UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 13, 1985

Ms. Mary C. Erickson
1901 South Ola Vista
San Clemente, California 92672

Dear Ms. Erickson:

Your letter dated January 23, 1985, addressed to Mr. Harold Denton, has been referred to me for reply. Your letter (1) protested the plan to start up San Onofre Nuclear Generating Station, Unit No. 1 without a public hearing, and (2) indicated that there are questions that need to be answered such as embrittlement.

As you are probably aware, in August 1982 the NRC issued an order which confirmed a voluntary agreement by Southern California Edison Company (SCE) to forego the submission of additional technical data demonstrating seismic qualification of all safety systems to 0.5g and to instead modify the facility to a 0.67g level. This issue was raised during the NRC's Systematic Evaluation Program (SEP) for San Onofre Unit No. 1.

Following its review of additional information provided by the licensees, the staff on November 21, 1984, authorized resumption of operations having concluded that such action would not pose an undue risk to the public health and safety. In connection with this action, a hearing was requested by the Sierra Club and others. A copy of the Commission's decision of February 19, 1985, denying that request is enclosed for your information. In this decision, the Commission concluded that the order merely suspended authority to operate pending modifications to the facility and approval by the NRC to restart; no provision of the license itself was modified. Accordingly, a license amendment to restart the facility was not required and under these circumstances, a prior hearing was not required.

The NRC staff has had the generic concern of pressurized thermal shock ("embrittlement") under review for several years. A proposed rule on pressurized thermal shock was published on February 7, 1984 for public comment (49 FR 4498). The rule, when approved by the Commission, will be applicable to San Onofre Unit No. 1, and contains provisions requiring surveillance, reporting, actions to slow the embrittlement, analyses, and corrective actions at certain embrittlement levels. The proposed final rule is scheduled to be forwarded to the Commission for approval during March 1985.

SE01
1/1 Ex(08)

50-206

In closing, it is the NRC staff's position that no open issues exist for San Onofre Unit 1 that would affect the safe operation of the plant and therefore there is no undue risk to the health and safety of the public. I trust that this letter answers your concerns.

Sincerely,

Frank Miraglia/for
Hugh L. Thompson, Jr., Director
Division of Licensing
Office of Nuclear Reactor Regulation

Enclosure:
As stated

DISTRIBUTION DL #768
Central File
ORB #5 Reading
CJamerson
JZwolinski
CGrimes
OELD
DCrutchfield/Schum
MJambor/HThompson
WPaulson
OELD

Retyped by CSchum 3/1/85

*SEE PREVIOUS PAGE FOR CONCURRENCE

DL: ORB #5*	DL: ORB #5*	DL: ORB #5*	OELD*	DL:ADL&A
CJamerson:jb	WPaulson	JZwolinski	SBurns	DCrutchfield
02/12/85	02/12/85	02/12/85	02/22/85	3/5/85

DL:DIR
HThompson
3/12/85

Docket No. 50-206

Ms. Mary C. Erickson
1901 South Ola Vista
San Clemente, California 92672

Dear Ms. Erickson:

DISTRIBUTION
Docket
ORB Reading
CJamerson
JZwolinski
CGrimes
DL 768
OELD
DCrutchfield/CSchum
MJambor
WPaulson

Your letter dated January 23, 1985, addressed to Mr. Harold Denton, has been referred to me for reply. Your letter (1) protested the plan to start up San Onofre Nuclear Generating Station, Unit No. 1 without a public hearing, and (2) indicated that there are questions that need to be answered such as embrittlement.

As you are probably aware, in August 1982 the NRC issued an order which confirmed a voluntary agreement by Southern California Edison Company (SCE) to forego the submission of additional technical data demonstrating seismic qualification of all safety systems to 0.5g and to instead modify the facility to a 0.67g level. This issue was raised during the NRC's Systematic Evaluation Program (SEP) for San Onofre Unit No. 1.

Following its review of additional information provided by the licensees, the staff on November 21, 1984, authorized resumption of operations having concluded that such action would not pose an undue risk to the public health and safety. In connection with this action, a hearing was requested by the Sierra Club and others. A copy of the Commission's decision of February 19, 1985, denying that request is attached for your information. In this decision, the Commission concluded that the order merely suspended authority to operate pending modifications to the facility and approval by the NRC to restart; no provision of the license itself was modified. Accordingly, a license amendment to restart the facility was not required and under these circumstances, a prior hearing was not required.

The NRC staff has had the generic concern of pressurized thermal shock ("embrittlement") under review for several years. A proposed rule on pressurized thermal shock was published on February 7, 1984 for public comment (49 FR 4498). The rule, when approved by the Commission, will be applicable to San Onofre Unit No. 1, and contains provisions requiring surveillance, reporting, actions to slow the embrittlement, analyses, and corrective actions at certain embrittlement levels. The proposed final rule is scheduled to be forwarded to the Commission for approval during March 1985.

I hope that this letter answers your concerns.

Sincerely,

Hugh L. Thompson, Jr., Director
Division of Licensing

Enclosure:
As stated

*SEE PREVIOUS PAGE FOR CONCURRENCE

DL:ORB#5*	DL:ORB#5*	DL:ORB#5*	OELD*	DL:AD/SA	DL:A/DIR
CJamerson:jb	WPaulson	JZwolinski	SBurns GD	DCrutchfield	FMiraglia
02/12/85	02/12/85	02/12/85	02/22/85	/ /85	/ /85

Docket No. 50-206

Ms. Mary C. Erickson
1901 South Ola Vista
San Clemente, California 92672

DISTRIBUTION

Docket	OELD
ORB Reading	DCrutchfield/CSchum
CJamerson	MJambor
JZwolinski	WPaulson
CGrimes	

Dear Ms. Erickson:

Your letter dated January 23, 1985, addressed to Mr. Harold Denton, has been referred to me for reply. Your letter (1) protested the plan to start up San Onofre Nuclear Generating Station, Unit No. 1 without a public hearing, and (2) indicated that there are questions that need to be answered such as embrittlement.

As you are probably aware, in August 1982 the NRC issued an order which confirmed a voluntary agreement by Southern California Edison Company (SCE) to forego the submission of additional technical data demonstrating seismic qualification of all safety systems to 0.5g and to instead modify the facility to a 0.67g level. This issue was raised during the NRC's Systematic Evaluation Program (SEP) for San Onofre Unit No. 1. Had SCE's voluntary agreement not been offered and had SCE submitted data confirming the seismic qualification of equipment to 0.5g, the normal SEP seismic upgrading process would have gone forward without any necessity for a plant shutdown order. Accordingly, the Commission concluded that the order merely suspended authority to operate pending modifications to the facility and approval by the NRC to restart; no provision of the license itself was modified. Accordingly, a license amendment to restart the facility was not required and under these circumstances, a prior hearing was not required.

The NRC staff has had the generic concern of pressurized thermal shock ("embrittlement") under review for several years. A proposed rule on pressurized thermal shock was published on February 7, 1984 for public comment (49 FR 4498). The rule, when approved by the Commission, will be applicable to San Onofre Unit No. 1, and contains provisions requiring surveillance, reporting, actions to slow the embrittlement, analyses, and corrective actions at certain embrittlement levels. The proposed final rule is scheduled to be forwarded to the Commission for approval during March 1985.

I hope that this letter answers your concerns.

Frank J. Miraglia, Acting Director
Division of Licensing

DL:ORB#5	DL:ORB#5	DL:ORB#5	OELD	DL:AD/SA	DL:A/DIR
CJamerson:jb	WPaulson	JZwolinski	SBurns	DCrutchfield	FMiraglia
2/12/85	2/19/85	2/22/85	2/22/85	/ /85	/ /85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

85443?

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

SERVED FEB 19 1985

In the Matter of SOUTHERN CALIFORNIA EDISON (San Onofre Nuclear Generating Station, Unit 1)	Docket No. 50-206

DENIAL OF REQUEST FOR HEARING AND REQUEST FOR STAY

On December 7, 1984 the Sierra Club, the Southern California Alliance for Survival Resources Center, and Tim Carpenter ("Petitioners") filed before the Commission a request for a hearing on an order issued November 21, 1984 by the Office of Nuclear Reactor Regulation and entitled "Contingent Rescission of Suspension" (hereinafter "November 1984 Order"). The November 1984 Order lifted the suspension of operation of San Onofre Nuclear Generating Station Unit No. 1 that had been imposed by an earlier NRC Staff order issued on August 11, 1982. The Petitioners also requested that the Commission stay the November 1984 Order pending completion of the requested hearing, thereby shutting down the facility. The San Onofre Unit 1 licensees, Southern California Edison and San Diego Gas and Electric Company, and the NRC staff opposed the request for a hearing and stay.

8502190186 24pp.

The petitioners filed a lengthy "Reply to Opposition" on December 18, 1984, whereupon the Commission authorized the filing of further opposing briefs by January 9, 1985. The staff and the licensees then responded in detail to the petitioners' "Reply to Opposition". Having carefully considered all this material, the Commission concludes for the reasons given below that the request for hearing and the request for a stay should be denied.

I. Background

San Onofre Unit 1, located on the Southern California coast near Oceanside, is one of the older nuclear generating facilities, having received an operating license in 1967. As part of a Systematic Evaluation Program ("SEP") the staff has been re-evaluating eleven older operating plants, including San Onofre Unit 1. In particular, pursuant to the SEP the staff has been reevaluating the capability of the facility to withstand earthquakes. The original seismic design basis for San Onofre Unit 1 required that the plant be able to shut down safely following a 0.5g Housner spectrum earthquake, in current terminology. See Safety Evaluation Report, Return to Service Plan, San Onofre Generating Station, Unit 1, Docket No. 50-206, November 1984 ("SER").

In May, 1982, during a plant outage, the staff became concerned because of unexpectedly high stresses reported during reevaluation of certain piping systems and mechanical equipment that San Onofre Unit 1

might not meet its original 0.5g design basis. The licensee proposed to the staff by letters of June 15 and 24, 1982 that, instead of undertaking costly analysis to reconfirm that the plant met its original 0.5g design basis, the licensee would instead commit to maintaining the plant in a shutdown condition until completion of a program initiated in 1973 to upgrade the plant to 0.67g, which is the seismic criteria applied to Units 2 and 3 that were later built at the same site. The staff agreed that completion of the 0.67g upgrade program would resolve staff concerns about whether San Onofre Unit 1 met its original design basis. Accordingly, on August 11, 1982 the staff issued an "Order Confirming Licensee Commitments on Seismic Upgrading" (hereinafter "August 1982 Order"), which required that the licensee

> maintain San Onofre Unit 1 in the shutdown condition until modifications described in their submittal dated June 15, 1982 as supplemented by letter dated June 24, 1982 are completed and NRC approval is obtained for restart.

47 Fed. Reg. 36058 (Aug. 18, 1982).

Since the August 1982 Order was issued the licensees have completed a substantial part but not all of the committed-to modifications. As the work progressed it appears that the costs of the modification, together with the costs of the extended shutdown, were found to be greater than the licensees originally estimated.[1] In late 1983 the licensees began to explore with the staff the possibility that,

---

[1] The unexpected costs of an extended shutdown included a requirement by the California Public Utilities Commission that San Onofre Unit 1 either be returned to full service by January 1, 1985 or removed from the licensees' rate base.

consistent with NRC regulations and adequate protection of public health and safety, San Onofre Unit 1 might be returned to service for a limited period while the remaining upgrades needed to reach 0.67g are being completed.

In the November 1984 Order, "Contingent Rescission of Suspension," the staff noted "that there is reasonable assurance that operation of San Onofre Unit 1 can be resumed prior to completion of the seismic reevaluation program without posing an undue risk to public health and safety." The staff stated further "that the licensee has reasonably established the seismic capability of the systems which would provide the capability to achieve and maintain a hot standby condition in the event of a 0.67g modified Housner spectrum earthquake. Moreover, with respect to other systems, the staff stated that "available information indicates that the plant should withstand a 0.5g seismic event, and may even withstand larger events without substantial damage." The Staff documented these conclusions in an accompanying Safety Evaluation Report (SER). Concluding on the basis of this evaluation that public health and safety no longer required suspension of plant operation, the staff rescinded the suspension of operation imposed by the August 1982 Order, "provided that the remainder of the seismic reevaluation program and the resulting plant modification are completed by the end of the next refueling outage" or that the licensees submit an adequate justification for an extension of time. November 1984 Order at 4, 5. The plant resumed operation shortly thereafter. On December 7, 1984 the

Commission received the petitioners' request for a hearing on the November 1984 order and a request for a stay of that order.[2]

II. The Petitioners' Request for a Hearing on the November 1984 Order

At the outset we are confronted by the petitioners' claim that the November 1984 Order is a license amendment and that the Commission is therefore obliged as a matter of law to offer a hearing on the order to interested persons.[3] Since the November 1984 Order does temporarily relieve the licensees of certain burdens imposed by the August 1982 "Order Confirming Licensee Commitments on Seismic Upgradings" and authorizes operation of San Onofre Unit 1 before all the conditions of that earlier order have been met, the petitioners are correct that the November 1984 Order would be a license amendment if the August 1982

---

[2] In an order dated December 10, 1984 the Commission denied the petitioners' request for a decision as early as December 12, 1984 but agreed to an expedited schedule for filing responses. On December 18, 1984 the petitioners filed a lengthy "Reply to Opposition," which greatly expanded upon their original arguments. The Commission thereupon allowed opposing parties until January 9, 1985 to respond to this reply.

[3] Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a), states

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.

Affidavits of the petitioners appear to establish that in all probability they would qualify as interested persons by virtue of residence and activities in the vicinity of the San Onofre facility.

Order had amended the San Onofre operating license. If, however, the conditions for further operations imposed by the August 1982 Order were not made part of the license by that order, then the Commission can modify or suspend those conditions simply by a subsequent order without going through the procedural steps required for a license amendment. In short, unless the August 1982 Order was itself a license amendment, the November 1984 Order rescinding it in part need not be treated procedurally as a license amendment on which interested persons would be entitled to a hearing.

The Commission has concluded that the August 1982 Order confirming the licensee's commitment to complete the 0.67g upgrade program prior to restarting San Onofre Unit 1 did not amend the San Onofre Unit 1 license. Accordingly, the Commission rejects the petitioners' argument that the conditional rescission of that order must be treated as a license amendment. The August 1982 Order in no way expanded the licensee's authority under its 1967 operating license, nor did it authorize or direct the licensees to take actions inconsistent with or not already authorized by its existing license. Instead, as a detailed examination shows, the order cut back on the licensees' authority and was in effect a license suspension, an action which can be entirely distinct from an amendment.[4]

---

[4]The petitioners object to the characterization of the August 1982 Order as anything other than a license amendment in part because of various asserted discrepancies between the form of the order and the requirements of the Commission's regulations governing enforcement orders. 10 CFR Part 2. The Commission sees such discrepancies as

[Footnote Continued]

The San Onofre Unit 1 operating license required that the plant be built and operated so as to withstand earthquakes of 0.5g ground acceleration. The licensees' voluntary commitment to upgrade the plant to 0.67g was in effect a commitment to make the plant safer than its license required. Such an action neither contradicted the existing license nor did it in general call for additional authorization. Similarly, the licensees' decision to keep the plant shut down during the upgrading was an action within the terms of its existing license, since a shutdown is obviously a mode of operation allowable under the Atomic Energy Act without additional authorization. By confirming the licensees' commitment to these actions, thereby making them enforceable by the Commission, the staff's order of August 11, 1982 thus had the effect of suspending the 1967 operating license, which otherwise would have permitted continued operation prior to completion of the 0.67g upgrade, but it did not amend the license or otherwise foreclose the possibility that the licensees' original authority could be promptly restored upon reconsideration by the Commission or upon a finding that

---

[Footnote Continued]

beside the point. It does not follow that if the August 1982 Order did not meet all the formal requirements of an enforcement order, it would then have been a license amendment. This is particularly so since the order did not meet the procedural requirements for a license amendment either, e.g. the prior notice and offer of a hearing to interested persons required by section 189a of the Atomic Energy Act were not included in the order, an omission which would have required an explanation and justification if the order had been intended to amend the license. See 10 CFR 2.204. Finally, if there were defects in the form of the order, they might or might not have been prejudicial to the licensees, but they were not so for the petitioners. Thus the petitioners have no standing to complain of these alleged defects and they cannot use them as a basis for transforming the nature of the order to the disadvantage of the licensees.

circumstances no longer warranted the additional restrictions imposed by the 1982 order. The Commission's ability to suspend a license in this manner and later lift the suspension is a necessary part of its regulatory capability to act quickly in protection of health and safety, without being deterred by concern that prompt action against a licensee may prove difficult to undo later when the need for it has passed.[5]

In sum, then, the August 1982 Order was a suspension of the San Onofre Unit 1 license. The conditions specified for lifting the suspension did go beyond the conditions for operation already in the license, but the order did not formally amend the license to incorporate the added conditions. Accordingly, the staff remained free to relax those conditions if it later perceived they were excessive or no longer required. As an exercise of that authority, the November 1984 Order

---

[5]This is not to say that it would never be appropriate to incorporate into the license a cut-back on licensee authority or imposition of new burdens. The decision is one of agency discretion and intent, however, rather than statutory compulsion. Thus the Commission could have chosen as a matter of discretion to put the "Order Confirming Licensee Commitments on Seismic Upgrading" into the form of an order modifying the license, including therewith the appropriate notice and offer of a hearing to interested persons as required by Section 189a, but it is obvious from the form of the order that this was not the intention. Because of the public interest in the status of San Onofre Unit 1, at the time the August 11, 1982 confirmatory order was issued, the Director of the Office of Nuclear Reactor Regulation issued a "Letter to California Residents" describing the confirmatory order. Nothing in this letter suggested that the licensees' commitment to extend the San Onofre outage until the 0.67 upgrade was completed was being made part of the license. Any persons believing that the commitment should have been made part of the San Onofre license could have petitioned the NRC so to amend the license. 10 CFR 2.206. The 2.206 procedure was well known to interested citizens, who had previously filed such petitions seeking a suspension or revocation of the San Onofre license. No petitions for an amendment incorporating the licensee's commitment were received.

lifted the suspension, temporarily restoring to the licensees the authority they possessed under their original license.[6] It also temporarily and conditionally rescinded the new operating requirements which the staff had imposed as an act of regulatory discretion in its August 1982 Order but had not made part of the license.

There is no statutory requirement for the Commission to offer a hearing on such an order. It is well established that the hearing requirements of Section 189a do not apply when the Commission lifts a suspension.[7] Deukmejian v. NRC, D.C. Cir. No. 81-2035 (decided December 31, 1984), Slip Op. at 49. Similarly, the categories of agency action specifically enumerated in Section 189a for which an offer of a hearing is required do not include the rescission of an order imposing extra-license requirements. Where Congress has made the statutory

---

[6] Contrary to the petitioners' view, we do not see in the staff's 1984 SER any admission that San Onofre Unit 1 is now operating with a smaller margin of safety than its 1967 license required. Rather, it is the staff's position that in view of the extensive upgrading already achieved the margin of seismic safety has been increased, even relative to what the staff believed that margin to be in November 1981, prior to the discovery of the high stress values which aroused the staff's concern regarding whether the original licensing basis was satisfied. See paragraph 14 of Affidavit of Christopher I. Grimes, attached to the "NRC Staff's Response to Sierra Club, et al's 'Reply to Opposition.'"

[7] As a matter of discretion the Commission may offer a hearing prior to lifting a license suspension. This is the course the Commission followed with regard to the restart of Three Mile Island, Unit 1. The Commission decision to require a formal hearing prior to TMI-1 restart was based on the particular circumstances of that case and did not establish an agency requirement for hearings on the lifting of license suspension. The Commission has generally denied such requests. See, e.g., the Commission's lifting of the suspension of the Diablo Canyon low power operating license. In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 19 NRC 953 (1984), aff'd, Deukmejian v. NRC, supra.

hearing requirements explicit, further implicit requirements should not be read into the language of Section 189a. "If a particular form of Commission action does not fall within one of the eight categories set forth in the section, no hearing need be granted by the Commission." Deukmejian v. NRC, Slip Op. at 48. Accordingly, the Commission is not obliged by law to offer the petitioners a hearing on the November 21, 1984 "Contingent Rescission of Suspension."

III. The Petitioners' Request for a Stay of the November 21, 1984 Order

In view of the Commission's conclusion that the November 1984 Order was not a license amendment and that the order has complied with all procedural requirements of the Atomic Energy Act, there is no ongoing proceeding with respect to San Onofre Unit 1. Accordingly, the petitioners' request that the Commission stay the order, thereby shutting down the plant, is properly before the agency only if viewed as a petition for enforcement action filed pursuant to 10 CFR 2.206.[8] Such a request for an immediate shutdown could be granted, even if a license violation could be demonstrated, only in cases of willfulness or of immediate threat to public health and safety. See Petition for Emergency and Remedial Action. 7 NRC 400, 404 (1978) (citing the

---

[8]The provision for filing petitions for enforcement action pursuant to 10 CFR 2.206 does not accord discovery rights, although the granting of a 2.206 petition might lead to a formal adjudication in which discovery would be available. There being no such proceeding involving San Onofre Unit 1, the petitioners' discovery requests filed in connection with their hearing and stay request are not in order.

Administrative Procedure Act, 5 U.S.C. 558(b)). In the present case the NRC staff has specifically found that the operation authorized by the order presents no undue risk to public health and safety.[9] The Commission finds that the staff has given a reasonable explanation of this finding in the SER and the papers filed with regard to the Petitioners' requests. Based on this material the Commission denies the request for a stay.

---

[9] This being so, it is questionable whether the petitioners' claim that restart of San Onofre Unit 1 "must be preceded by an environmental review under the National Environmental Policy Act," even if correct, would justify the immediate suspension of a license until such a review is performed, particularly in the absence of any attempt by the petitioners to show that resumed operation of San Onofre Unit 1 will cause environmental impacts not already analyzed by the agency. Cf. Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); Alaska v. Andrus, 580 F.2d 405 (D.C. Cir.), vacated in part on other grounds sub nom. Western Oil and Gas Ass'n v. Alaska, 439 U.S. 922 (1978). In any event, the Commission rejects the claim that the contingent rescission order required a prior NEPA analysis. The order simply restored the status quo prior to the 1982 suspension order, permitting San Onofre 1 to resume an operation with no anticipated change in the environmental impacts which were evaluated and found acceptable in a Final Environmental Statement issued in October 1973. The Petitioners have suggested no reason why those impacts would be changed by the November 21, 1984 order and none is apparent.

CONCLUSION

For the reasons given above the Request for Hearing and Request for Stay is denied.

Commissoioner Asselstine disapproved this order and his separate views are attached. The additional views of Chairman Palladino and Commissioners Roberts, Bernthal, and Zech are also attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC
this 19th day of February, 1985

DISSENTING VIEWS OF COMMISSIONER ASSELSTINE

The central legal question presented by petitioners' request for a hearing is whether the Commission's November 1984 "Contingent Recission of Suspension" is a license amendment. If it is an amendment, the Commission is most probably required by section 189 of the Atomic Energy Act (AEA) to provide an opportunity for a prior hearing if it cannot make a "no significant hazards consideration" finding. Whether the Commission's November 1984 order amends the license depends upon whether the Commission's original shutdown order of August 1982 was an amendment. If the 1982 order was merely a license suspension and not an amendment, then the 1984 order merely lifts the suspension and no opportunity for a hearing is required. Deukmejian v. NRC, No 81-2035 (D.C. Cir. December 31, 1984).

The Commission has concluded that the August 1982 order did not amend the San Onofre 1 license. The Commission says that the 1982 order is not an amendment because the purpose of the upgrade to .67g was to make the plant safer and that action neither contradicted the existing license nor did it call for additional authorization. Slip Op. at 7. We are told that allowing the plant to operate in the interim until the upgrade is completed was within the terms of the existing authority so that the requirement in the 1982 order that the plant remain shut down pending completion was a license suspension, not a license amendment. The Commission majority says that it has complete discretion, then, to relax any part of the order at any time. Slip Op. at 8. According to the Commission, it could have decided to incorporate the change in authority into the license, but again

that decision is the Commission's. The Commission has, then, according to the majority, complete discretion to label its actions as either amendments or suspensions. Slip Op. at 8.

I cannot agree with the Commission's conclusions. I sympathize with the majority's desire to retain maximum enforcement and regulatory flexibility. I too believe that our enforcement process should not become freighted with overly complex procedural requirements. On the other hand, I do not believe that the Commission has complete and unfettered discretion to determine when procedural rights accrue to interested parties and when they do not. I do not believe that the Commission is correct when it seemingly asserts that any time the Commission goes beyond existing license to require an upgrade or safety improvement the Commission has carte blanche to label that action an amendment or a suspension, and that that label is dispositive for purposes of determining whether the action triggers hearing rights on the part of third parties.

Unfortunately, the available law on the issue of what constitutes a license amendment is somewhat less than clear. In addition, the courts do not appear to have specifically addressed the issue presented by this case. The latest discussion of license suspensions and amendments appears in the Diablo Canyon case decided in December 1984 by the D.C. Circuit. Deukmejian v. NRC, supra. The court decided that the Commission's decision to lift the suspension of the Diablo Canyon license did not trigger hearing rights under section 189 of the AEA. The court did not explain, however, how one determines whether a particular Commission action is an amendment

or a suspension. The court said only that: "The lifting of a suspension does nothing to alter the original terms of the license; indeed, it removes a significant impediment to the enforcement of those terms." Id. at 48. The court also appeared not to object to the statement it quoted from the Sholly [1] case that an amendment is something which "granted the licensee authority to do something that it otherwise could not have done under existing authority." Deukmejian at 47.

The Diablo Canyon case appears not to address the situation in the San Onofre 1 case, i.e. an order which requires additional measures beyond the license requirements. The Diablo Canyon court said that where Commission action allows a licensee to do something it is not authorized to do under existing licensing authority, e.g. relaxes a license requirement, that action amends the license and triggers Section 189 hearing rights. And, where the Commission action suspends a license because a licensee is found not to be in compliance with its license and then the Commission, after determining that the licensee is in compliance, lifts that suspension, third parties do not have a statutory right to a hearing. In the latter case, the Commission's action in lifting the suspension does not create a right to litigate the Commission's determination that the licensee is in compliance with the terms of the suspension order. However, the Court did not address the two questions relevant to the San Onofre situation: (1) whether and under what circumstances additional, new requirements beyond

---

1/ Sholly v NRC, 651 F.2d 780 (D.C. Cir. 1980) vacated on other grounds, 103 S.Ct. 1170 (1983).

what the license requires amend the license, and (2) what Commission action with regard to these new requirements triggers a right to a hearing.

The Commission urges that in the case of a safety improvement whether a Commission action amends the license or merely suspends it depends solely on Commission intent and the label the Commission attaches to the action. There does not appear to be any reliable law on this subject which interprets the AEA. In Sholly, the Court indicated that Congress intended that "any significant change in the licensing status of a nuclear power plant" gave rise to an opportunity to intervene before that change could occur. 691 F.2d at 791. However, the Diablo Canyon court cast doubt on the continued validity of that statement. The court said that this dictum in Sholly was "inadequate precedent for the proposition that any significant change in the licensing status of a nuclear power plant triggers the procedural protection of section 189 (a)." Deukmejian, slip op. at 48. The Court did not explain, however, what standard should apply for determining when a license is amended. It only said that a license suspension does not alter the terms of the license. To the best of my knowlege, no other case interpreting the Atomic Energy Act sheds substantial light on this issue.

Although it does not deal with Section 189 of the AEA, a case in which the D.C. Circuit interpreted the hearing requirement of the Communications Act of 1934 may be helpful. Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984). The Court held that where a license is granted subject to certain express conditions set forth in the license and the regulations, and the licensee

then fails to meet those conditions, action by the FCC to revoke the license is not a "license modification", but rather the enforcement of the original license conditions. The Court said that whether the license has been modified depends upon whether agency action "substantially affected" an unconditional right conferred by the license. Id. at 927-928. The Court also said that the label attached to the agency action was not dispositive and that a reviewing court "must look beyond the form of the license document and beyond the language employed by the FCC to describe its action." Id. at 927.

The Temmer standard is consistent with the court's Diablo Canyon decision. I hesitate, however, to make general pronouncements about wher an upgrade to a plant constitutes an amendment of the license. I am also reluctant to conclude that the staff has no flexibility to alter its decision about what change is needed at some later time. Such an absolute rule could only lead to a reluctance on the part of the staff to issue enforcement orders because they do not want to get "locked into" a position. I think this issue is best handled on a case by case basis to ensure reasonable enforcement flexibility. However, for lack of something better I have used the Temmer standard as guidance in concluding that the 1982 order for San Onofre 1 amended the license. The order at issue here was a substantial change to a fundamental part of the license, the seismic design basis. Further, the Commission's order prohibited operation of the facility until the changes were completed. Thus, the order substantially affected a condition of the license. I therefore conclude that the 1982 order amended the San Onofre 1 license. By removing the condition that the plant remain

shut down while the modifications were in progress, the 1984 order amended the license again.

However, deciding that a particular Commission action is a license amendment does not end the inquiry. We must also determine what hearing rights accrue. A case with some relevance to this issue is Bellotti v NRC, 725 F.2d 1380 (D.C. Cir. 1983). In Bellotti, the Commission issued an Order Modifying License which amended Boston Edison's Pilgrim operating license to require development of a plan for reappraisal and improvement of management functions. The Attorney General of Massachusettes petitioned to intervene in the enforcement proceeding and asked to litigate various issues related to compliance with the Commission order. The Court held that the Commission could properly deny the petition to intervene because the issues the Attorney General wanted to litigate went beyond the scope of the hearing as defined by the Commission's amendment order. The Court said:

> The Commission's power to define the scope of a proceeding will lead to the denial of intervention only when the Commission amends a license to require additional or better safety measures. Then, one who, like petitioner Bellotti, wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to section 2.206's petition procedures.

The Court says, then, that even where the Commission amends a license to require additional or better safety measures it can deny a hearing on that amendment to third parties. However, the court went on to say:

> If, on the other hand, the Commission proposes to amend a license to remove a restriction upon the licensee, the scope of the proceeding is defined by that proposal and section 189(a) permits public

participation to oppose that relaxation. The upshot is that automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare.

This language is extremely broad and if read literally suggests that the need for a hearing depends upon whether the proposed agency "action" has the potential for increasing or decreasing public safety; if the latter, the public has an automatic right to a hearing. If that test is applied to the San Onofre 1 case the public had no right to a hearing on the issuance of the August 1, 1982 order because it involved a safety improvement. The public would also have no right to a hearing on whether the terms of the order had been satisfied, but would have an automatic right to a hearing if the NRC were to relax the requirements of that order.

It is not clear what weight we ought to give the court's language because it appears to be dictum. Also, I cannot believe that the D.C. Circuit intended the anomalous situation described above. A basis for the court's decision was the desire to maintain enforcement flexibility in the agency by not encumbering the enforcement process with numerous procedural requirements. 725 F.2d at 1382. The Court obviously was concerned about discouraging the use of orders because the Commission feared it would be "locked in". On the other hand, the court obviously did not mean to exclude all public participation on enforcement matters especially where amendments to the license were involved.

Again, I hesitate to generalize because of the impact such generalizations could have on the agency's enforcement flexibility. However, in this case,

I believe that the modifications to the license and the issues involved are significant enough that a relaxation of the conditions imposed by the 1982 order triggers the hearing requirement of Section 189. Indeed, these issues are of sufficient importance that even if a hearing is not legally required the Commission should have granted a hearing as a matter of discretion.

Setting these procedural issues to one side, however, I have other, nonprocedural concerns about the decision to allow restart of San Onofre 1 at this time. The decision to put the licensee's commitments into order form was based partly on an apparent reluctance by Southern California Edison (SCE) to complete the upgrade in a timely manner and because of a concern that the plant did not ever meet the existing licensing requirement that the plant meet the seismic design basis of .5g. I am unable to agree to an alteration of the order because I do not believe these concerns have been adequately resolved. As long as the plant is permitted to operate, there is little incentive for SCE to complete the upgrade. In fact, the schedule for completion of the modifications set out in the Commission's Contingent Recission order seems to require little in the way of timely completion. Further, I am extremely uncomfortable with the staff's finding that the plant is "reasonably likely" to withstand an earthquake with ground motions of .5g. This does not appear to be the same standard the staff would normally apply to issues such as this. Thus, the staff seems to be accepting a lesser margin of safety in determining whether the plant now meets its original seismic design basis than it requires in other cases. This is particularly troubling in view of the staff's conclusion that the correct seismic design basis for the San Onofre site is in fact .67g rather than the .5g figure adopted at the time of licensing San Onofre 1.

Finally, I am concerned by the fact that the motivating factor for the Commission's relaxation of its 1982 order was originally not a determination that the changes are no longer necessary, but that it is too expensive to keep the plant shut down while they are made. As I have said before, I do not believe that the financial difficulties of licensees should be a factor in our decisions whether to relax safety requirements.

In conclusion, I believe the Commission's 1982 order modified the San Onofre 1 license and that the 1984 order was a further amendment of the license. Section 189 of the Atomic Energy Act requires that a hearing be held in this case. I voted not to allow restart of Unit 1 in November of 1984, and I would now grant the Sierra Club's request for a stay of the Commission's decision.

Additional Views of Chairman Palladino and Commissioners Roberts, Bernthal and Zech in San Onofre 1

Commissioner Asselstine states in his dissent (at page 9 of the typed copy) that ". . . the motivating factor for the Commission's relaxation of its 1982 order was originally not a determination that the changes are no longer necessary, but that it is too expensive to keep the plant shut down while they are made."

This statement is not correct. The correct and complete explanation of the Commission's position is set forth in its previous statement in the San Onofre 1 proceeding which has not heretofore been publicly issued:

"Considering all relevant circumstances, the Commission has decided that the August 1982 order should not be read as having amended the license to operate the San Onofre 1 reactor. The essence of the rationale for this conclusion is:

First, the Commission believes that it needs the enforcement flexibility that orders give it, and it is concerned that treating the August 1982 order as an amendment will discourage the practice of making licensee commitments legally binding. Second, there is no contemporaneous information which suggests that the August 1982 order was intended to amend the license. Indeed, the order resulted from a voluntary agreement by the licensee to forego the submission of additional technical data demonstrating qualification of all safety systems to 0.5g and to instead modify the facility to a 0.67g. level. Had this voluntary agreement not been offered and had the licensee submitted data confirming qualification of equipment to 0.5g, the normal SEP upgrading process would have gone forward without any necessity for a plant shutdown order. Thus, the order merely suspended authority to operate pending modifications to the facility and approval by the NRC to restart. No provision of the license itself was modified.

The staff is directed to handle the restart matter procedurally according to the foregoing conclusion. The staff prior to authorizing restart must first make all of the required safety findings as it does in any other similar situation. The basis for approval of restart would be that continued suspension of the authority to operate is no longer required adequately to protect public health and safety."

Commissioner Asselstine subsequently indicated that he did not support this Commission decision. He provided the following statement of views:

> "I do not support the Commission decision to allow San Onofre 1 to return to service at this time. I am in essential agreement with the points raised in the November 5, 1984 memorandum from the Office of the General Counsel regarding San Onofre 1 restart. Specifically, I believe that the changes to the operation and design of the plant that were included in NRC's confirmatory order of August 11, 1982 were so substantial that they must be considered an amendment to the license. Therefore, the subsequent order relaxing those changes must also be considered a license amendment. In addition, I am troubled by the

Commission's reliance on the economic impact on the licensee of the California Public Utilities Commission's ruling as the basis for relaxing the safety requirements called for by the August 1982 confirmatory order. I believe that in the context of this case, reliance on such economic impacts to relax safety requirements is inappropriate. Finally, I am concerned about the reductions in the margin of safety for this plant that are involved in the relaxation of the August 1982 order."

The Commission has provided the following response to Commissioner Asselstine's comments:

"The Commission believes it is important that the basis for its decision on the procedural issue concerning restart of San Onofre 1 be accurately understood.

"The action of the majority is consistent with the advice given to the Commission by its Office of the General Counsel. That office advised the Commission, both orally and in writing at the public meeting of the Commission on November 21, that the Commission had the legal authority to decide the procedural issue (i.e., whether the August 1982 confirmatory order should be construed to be an amendment) as it chose to do as a matter of regulatory policy.

"As to the equities involved, given the California PUC order, the NRC was called upon in keeping with its broad statutory responsibilities and in fairness to the licensee, to determine promptly whether or not restart could be authorized consistent with the protection of public health and safety. While the Commission was aware of the PUC action and the need for a timely NRC decision, the resumption of operations at San Onofre 1 was authorized by NRC on the basis of a technical judgment that there is reasonable assurance that such operation during completion of seismic reevaluation does not pose undue risk to public health and safety. The Commission decision on the procedural issue was grounded on policy considerations relevant to the Commission's licensing and enforcement responsibilities and, as noted above, the legal authority which was available in the circumstances.

"Finally, having made that legal and policy decision, the Commission directed that the staff, prior to authorizing restart, make all the required safety findings that it must in any similar situation. It is the Commission's understanding that staff is satisfied that all systems necessary to achieve a hot standby condition have been upgraded to 0.67g, thereby making the plant substantially safer than it was when originally licensed. As to the upgrade of remaining safety systems, while seismic evaluation continues, operation of San Onofre Unit 1 at this time rests on an NRC judgment similar to the judgment to be made in other Systematic Evaluation Program (SEP) cases. That SEP judgment addresses the question whether, under the specific circumstances of a particular case, operating authority must be suspended while issues concerning plant design are addressed.

"Staff has presented to the Commission its technical judgment that, consistent with protection of public health and safety, the margin of safety is reasonable and adequate to authorize restart of San Onofre 1 and that continued suspension of operating authority is not necessary. The Commission finds no basis upon which to contravene staff's technical finding favorable to that restart."