

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Title: AFFIRMATION/DISCUSSION AND VOTE

Location: ROCKVILLE, MARYLAND

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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AFFIRMATION/DISCUSSION AND VOTE

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PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Thursday, November 30, 1989

The Commission met in open session, pursuant to notice, at 3:30 p.m., Kenneth M. Carr, Chairman, presiding.

COMMISSIONERS PRESENT:

KENNETH M. CARR, Chairman of the Commission
THOMAS M. ROBERTS, Commissioner
KENNETH C. ROGERS, Commissioner
JAMES R. CURTISS, Commissioner

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STAFF SEATED AT THE COMMISSION TABLE:

SAMUEL J. CHILK, Secretary

WILLIAM C. PARLER, General Counsel

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P-R-O-C-E-E-D-I-N-G-S

3:35 p.m.

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3 CHAIRMAN CARR: Good afternoon, ladies and
4 gentlemen.

5 This is an affirmation session. We have two
6 items to come before us this afternoon.

7 Before I ask the Secretary to lead us
8 through the items for affirmation, do any of my fellow
9 Commissioners have any opening comments they would
10 like to make?

11 If not, Mr. Secretary, you may proceed.

12 SECRETARY CHILK: The first item, Mr.
13 Chairman, is SECY-89-343. It's a request for hearing
14 on a St. Lucie exemption.

15 In this paper, the Commission is being asked
16 to act on an order responding to a request by Thomas
17 J. Saporito, Jr., for a hearing on an exemption from
18 the Commission's regulations granted by the staff to a
19 Commission licensee. All Commissioners have approved
20 an order which was attached to our memorandum of
21 November 28th, which denies the request.

22 Would you please affirm your votes?

23 CHAIRMAN CARR: Aye.

24 COMMISSIONER ROBERTS: Aye.

25 COMMISSIONER ROGERS: Aye.

1 COMMISSIONER CURTISS: Aye.

2 SECRETARY CHILK: The second item is SECY-
3 89-248. It's a rulemaking on sequestration of
4 witnesses interviewed under subpoena and exclusion of
5 attorneys.

6 The Commission is being asked to approve a
7 final rule in this paper which provides for the
8 sequestration of witnesses compelled by subpoena to
9 appear in connection with NRC investigations or
10 inspections.

11 The amendment also provides for the
12 exclusion of counsel for a subpoenaed witness when
13 that counsel represents multiple interests and there
14 is reasonable basis to believe that such
15 representation will prejudice, impede, or impair the
16 integrity of the inquiry.

17 All Commissioners have approved the final
18 rule as attached, again, to our memorandum of November
19 28th.

20 Would you please affirm your votes?

21 CHAIRMAN CARR: Aye.

22 COMMISSIONER ROBERTS: Aye.

23 COMMISSIONER ROGERS: Aye.

24 COMMISSIONER CURTISS: Aye.

25 CHAIRMAN CARR: Is there anything else to

1 come before us today?

2 SECRETARY CHILK: I have nothing else, sir.

3 CHAIRMAN CARR: If not, we stand adjourned.

4 (Whereupon, at 3:38 p.m., the above-
5 entitled matter was concluded.)

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CERTIFICATE OF TRANSCRIBER

This is to certify that the attached events of a meeting
of the United States Nuclear Regulatory Commission entitled:

TITLE OF MEETING: AFFIRMATION/DISCUSSION AND VOTE

PLACE OF MEETING: ROCKVILLE, MARYLAND

DATE OF MEETING: NOVEMBER 30, 1989

were transcribed by me. I further certify that said transcription
is accurate and complete, to the best of my ability, and that the
transcript is a true and accurate record of the foregoing events.

Carol Lynch

Reporter's name: Peter Lynch

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RULEMAKING ISSUE

August 15, 1989

(Affirmation)

SECY-89-248

For: The Commissioners

From: William C. Parler
General Counsel

Subject: RULEMAKING ON SEQUESTRATION OF WITNESSES
INTERVIEWED UNDER SUBPOENA/EXCLUSION OF
ATTORNEYS

Purpose: To recommend that the Commission promulgate the attached draft final rule relating to the sequestration of witnesses during the conduct of investigative interviews and the exclusion of counsel representing multiple interests.

Discussion: On November 14, 1988, the Commission published in the Federal Register for public comment a draft rule which provided for the sequestration of all witnesses interviewed in connection with NRC investigations. The proposed rule also provided for the exclusion of counsel who represents multiple interests when there is a reasonable basis to believe that such representation might prejudice, impede, or impair the integrity of an investigation.

After reviewing the public comments, OGC is recommending that the Commission promulgate a slightly revised rule. In response to the comments, the draft final rule clarifies the meaning of the term "sequestration" and identifies more clearly the circumstances under which certain counsel may be excluded. The rule also includes additional

Contact:
C. Evans, OGC
x21632

procedural requirements to govern the exclusion process. The attached draft final rule provides a detailed explanation of the rule and the changes that have been made as a result of the comments.

Coordination: EDO comments have been incorporated.

Recommendation: That the Commission publish the attached draft Federal Register notice as a final rule to become effective thirty days after publication.


 William C. Parler
 General Counsel

Attachment:
Draft Federal
Register notice

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Thursday, August 31, 1989.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Thursday, August 24, 1989, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for consideration at an Open Meeting during the Week of September 4, 1989. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ATTACHMENT

NUCLEAR REGULATORY COMMISSION
RIN 3150-AD06
Part 19 10 CFR
Sequestration of Witnesses Interviewed Under
Subpoena/Exclusion of Attorneys

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission ("NRC") is amending its regulations to provide for the sequestration of all witnesses interviewed in connection with NRC investigations. These amendments also provide for the exclusion of counsel who represents multiple interests when there is a reasonable basis to believe that such representation might prejudice, impede, or impair the integrity of an investigation. These amendments are designed to ensure the integrity of the investigative process by promoting candor. These amendments are also intended to serve as notice of the rights and responsibilities of the NRC and the rights of individual interviewees, licensees and attorneys when exclusion authority is exercised.

EFFECTIVE DATE: [Insert 30 days after publication in the FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Carolyn F. Evans, Attorney, Office of the General Counsel, telephone (301) 492-1632, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

SUPPLEMENTARY INFORMATION:

I. Background

On November 14, 1988, (53 FR 45768) the Nuclear Regulatory Commission published in the Federal Register proposed amendments to its regulations found at 10 CFR Part 19. The amendments provided for the sequestration of all witnesses (and their counsel, if any) compelled to appear under subpoena before NRC representatives. The amendments also provided for the exclusion of counsel representing dual interests (specifically, licensee's and employee's) whenever the NRC investigator had a reasonable basis to believe that counsel's representation of these interests might impair or impede the investigation. January 6, 1989, (54 FR 427) the NRC published in the Federal Register a notice that extended the original 60-day comment period for an additional 30 days to February 9, 1989.

During the 90-day comment period, the Commission received 22 comments. Commenters included utilities, law firms representing utilities, the Nuclear Utility Management and Resources Council (NUMARC), the Nuclear Information and Resource Service and an individual. All comments are available for inspection and copying in the agency's Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, DC.

The Commission has considered all the comments and wishes to express its appreciation for the thoughtful views expressed. In response to the comments, the rule has been revised to clarify the meaning of the term "sequestration" and to identify more clearly the circumstances under which exclusion authority is to be exercised. The rule also includes additional procedural requirements to govern the exclusion process. A review of the specific comments and the Commission's responses to these comments follows.

Before addressing other more substantive comments, the Commission will first address the remarks of some commenters regarding the necessity for the exclusion of counsel provisions of the rule. The Commission is extremely sensitive to the commenters' concerns and reservations in this regard, for we recognize that a decision to exclude an individual's chosen counsel is an extraordinary action. It is still our view, however, that a rule is needed. This is so for several reasons.

One means by which the Commission satisfies its statutory responsibility of ensuring the public health and safety is through investigation of unsafe practices and violations of the Atomic Energy Act and NRC regulations. Investigators from NRC's Office of Investigations must often interview licensees, their employees, and other individuals having possible knowledge of matters under investigation which are of regulatory interest to the NRC. When interviewing the employees of a licensee, investigations officials are especially sensitive to the need to provide these witnesses an atmosphere which encourages and promotes candor. This may be especially true during an investigation of a violation of the Commission regulations involving the harassment or intimidation of employees for raising safety issues. The very identification and correction of unsafe practices or regulatory violations often requires this if the public's health and safety are to be adequately safeguarded.

Difficulties have resulted in some cases where a licensee's counsel or counsel retained by licensee has sought to represent the employees of the licensee during interviews. This dual representation has inhibited the candor of these witnesses who, quite naturally, have been hesitant to divulge information against the interests of their employer in the presence of licensee's counsel or counsel retained by the licensee. For example, recently

during the course of conducting an investigation at an NRC-licensed facility, the investigator was approached by an individual previously interviewed. This individual informed the investigator that during his interview he wanted to answer questions in greater detail but felt uncomfortable about doing so with the licensee corporate attorney present. The result of dual representation is that the overall effectiveness of NRC investigations has been reduced.

The Commission's ability to safeguard the public health and safety through an effective investigative process is especially impaired when NRC investigators must interview an employee who represented by counsel and that counsel states before any interview that he or she intends to tell the licensee everything that is said during the interview, regardless of whether or not what the counsel tells the licensee may somehow jeopardize an interest of the employee. Contrary to the commenters' assertions regarding a lack of factual support for the rule, and as the Commission pointed out in its statement accompanying the proposed rule, there have been several instances where a licensee's counsel has stated his or her intent to do this. This situation has the very real potential of frustrating the objectives of the investigation by chilling the candor of the employee witness who knows or at least believes that, in the final analysis, counsel's allegiance lies with the licensee, and that by providing information contrary to the interests of his or her employer this may be adverse to the employee's interest in continued or rewarding employment.

By setting forth guidance in this area, the Commission hopes to avoid the confusion and delay which occurred in the absence of a rule when dual representation issues were resolved on an ad hoc basis. This rule also serves to notify all affected persons and entities of Commission policy in this area and constitutes a statement of the rights of the licensee, its employees, and attorneys and the responsibilities of the NRC when exclusion authority is

exercised. As we stated previously in the notice of proposed rulemaking, the Commission is not suggesting that dual representation alone can form the basis for an exclusion decision. However, where the investigator concludes that an attorney's representation of both the licensee and its employees poses a threat to the effectiveness of an NRC investigation, then exclusion may be warranted. The investigator who, in the final rule, is still required to consult with the Office of the General Counsel before exercising exclusion authority, is in the best position to assess when the presence of licensee counsel or counsel retained by the licensee (particularly counsel who expresses an intent to inform the licensee of what has been said) will impede or impair the particular investigation.

Some of the commenters contend the Commission's concern with preventing an attorney from advising a licensee of what has been said during the investigative interviews of employees is misplaced as there is nothing wrong with an attorney doing this. The Commission disagrees. Secrecy is often a necessary element of an ongoing probe so that those under investigation and other prospective witnesses might not be warned of what has been asked and answered and so aided in thwarting the inquiry. When the integrity of an NRC investigation depends on the licensee not being apprised of information relating to the nature, scope or focus of the inquiry, counsel who compromises that integrity by advising the licensee of what was asked and answered has committed an improper act, at least from a regulatory standpoint. In addition, it may be improper for an attorney to divulge to a licensee client the testimony of its employees who are also clients of the attorney, particularly in cases where the employees suffer adverse consequences as a result of the divulgence. These concerns are not theoretical. There have been several instances in which concerns about counsel disclosures have impeded

investigations. For example, in one instance company lawyers gathered potential interviewees and advised them that NRC investigators were coming to interview them and advised them that the NRC would compare testimony of those persons interviewed and attempt to find conflicts which could result in criminal sanctions against the individuals. Interviewees were encouraged to have company counsel present during all interviews for their protection. The licensee advised our Office of the Investigations that any interviews conducted on-site would be in the presence of a company attorney. To avoid potential compromise of the investigative process, the interviews were conducted off-site after normal work hours at various locations convenient to the employees. This extended the investigation by several months.

A number of commenters contend there is already a statutory and regulatory scheme in place to protect against the concerns expressed by the Commission. These commenters cite the obstruction of justice statute, 18 U.S.C. 1505, Section 210 of the Energy Reorganization Act and its implementing regulations, and 10 CFR 50.7 as providing sufficient safeguards against the concerns articulated in the rule. The Commission agrees that the statutory provisions cited by the commenters may well protect against some of the concerns expressed in the rule; however, these provisions are an inadequate means for accomplishing an expeditious administrative remediation of potential impairments to NRC investigations, a major goal of the rule.

In the past, there have been only a limited number of investigations which would have warranted the exclusion of a particular attorney. This fact suggests, and indeed it is the Commission's intent, that exercise of exclusion authority be confined to extremely compelling cases.

A. General Comments - Sequestration

The majority of comments relate to the exclusion of counsel provisions of the rule. However, several commenters have raised concerns regarding the rule's sequestration provisions. The Commission's responses to these concerns are set forth below.

1. Sequestration Is Defined In An Anomalous Manner.

Several commenters have indicated that the term "sequestration" is defined in an anomalous or confusing manner. These commenters, however, do not indicate in what respect they are confused. The term is intended to have its common meaning which is the act of separating or isolating persons during the course of trial, but in this context, investigative interviews. Some of the confusion may have arisen from the Commission's characterization of the act of prohibiting counsel from attending the interviews of employees as a sequestration. The proper term for the act of removing counsel under the rule is actually "exclusion". The definitions have been slightly revised in the final rule to clarify the meaning of terms.

2. Implementation Of The Rule Will Violate Witnesses' First Amendment Rights.

NUMARC and several other commenters have expressed concern that the provisions governing the sequestration of witnesses would also apparently bar discussions among interviewees in contravention of the First Amendment protections of freedom of speech and association. The Commission disagrees. The rule, which is reasonably related to the legitimate investigative function of the NRC, neither by its terms nor in its intended application effects a prohibition on the communications or associational rights of witnesses either before or after an interview. The rule is designed to discourage fabrication,

inaccuracy, and collusion during the course of the investigative interview, and no more restricts an individual's First Amendment rights than does Federal Rule of Evidence 615, the provision upon which it is based.

B. General Comments - Exclusion Of Counsel

1. Rule Unnecessarily Infringes Upon A Witness' Right To Counsel Of Choice.

Virtually all of the commenters expressed concern that implementation of the proposed rule would deprive witnesses of the fundamental right to counsel of choice as guaranteed by section 6(a) of the Administration Procedure Act (APA). 5 U.S.C. 555. In this context, one commenter contends that in view of what it perceives as the dual nature of NRC investigations, i.e., that they are conducted for civil and/or criminal purposes, the constitutional implications of depriving subpoenaed witnesses of the right to counsel should not be lightly disturbed. A significant number of commenters also asserted that the "reasonable basis" standard for exclusion of counsel is contrary to established judicial precedent and the recommendations of an NRC advisory committee which explored the merits of adopting a sequestration rule at the NRC in 1983. See, Report of the Advisory Committee for Review of the Investigation Policy on Rights of Employees Under Investigation, September 13, 1983. (This report is available for inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, DC.).

The Commission recognizes that the right to select and be represented by an attorney of one's own choosing is not to be lightly disturbed. This right, however, "does not override the broader societal interests in the effective administration of justice . . . or in the integrity of [the] legal system." In re: Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 250-251 (2d Cir.) cert. denied, sub nom. Roe v. United States 475 U.S. 1108 (1986); United States v.

Reese, 699 F.2d 803 (6th Cir. 1983). Thus, the right may be circumscribed, not only in the context of criminal proceedings where it is most critical, see, Wheat v. United States, 486 U.S. ___, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988), but also in the context of administrative proceedings under the APA. See, SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). As discussed below, the Commission, in its final rule, has sought to make it clear that exclusion authority is to be confined within discernible limits.

A number of commenters contend that exclusion of counsel under a "reasonable basis" standard would hardly be within permissible limits. According to these commenters, the "concrete evidence" standard articulated by the D.C. Circuit in Csapo represents the proper standard for disqualification of counsel.

Since Csapo, neither the D.C. Circuit nor any other court has had the occasion to consider whether an administrative agency must still meet a concrete evidence standard before an exclusion decision will be sustained. We do note, however, that in the context of criminal proceedings where the right to counsel of choice is of constitutional dimension, the Supreme Court has said that trial courts may not only disqualify counsel in those rare cases where an actual conflict may be demonstrated, but also in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict. See, Wheat v. United States, supra, 108 S. Ct. at 1699. The Court went on to state that although a presumption exists in favor of the criminal defendant's choice of counsel, this presumption may be overcome "by a showing of serious potential for conflict." Id at 1700; accord, In re: Special February 1977 Grand Jury, 581 F.2d 1262, 1264 (7th Cir. 1978).

Although the Commission's sequestration/exclusion rule is set against the backdrop of administrative investigative interviews, not criminal proceedings,

we believe the Wheat decision is extremely useful if not entirely dispositive. For one, it recognizes the difficulty of demonstrating actual conflicts. This suggests that the Court would find a concrete evidence standard unrealistic. Secondly, if the Supreme Court in the context of criminal proceedings will allow a trial court to disqualify a defendant's counsel upon finding that a serious potential exists for a conflict of interest, then an administrative agency's proposal to exclude counsel from non-criminal investigatory interviews under a reasonable basis standard should be sustained. Indeed, the reasonable basis standard coupled with the provision requiring the investigator to consult with the Office of the General Counsel before exercising exclusion authority makes the rule's standards for exclusion of counsel qualitatively on par if not more exacting than the standard prescribed for disqualification of counsel in criminal proceedings.

The statutory responsibilities of the IRS and the NRC are arguably sufficiently different to justify using a less exacting standard than the "concrete evidence" standard of Csapo. Undetected violations of the tax laws have only monetary consequences and result in a windfall to the tax evader and a loss of federal revenues. In contrast, undetected violations of Commission regulations or the Atomic Energy Act could have far reaching health and safety implications that could impact the public at large. The extreme importance of uncovering in an expeditious manner willful regulatory violations justifies use of a less stringent standard.

A related issue raised by a number of commenters is that the proposed rule will deprive individuals of the effective assistance of counsel. They assert this is so because of a small nuclear bar and the fact that many lawyers are unfamiliar with the often technical issues involved in practice before the NRC. It is inappropriate to raise Sixth Amendment effective assistance of counsel

claims in the context of the NRC investigatory interviews. For one, there is a substantial difference between the rights of an accused in a criminal proceeding and the rights of a witness in a civil (administrative) proceeding; secondly, the stringent standards of appointment and effective assistance of counsel mandated by the Sixth Amendment and Federal Rule of Criminal Procedure 44 do not apply to civil proceedings. In re: Grand Jury Matter, 682 F.2d 61 (3d Cir. 1982); Watson v. Moss, 619 F.2d 775 (8th Cir. 1981); United States v. Rogers, 534 F.2d 1134 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Moreover, the nuclear bar is large enough so that alternative counsel with the necessary expertise will always be available.

Almost half the commenters take issue with the one week time frame cited in the supplementary information to the proposed rule as an example of a reasonable period of time within which to retain new counsel when exclusion authority has been exercised. Specifically, they contend one week is an insufficient amount of time, particularly in situations where a nuclear plant is remotely located and counsel experienced in NRC practice and federal administrative law are scarce or unavailable.

Although the supplementary information cited one week as an example of a reasonable period of time, former § 19.18(c) of the proposed rule did not attempt to quantify a reasonable time frame. One week may constitute a reasonable period of time under some circumstances. What constitutes a reasonable period of time however must be determined on a case by case basis with the official taking into account the circumstances, including the Commission's need to conclude an investigation promptly in order to protect the public health and safety. The final rule retains the reasonable period of time standard.

2. Rule Ignores Fact That Multiple Representation Issues Are Governed By Principles Of Legal Ethics.

Several other commenters contend the rule ignores the fact that the propriety of multiple representation is governed by basic principles of legal ethics, and that the Code of Professional Responsibility generally permits an attorney to represent multiple interests. Another commenter questions the Commission's authority to exclude counsel, stating we have no business or particular expertise in determining for an interviewee whether a conflict of interest exists or wherein lies his or her best interest.

The Commission, in the supplementary information and text of the proposed rule, expressly recognized, as we do now, that an attorney may ethically represent multiple clients provided he or she discloses any potential conflicts to the clients who then assent to the representation. Moreover, the rule does not provide that an attorney representing multiple interests will be excluded from the investigative interviews of other witness clients on the basis of the multiple representation alone. To the contrary, the rule provides for the exclusion of counsel in the limited circumstances where counsel's representation of dual interests poses a threat to the integrity of investigative findings, either because the nature of the investigation is such as to require some degree of secrecy and thus, the assurance that licensee and others are not apprised of the specifics of the investigation, or because the nature of the investigation may require employees to divulge information against the interests of the employer. Exclusion of counsel under these bases does not require any particular expertise or knowledge of legal ethics, nor is exclusion under such a standard at odds with any provision of the Code of Professional Responsibility.

3. Procedures For Excluding Counsel Are Inadequate.

Many of the law firm commenters have raised objections to the procedures for excluding counsel. Specifically, they contend the procedures are inadequate and afford the interviewing official virtually unfettered discretion in the exclusion process. In this regard, they point out that the rule does not include any provision requiring the official to make factual findings prior to excluding counsel nor does it require the official to document the basis for exclusion, or to communicate the basis to the witness or counsel. One law firm, has also expressed concern with the provision of the rule that allows an interviewing official to exclude counsel. According to this commenter, a court is the appropriate forum for resolution of conflicts of interest issues. It suggests including a provision in the rule requiring the NRC to file a motion before a federal judge requesting the disqualification of the attorney. Another firm points out that because the agency's Office of Investigations (OI) is, in this commenter's opinion, an adversary of the licensee, the provision allowing an official of OI to make the exclusion decision alone is fundamentally misconceived.

The Commission agrees that additional guidelines should be included to assist agency officials in the exclusion process. Consequently, the rule now requires the interviewing official to advise an excluded attorney of the basis for his/her exclusion in every instance. The rule also unequivocally provides that counsel be provided a written statement of those reasons. The rule retains the provision requiring the interviewing official to consult with the Office of the General Counsel prior to invoking the exclusion rule. This requirement is designed to ensure that exclusion authority is confined within lawful limits. We believe these provisions provide sufficient safeguards

against arbitrary and capricious conduct in the exclusion process. The Commission does not believe, however, that a provision requiring the institution of fact-finding proceedings in advance of excluding counsel would provide a higher level of protection than the above procedures. If, as many of the commenters assert, the bottom line is going to be judicial challenges to an exclusion decision, a petitioning party will have the written statement of reasons to challenge in court. We also do not agree with the suggestion that an agency cannot disqualify counsel but must file a motion with a district court. An administrative agency which has the general authority to prescribe its rules of procedure may set standards for determining who may practice before it. See, *Koden v. Department of Justice*, 564 F.2d 228 (7th Cir. 1977); see also, *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926). The NRC has prescribed rules of practice for attorneys. See, e.g., 10 CFR 2.713. Moreover, the rule does not require agency officials to resolve conflict of interest issues. Rather, the rule affords an investigator a means for excluding counsel who represents the licensee and licensee employees when there is a reasonable basis to believe that the investigation will be impaired by virtue of the dual representation.

In order to remove the perception that investigatory officials have unfettered discretion in the exclusion process, the rule has been revised to afford a disqualified attorney the right to seek administrative review of the exclusion decision. Specifically, the provision affords the attorney an opportunity to present his or her side of the case in writing to a high ranking NRC official. The rule designates the Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support as the reviewing official. He or she will make the final decision for the agency. This decision will be subject to judicial review.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of choice. 5 U.S.C. 555(b). Although the right to counsel guarantee of Section 555(b) is not to be lightly disturbed, it is not absolute and may be circumscribed when justice requires. Any restrictions on the right to counsel must, however, be within permissible limits.

Questions concerning the scope of the right to counsel have arisen in the context of NRC investigative interviews of licensee employees and the licensee's right to appoint in-house or retain outside counsel to represent them. Although there is nothing improper about this kind of arrangement on its face, it has been the Commission's experience that such dual representation sometimes has the potential of undermining the investigative process by

inhibiting the candor of these witnesses or otherwise impairing the Commission's ability to carry out its statutory responsibility of ensuring the public health and safety through an effective investigative process. The rule, which delineates the rights and responsibilities of licensees, their employees, their attorneys and the NRC during the conduct of investigative interviews, is intended to facilitate an expeditious and satisfactory resolution of NRC investigations. This final rule is also intended to avoid the confusion and delay that obtained through attempts to resolve dual representation issues on an ad hoc basis. The foregoing discussion constitutes the regulatory analysis for this final rule.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The final rule, which simply sets forth the rights of licensee employees and other individuals who are compelled to appear before NRC representatives under subpoena, has no significant economic impact on a substantial number of small entities.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule. Therefore, a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 19

Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Penalty, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 19.

1. The authority citation for Part 29 continues to read as follows:

AUTHORITY: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955 as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. The title of Part 19 is revised to read as follows:

PART 19--NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

3. Section 19.1 is revised to read as follows:

§ 19.1 Purpose.

The regulations in this part establish requirements for notices, instructions, and reports by licensees to individuals participating in licensed activities and options available to these individuals in connection with Commission inspections of licensees to ascertain compliance with the provisions of the Atomic Energy Act of 1954, as amended, Title II of the Energy Reorganization Act of 1974, and regulations orders, and licenses thereunder regarding radiological working conditions. The regulations in this part also establish the rights and responsibilities of the Commission and individuals during interviews compelled as part of agency inspections or investigations pursuant to Section 161c of the Atomic Energy Act of 1954, as amended, on any matter within the Commission's jurisdiction.

4. Section 19.2 is revised to read as follows:

§ 19.2 Scope.

The regulations in this part apply to all persons who receive, possess, use, or transfer material licensed by the Nuclear Regulatory Commission pursuant to the regulations in Parts 30 through 35, 39, 40, 60, 61, or Part 72 of this chapter, including persons licensed to operate a production or utilization facility pursuant to Part 50 of this chapter and persons licensed to possess power reactor spent fuel in an independent spent fuel storage installation ISFSI pursuant to Part 72 of this chapter. The regulations regarding investigative interviews of individuals apply to all investigations

within the jurisdiction of the Nuclear Regulatory Commission other than those involving NRC employees or NRC contractors.

5. In § 19.3 remove the paragraph designations, rearrange definitions in alphabetical order, and add the definition for "exclusion" and the definition for "sequestration" in the appropriate alphabetical sequence to read as follows:

§ 19.3 Definitions.

* * * * *

"Exclusion" means the removal of counsel from investigatory interviews whenever the investigations official conducting the interviews has a reasonable basis to believe that counsel's representation of the licensee and employees of the licensee will impair the investigation.

* * * * *

"Sequestration" means the separation or isolation of witnesses and their attorneys from other witnesses and their attorneys during an interview conducted as part of an investigation.

* * * * *

6. A new § 19.18 is added to read as follows:

§ 19.18 Sequestration of witnesses and counsel.

(a) All persons compelled to submit to agency investigative interviews shall be sequestered unless the official conducting the interviews permits otherwise.

(b) Any person compelled to appear at an interview during an agency investigation may be accompanied, represented, and advised by counsel of his or her choice; however, when the agency official conducting the investigation determines, after consultation with the Office of the General Counsel, that a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly by an attorney's representation of multiple interests, the agency official may prohibit that attorney from being present during the interview of the employee witness.

(c) The interviewing official is to provide a person's counsel excluded under paragraph (b) of this section a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after the exclusion, should detail the basis for counsel's exclusion.

(d) Within five days after an attorney has received the written notification required in paragraph (c) of this section, he or she may appeal the exclusion decision to the Deputy Executive Director for Nuclear Materials Safety Safeguards and Operations Support.

(e) Where a person's counsel is excluded under paragraph (b) of this section, the interview may, at the person's request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The interview may also be rescheduled to a subsequent date established by the NRC.

Dated at Rockville, Maryland this _____ day of _____, 1989.

For the Commission,

SAMUEL J. CHILK,
Secretary of the Commission.