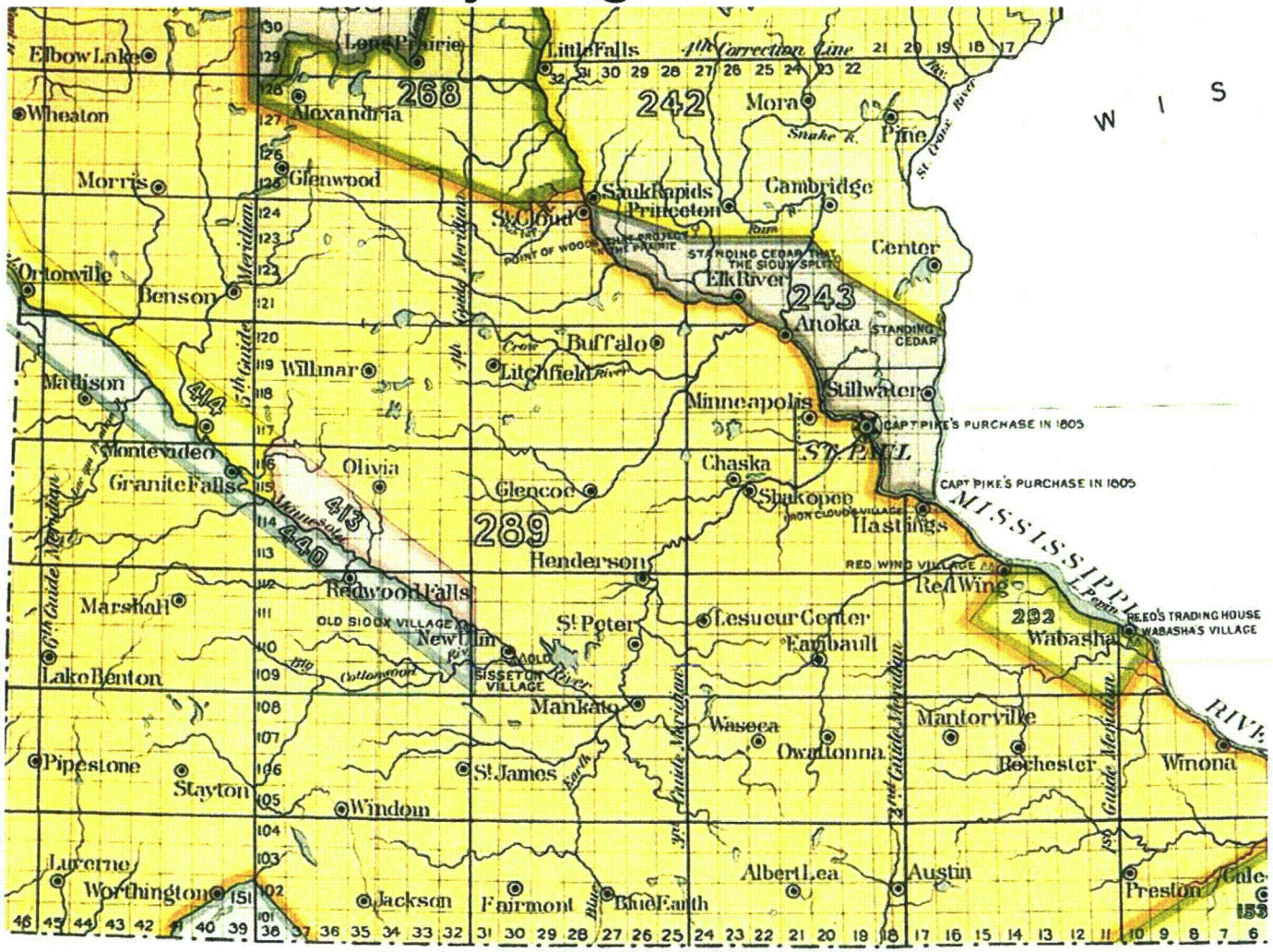
Burial Mounds, Sacred Sites, Ancient Villages



Ancestral Lands and Ceded Territory



Usufructuary Rights



Evolving Tribal Standing Analysis

- Compare *Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138 (1996) with *Northern States Power Co.* (PINGP Units 1 and 2), LBP-08-26, 68 NRC 905 (2008) and *Northern States Power Co.* (PINGP ISFSI), LBP-12-24 (December 20, 2012).

Agency Tribal Relationships - the Environmental Context (1)

- The Indian Trust doctrine
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
  - The United States has a unique legal relationship with Indian Tribal governments
  - Recognizes the right of Indian Tribes to self-government and tribal sovereignty
  - Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies which affect the Tribe

Agency Tribal Relationships - the Environmental Context (2)

- Environmental justice analysis
- Agency Tribal Policies
- Cooperating agencies in the development of EIS

NRC Policies and Protocols

- MOU with the Prairie Island Indian Community of the preparation of the EIS on the license renewal of the Prairie Island Nuclear Generating Plant and the EA for the PINGP ISFSI.
- No overall Native American Policy but recently issued Native American Tribal Protocols
- NRC organizational structure specifically includes Native American considerations

Consultation

- Government-to-Government
  - Tribal Protocols
  - Tribal Councils
  - Tribal staff
- Early in the NEPA process
  - Not at the "public" meeting stage
- Meaningful involvement

Tribal Participation in NRC Regulatory Decision-Making

- Depends on the Tribe
- Competing interests
- Resources may be an issue
  - Financial
  - Human
  - Technical

Tribal View of NEPA

- Mitakuye oyasin (All things are related)
- Integrated and cumulative impacts
- Holistic view
  - Power plant complex is one entity

Tribal Expectations

- Meaningful involvement in process
- More than "consideration" of concerns
- Fullest protection of human health, the environment, natural and cultural resources

Questions?

- Phil Mahowald
- pmahowald@piic.org
- (651) 267-4006