

Citizens' Oversight Projects (COPs)

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COMMENT ON U.S. NUCLEAR REGULATORY COMMISSION

DRAFT PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES

I. INTRODUCTION

President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review" on January 18 2011. Executive Order 13563 directs Federal agencies to develop and submit a plan to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget. The plan should explain how each agency will review existing significant regulations and identify those regulations that can be made more effective or less burdensome while achieving regulatory objectives. Independent regulatory agencies were not covered by this order.

Subsequent to that initial action, the President issued "Executive Order 13579 -- Regulation and Independent Regulatory Agencies" on July 14, 2011¹, which extended the application of EO 13563 to independent regulatory agencies such as the U.S. Nuclear Regulatory Commission ("NRC" or the "Commission").

On November 16, 2011, the NRC published the draft document "Retrospective Review Under Executive Order 13579". The Federal Register summary stated "The purpose of the NRC's review is to make its regulatory program more effective and less burdensome in achieving its regulatory objectives." No comment period was provided for this initial plan.

¹ <http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf>

Later, the "Draft Plan for Retrospective Analysis of Existing Rules" (NRC-2011-0246-004.pdf) was published on November 23, 2012 ("Draft Document".)

Citizens Oversight now provides these comments by regarding the Draft Document.

II. NEW FOCUS OF EO 13563 and EO 13579

Prior to issuing Executive Order 13563, "Improving Regulation and Regulatory Review" and the subsequent Executive Order 13579 -- "Regulation and Independent Regulatory Agencies," the President, on the first day of his administration, issued the Presidential Memorandum "Transparency and Open Government"² which stated that (paraphrased):

Government should be transparent.

Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge.

Government should be collaborative.

The EO 13563 and EO 13579 both referred back to EO 12866 of 1993, "Regulatory Planning and Review"³ which outlined a program to reform and make more efficient the regulatory process. The regulatory philosophy outlined in EO 12866 :

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

So the whole notion of efficient regulations has already been promulgated. The new Executive Orders of 13563 and 13579 add an additional focus which was missing in the original EO 12866, namely

2 <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>

3 http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

the explicit emphasis on participation by the public.

Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

III. NEW FOCUS ON PUBLIC PARTICIPATION SUBSTANTIALLY MISSING FROM DRAFT DOCUMENT

According to the Draft Document:

The draft Plan for public comment includes discussion of the following:

- (a) Efforts to incorporate risk assessments into regulatory decisionmaking;
- (b) Efforts to address the cumulative effects of regulation;
- (c) The NRC's methodology for prioritizing its rulemaking activities;
- (d) Rulemaking initiatives arising out of the NRC's ongoing review of its regulations related to the recent events at the Fukushima Dai-ichi Nuclear Power Plant in Japan; and
- (e) The NRC's previous and ongoing efforts to update its regulations in a systematic, ongoing basis.

However, there is no mention in the scope of any review of openness and public participation as explicitly added from the earlier regulatory review process (EO 12866) by the "Transparency and Open Government" Presidential Memo and EO 13563 and EO 13579. The Draft Document does include section "G. Opportunities for Public Participation" but it does not propose any new opportunities for public participation nor does it attempt to turn back the clock on a closed and secretive culture that has formed at

the NRC, as described below.

IV. COMPLIMENTS ON RECENT HEARINGS ON THIS TOPIC

Before we make suggestions to the Draft Document, it is appropriate to note that Citizens Oversight welcomes the recent "Briefing on Public Participation in NRC Regulatory Decision-Making" which was conducted on January 31, 2013. We find the comments of Christopher Paine, NRDC Nuclear Program Director, to be the most closely aligned with our observations. The work to improve public participation as implied by this meeting SHOULD be folded into the work to address EO 13579 (i.e. the "Draft Document".)

V. CLOSED AND SECRETIVE CULTURE OF THE NRC AND ITS "STAKEHOLDERS"

NRC states that it embraces the concepts of openness and transparency⁴.

Yet, the NRC has a long-standing practice of limiting oversight by the public which still persists, and is not addressed by the Draft Document.

The culture of suppression of public participation was initially founded on reasonable decisions to improve efficiency and reduce the number of hearings and the implied time delays, but have evolved into excessive suppression which has resulted in serious errors and placing the safety of the public at risk.

a) The NRC limits public participation by adopting very restrictive definitions for standing, such as:

i) by requiring that petitioners must have an "interest" in the proceeding and not just "be interested", as described in the executive order

ii) by reducing the window for participation to the absolute minimum (a recent license amendment request included 14 volumes of information, each with over 500 pages, and was processed for over a year by the licensee, yet the public has only 30 days to comment and 60 days to file a petition to intervene and request a hearing, and

ii) by requiring the format of the submission to adhere to arbitrary constraints and essentially provide all arguments, expert testimony, etc. prior to ever being approved for a hearing;

4 <http://www.nrc.gov/public-involve/open/transparency.html>

b) The NRC limits the number of proceedings which are available for participation by reducing the number of license amendments which are processed. This has been done by moving critical information to licensee-controlled documents so that there is very little left in the core license that will be changed, and the licensee controlled documents are then considered proprietary documents which necessitate a non-disclosure agreement before they can be reviewed by the public;

c) The NRC interprets 10 CFR 50.59, the "like-for-like" rule extremely liberally, such that almost no change rises to the level that requires a license amendment, and therefore possible public participation. The recent steam generator failure at the San Onofre Nuclear Generating Station brings this issue to light, because Edison admitted that "a major premise of the replacement project was to avoid NRC approval", meaning they strove to avoid the license amendment process, and therefore public review.

DRAFT DOCUMENT SHOULD INCLUDE MORE ATTENTION TO PUBLIC

INTERACTION:

The scope of the Draft Document should include a review of the process by which the public can participate in the hearing process with attention given to improving the ease which the public can navigate the gauntlet of requirements so as to a) make hearings more common rather than rare; b) to reverse the trend that makes most details of the reactors proprietary and therefore not available for public review and oversight; and c) to review the use of the 10 CFR 50.59 rule allowing the licensee to make changes without public review.

STANDING TOO RESTRICTIVE: The requirements for standing, using arbitrary proximity to the plant, a need for "actual injury" are not in concert with the expectations of the Executive Orders on openness. Those executive order uses the words "interested members of the public" while the NRC uses the concept of "members of the public with an interest," and according the NRC staff, it cannot be a financial or passing interest. It can only be an interest is actual injury from a radiological release from the plant. This is FAR TOO RESTRICTIVE. These concepts of standing should be thrown out. Any member of the public that can spend the time to engage with the NRC should be respected and treasured.

COMMENT/PETITION PERIOD TOO SHORT: The change in technical specifications was in process for over a year and consisted of over 3,000 pages. The comment period of only 30 days is far too short, and is shorter than the 60 days specified in the Executive Order 13563. The Additional time to come up with a petition is also too short, particularly if the threshold for hearing is too high.

HEARINGS SHOULD BE THE RULE, RATHER THAN THE EXCEPTION: Most bodies in the government conduct hearings routinely, and there is not a need for someone to come in and demand one, then make it through a gauntlet of requirements, only to be rejected because of some detail. Involvement by the public should be treasured rather than avoided. For any License Amendment, any License application, any changes that qualify under 50.59 but are substantial (like switching out entire steam generators for \$700 million) and any rule change, a public hearing should be the standard of operation, and should not require endless requests, nor be at the whim of the licensee.

NRC-STAFF AND LICENSEE ARE ON THE SAME SIDE: The typical adjudicatory process assumes there are two parties involved. But the proceedings at the NRC, the petitioner faces two parties that are typically working against the petitioner, both the NRC Staff and the Licensee. When arguments are the same, they should be folded together into one argument, and it would be nice if there were another party that could be on the same side as the petitioner to help get these through the system.

ADJUDICATORY PROCESS IS TOO FORMAL: The process used for hearings is far too formal for many actions, and it is too difficult for the petitioner to foresee everything that must be raised to get through the system. This sort of system benefits the industry players by keeping the public largely out of the process, and everyone is sidetracked on superfluous administrivia and legalities such that the main focus of the contention is never dealt with.

CLOSED COMMISSION MEETINGS MUST STOP: Commission Meetings including discussions by the commissioners are largely held in closed session, followed by a proforma meeting with affirmation vote in public. This is the reverse of all other governmental bodies reviewed by Citizens Oversight.

This practice has been challenged by the Natural Resources Defense Council but they failed to force the NRC to conduct open commission meetings⁵.

The Nuclear Regulatory Commission let Government in the Sunshine Act rules that let it close meetings it had always kept open sit idle for 14 years, but in 1999 decided that its commissioners needed to meet out of the public spotlight except when they were actually deliberating.

The Natural Resources Defense Council objected and sued, saying the agency is closing meetings about nuclear safety when the public has a strong and obvious interest in knowing what is going on at the agency. But a federal appeals court refused to review NRDC's petition, saying that a U.S. Supreme Court decision from 1984 defined a "meeting" subject to the Sunshine Act the same way the agency now defines it.

This is extremely disconcerting, given the new emphasis on openness as directed by the President in the Presidential Memo and Executive Orders.

--> This practice should be part of the review of regulatory procedures and Citizens Oversight requests that the practice of holding closed meetings for all discussions among the commissioners must stop, with the closed session reserved for truly sensitive issues. This change can be implemented immediately because the manner in which the Commission conducts its own meetings is under its own control.

DIRECT LINKS SHOULD BE PROVIDED

The Internet is now the standard information repository, and there are standards with regard to Uniform Resource Locators (URL) so as to allow access of documents.

1. ADAMS URLs DON'T ALWAYS WORK.

The NRC relies on the ADAMS repository, which does not always provide working direct links.

EXAMPLE (I am using Firefox version 18.0)

- go to <http://www.nrc.gov>
- Click "NRC LIBRARY" then "ADAMS PUBLIC DOCUMENTS"
- Click "Begin Web-Based ADAMS Search"

⁵ <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2000/petition-force-open-meeting> -- "Petition to force open meetings for Nuclear Regulatory Commission fails"

- Default is FOLDER VIEW, that will work for this demonstration.
- Open the first folder, I choose February 2013
- Click on the first subfolder, I choose February 05, 2013
- Right click on the first Adobe Acrobat icon, choose "get URL"
- Dialog box shows LINK and URL:

<http://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber='ML13032A076'>

Click the link, you get this error message:

Please check your URL. Either your document was not found, it does not have any content associated, or there was an error in the URL
Please use WBA to re-search and find the requested document.

- The reason for the error is the quotes around the AccessionNumber. You don't need quotes in a properly formatted URL. The URL works in Microsoft Internet Explorer and Chrome, but not in FireFox (18.0.1). Why this error occurs is not clear because the quotes should be passed as-is to your ADAMS engine.

2. HYPERLINKS IN DOCUMENTS. Documents provided by the NRC do not have direct links to other documents that are referenced. Instead of just mentioning the ADAMS Accession Number, the standard should be to install hyperlinks into documents so that a click will pull up the document.

3. HYPERLINKS TO PROCEEDINGS. A given proceeding should have a permanent link to the folder of the docket. At present, there is no way to provide someone a URL to access the entire proceeding.

4. LINKS TO RELATED DOCUMENTS. For every proceeding, project, application, or similar process that submits documents to the ADAMS system or provides videos, etc. to the website, there should be TAGS on any items submitted to the ADAMS system so those items can be associated with the project. All submissions should provide these tags so that a click on the tags will show all the documents that are related to that project.

NRC SHOULD RESPOND TO QUESTIONS FROM THE PUBLIC: On June 18, 2011, there

was a meeting conducted in Dana Point, CA, to brief the public regarding the soon-to-be-released Augmented Inspection Team Report. This was a Category 2 meeting. At that meeting, the facilitator instructed the public to submit questions in writing to the NRC if they did not have time to address the questions that evening. Approximately 30 days later, the AIT Report was released. Interested members of the public reviewed this document and contributed questions to a common document, submitted by Citizens Oversight. There were 87 questions in this document, but they could be grouped into about a dozen similar categories. To date, there has been no answer to any questions. To be fair, a representative did call Citizens Oversight and offered to answer one question, or to set up a 15-minute phone call to answer a question. No written response has been received.

If there is not going to be any effort to answer questions from the public that are submitted in writing, it seems unfair to ask for those questions at such a meeting. Questions implies answers.

PUBLIC SHOULD BE ABLE TO SUBSCRIBE TO ELECTRONIC HEARING DOCKETS

The NRC has an Electronic Information Exchange (EIE) where parties to a docket are provided with electronic copies of documents submitted to a proceeding. However, there is no way for the public to conveniently subscribe to a docket so as to obtain all public documents submitted to the proceeding. The only way to monitor these is to come back to the website and look up the docket to see if anything has changed. This is a multi-step process because there are no direct links to proceedings (See #3 above).

1. The public should be able to subscribe to a docket to receive documents by email that are distributed to other parties in the proceeding.

RSS Feeds shown but not provided

RSS Feeds make it easy to monitor the NRC programmatically. Unfortunately, they don't always work. For example, at <http://video.nrc.gov> there is a little box that says "Subscribe via RSS feeds" but none of the links work.

EVERY PAGE should have RSS feeds provided, including the ADAMS system, the video archives, the hearing dockets, etc. Many of these have no RSS Feeds.

BACKGROUND ON CITIZENS OVERSIGHT

Citizens Oversight, Inc., or "Citizens Oversight Projects" (COPS) which was first organized in 2006 and was incorporated as a 501(c)3 nonprofit in 2011. The primary mission of COPS is to improve oversight of our democratic republic form of government, at all levels. What we quickly discovered is that most governmental bodies have insufficient oversight by the public, and this can frequently result in waste, fraud and abuse. We also learned, over the course of the past six years of studying governmental bodies and agencies, that there is a tendency for these organizations to reduce public participation over time.

There are two distinct avenues for public participation. The most obvious are those opportunities that are specifically provided within the regulations, such as in the Code of Federal Regulations."¹

But also the public is obligated to participate outside the scope of those regulations, yet specifically supported by our democratic republic form of government. To be effective, the public must carefully monitor the activities of the regulatory agencies and the industry they regulate, and if those agencies are not performing their duties -- even if they are following every letter of the law -- the public can, through their elected representatives, modify the regulations of that agency, open official Congressional level hearings, or issue Executive Orders, to name a few.

RESPECTFULLY SUBMITTED:

Ray Lutz, National Coordinator, Citizens Oversight.

RulemakingComments Resource

From: Ray Lutz [raylutz@citizenoversight.org]
Sent: Wednesday, February 06, 2013 5:29 PM
To: RulemakingComments Resource
Subject: Comments to Retrospective Review Under Executive Order 13579
Attachments: COPS comment on analysis for EO 13579.pdf

Please accept these comments from Citizens Oversight for the

Retrospective Review Under Executive Order 13579

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