

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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 )  
 ) Docket No. PRM  
 )  
 Proposed Rulemaking on )  
 Emergency Planning )

STATEMENT IN SUPPORT OF PETITION

10 C.F.R. Section 2.802(c)(3) requires that a Petition for Rulemaking "[i]nclude a statement in support of the petition. . . ." Pursuant thereto, the following statement which sets forth the specific issues requiring rulemaking, as well as the basis supporting petitioners' view on such issues, is provided.

History

March 28, 1979, marked the occurrence of the Three Mile Island accident. Shortly thereafter, the Nuclear Regulatory Commission ("NRC" or "Commission") staff commenced an evaluation of the accident, focusing upon, inter alia, the adequacy of emergency planning and response.<sup>1/</sup> As a result of this review, as well

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<sup>1/</sup> See, 44 Fed. Reg. 75167, 75168 (December 19, 1979), wherein it is noted that

In June 1979 the Nuclear Regulatory Commission began a formal reconsideration of the role of emergency planning in assuring the continued protection of the public health and safety in areas around nuclear power facilities.

as reports issued by various possible offices of government and Congressional oversight committees, the Commission revised its thinking with regard to emergency planning, holding that such must be elevated from its "secondary" role.<sup>2/</sup> By memorandum dated July 31, 1979, the Commission requested that the NRC staff undertake expedited rulemaking on the subject of State, local and licensee emergency response plans.<sup>3/</sup>

The proposed regulations serve as the NRC staff's response to the Commission's rulemaking request. They were published in the Federal Register on December 19, 1979.

44 Fed. Reg. 75167.

#### Interest of Petitioners

Petitioners are electric utility companies which hold permits to construct and/or licenses to operate nuclear power reactors for generating purposes. They are bound by regulations promulgated by the Nuclear Regulatory Commission, including those governing emergency planning. See, e.g., 10 CFR §50.34 and Appendix E to Part 50. As noted above,

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<sup>2/</sup> Id.

<sup>3/</sup> Id.

on December 19, 1979, the NRC announced its intention to amend such regulations. 44 Fed. Reg. 75167 (1979). As licensees or permittees, petitioners will be affected by proposed changes in the regulations.

Argument

Petitioners are concerned with the haste with which the proposed regulations were promulgated. 4/ Petitioners maintain that recent events significant to emergency planning

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4/ 1. In the Supplementary Information accompanying the proposed rule, the Commission acknowledged that the rule "had been prepared on an expedited basis." 44 Fed. Reg. at 75168 (1979). As a result, it stated that "considerations related to the workability of the proposed rule may have been overlooked and significant impacts to NRC, applicants, licensees, and State and local governments may not have been identified." (Id.)

Further, the NRC staff in its October 26, 1979, Commission Action Paper, SECY-79-591, stated:

The haste with which this paper was prepared precluded the critical review normally given to actions of comparable significance.

With the above as background, the NRC staff warned applicants for operating licenses and construction permits that the up-graded emergency plans were in flux:

The staff believes it is likely, as a result of expected public comments, that significant changes may be indicated in the rule as proposed.

(November 21, 1979, letter to Applicants for Operating Licenses and Existing Licensees from the Acting Director, Division of Project Management, Office of Nuclear Regulation.)

must be factored into the proposed rule. Further, we maintain that the NRC has yet to deal adequately with such issues as 1) NRC concurrence in, and approval of, State and local emergency plans and 2) the role of the Federal Emergency Management Agency (FEMA). Consequently, the NRC is on a path leading to the imposition of requirements petitioners believe will result in the very confusion the Commission is attempting to eliminate. 5/ Simply put, the Commission has acted in an unreasonably short timeframe.

A. The Commission Must Consider Emerging Critical Factors Prior To Promulgating The Instant Regulations

Events concurrent and subsequent to the publication of the proposed regulations have raised matters that are so

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5/ The proposed regulations were promulgated to address the concerns raised by the various reviews of the Three Mile Island accident. See, 45 Fed. Reg. 3913 (January 24, 1980), where the Commission stated

Due to the accident at Three Mile Island, the various reports, and its own assessment of the health and safety significance of emergency planning, the Commission saw a need to act to upgrade those portions of its regulations concerning emergency planning and preparedness.

The lesson learned from Three Mile Island is the necessity for prompt, efficient emergency response by all levels of government and the avoidance of confusion. See Report of the President's Commission on the Accident at Three Mile Island at pp. 17 and 76; A Report to the Commissioners and to the Public at pp. 134-135.

significant to the proper development of emergency planning that they must be considered in the present rulemaking. These matters are set forth below.

1. The President's December 7, 1979, Statement

On December 7, 1979, the President issued a prepared Statement and Fact Sheet concerning his response to the Recommendations of the President's Commission on the Accident at Three Mile Island (Kemeny Commission). Therein, the President addressed emergency planning and response; he supported the Kemeny Commission's recommendations and took six specific actions. Inexplicably, the substance of the President's position was not included in the proposed regulations despite the fact that it was issued a week before the Commission proposed the changes to the regulations. There can be no question that the President's statement is significant; it served as a basis for the Memorandum of Understanding between NRC and FEMA. See, 45 Fed. Reg. at 5847, wherein it is stated:

This memorandum responds to a directive from the President dated December 7, 1979, which defined areas of responsibility for emergency preparedness... (emphasis added)

The President's statement also gave rise to the publication of emergency response plan criteria set forth in NRUEG-0654/-FEMA-REP-1:

The NRC and FEMA Staff have prepared this document as part of their responsibilities under the Atomic Energy Act, as amended, and the President's Statement of December 7, 1979, with the accompanying Fact Sheet. at p. 1.



It follows that the President's position should play an integral role in the proposed regulations.

2. Rogovin Report

On January 24, 1980, the Commission's independent Special Inquiry Group issued its Report to the Commissioners and to the Public (Rogovin Report). This Report addressed improved emergency planning, including evacuation planning, as a condition of reactor operation. The Report was considered so significant as to delay the issuance of the NRC staff's Action Plan until it had been factored into the Plan. 6/ However, no such deferral was extended to the publication of the proposed regulations despite the fact that the Commission realized that the emergency plan record "will be supplemented by the report of its own Special Inquiry Group...", 44 Fed. Reg. at 75169. Clearly, the Commission's own independent examination of the Three Mile Island accident, as it relates to emergency planning, will, and must be, made a part of the

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6/ See NRC January 5, 1980 Memorandum (Gossick) to the Commission concerning "TMI Action Plan--Prerequisites For Resumption of Licensing" wherein it is stated:

Recognizing that the NRC special inquiry report may contain additional requirements not presently identified in the draft Action Plan and that there is staff review of the plan still ongoing, we are not recommending approval of the existing draft Action Plan.  
at p. 2.

proposed regulations 7/; yet, no opportunity for public input on this point has been provided.

3. Memorandum of Understanding

On January 24, 1980, a Memorandum of Understanding between NRC and FEMA to Accomplish a Prompt Improvement in Radiological Emergency Planning and Preparedness was published in the Federal Register. 45 Fed. Reg. at 5847.

This memorandum "delineates each agency's lead responsibilities in radiological emergency preparedness" and thus is an important aspect of emergency planning which warrants reference in the proposed regulations. Indeed, the Memorandum changes aspects of the proposed regulations. 8/ To clarify this inconsistency, it is necessary to include discussion of the Memorandum in the instant regulations and give the public an opportunity to comment. This point is underscored by recent experience which indicates that the framework set

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7/ See NUREG-0585, "TMI-2 Lessons Learned Task Force Final Report" wherein in its discussion of emergency plans it is recognized that "findings and conclusions of all these efforts [including the Commission's Special Inquiry] will need to be synthesized into a 'consensus' position regarding this important policy question. at p. 4-7.

8/ For example, proposed §50.47 provides that emergency response plans will be "reviewed and concurred in by NRC". However, the Memorandum states that FEMA will "take the lead in off-site emergency planning and review and assess state and local emergency plans for adequacy."

forth in the Memorandum will serve as the basis for evaluation of emergency plans. 9/

Lastly, the Memorandum expires on September 30, 1980. The temporary nature of such Memorandum signals future significant changes in the roles the two agencies may play. The Commission should use the deferral sought by Petitioners as a time within which to finalize the role of NRC and FEMA so as to avoid confusion.

4. NUREG-0654/FEMA-REP-1

The proposed regulations noted that "in early 1980 upgraded and revised acceptance criteria for evaluating emergency preparedness plans will be issued for comment." 44 Fed. Reg. at 75168, n. 1. In February 1980, NRC and FEMA issued "For Interim Use and Comment", Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, NUREG-0654/FEMA-REP-1. These Criteria "are related to" the proposed revision of 10 CFR Part 50, Appendix E. See, 44 Fed. Reg. at 75168, n. 1. Accordingly, they should be factored into the proposed regulations. Indeed, the Commission has advised that such revised criteria "may be included in the Commission's

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9/ See, NRC February 11, 1980, staff letter (Denton) to the Commissioners concerning "Consideration of Operating License for Sequoyah Nuclear Station, Unit No. 1" and FEMA's February 11, 1980, letter to the NRC staff (Denton), which is attached thereto.



regulations" and that "the Commission will consider codification of the upgraded criteria in 1980." Id., n. 1 & 3. To assure that the public has been provided an opportunity to comment on the Criteria, the NRC has provided for a ninety-day public comment period. 45 Fed. Reg. 9768 (February 13, 1980). In light of the importance of the Criteria, the proposed regulations should not be finalized until the comment period in NUREG-0654/FEMA-REP-1 has expired and comments have thereafter been fully considered. 10/

Petitioners would note that these Criteria are presently being used by the NRC staff in its evaluation of emergency

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10/ To date, Petitioners question the following criteria which are set forth in NUREG-0654/FEMA-REP-1:

1. 15-minute notification of people within 10 mile radius.
2. Minimum staffing requirements on shift and within 30 minutes.
3. Redundant meteorological equipment and off-site data transmission to CMC and NRC.
4. Project dose rates and integrated doses at the site boundary, 2 miles, 5 miles, 10 miles, based on actual meteorology.
5. Utility funding of, and technical assistance to, State and local governments to meet the criteria.
6. OSC should have adequate shielding, ventilation and inventory of supplies.

plans. 11/ Petitioners question such action in light of the fact that the comment period is still running. Petitioners appreciate the need for criteria; however, until such are finalized, they should not be dogmatically enforced. Rather, the Criteria should be tempered so as to accommodate all reasonable positions, including the views of those entities most familiar with emergency responses, i.e., State and local governments. 12/

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11/ See, NUREG-0654/FEMA-REP-1, p. i. See also footnote 9, supra wherein FEMA acknowledges its use of the Criteria.

12/ One particularly troublesome aspect of the Criteria is its reference to completion of notification within 15 minutes after State and local officials are informed of accidents. This proposed requirement is also a part of the proposed regulations. See footnote 3 to Appendix E to 10 CFR Part 50, as proposed. Inasmuch as the Criteria and proposed regulations are presently out for comment, petitioners question the imposition of this requirement at this time, i.e., prior to completion and consideration of public comment. This is particularly the case wherein present imposition of this requirement will result in the incurrence of significant expenditures by utilities, when, upon receipt of comments, this matter may be resolved such that those costs need not have been incurred.

Notification is an off-site measure tied to evacuations. State and local officials will notify and evacuate the public, not NRC. Accordingly, these matters should be left to State and local officials. NRC should provide input, such as radiological consequence information.

Petitioners question the appropriateness of the time frame selected. NUREG-0396, NRC's supporting documentation, indicates that the basis for the 15 minutes was the Reactor Safety study (WASH-1400). An examination of WASH-1400 reveals that the only situations that would give rise to releases that 1/2 hour are those denoted as PWR 8 and PWR 9. See WASH-1400,

5. Congressional Action

On July 17, 1979, the Senate passed S.562, the NRC Authorization Bill. This legislation specifically addresses

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(footnote continued)

Vol. 6, Sect. 2, Table 6V12-1. However, these situations are of short duration and of relatively low release levels. In addition the probability of such releases is once in 100,000 years. NUREG-0654/FEMA-REP-1 I-12. Accordingly, additional time should be provided, for notification of the public.

Furthermore, NUREG-0396 recognizes that atmospheric conditions, as well as distance, play a significant role in exposure to the public. For instance, if it is windy, people in outlying areas will be exposed more rapidly. However, since it is windy, the level of exposure will be decreased due to dispersion characteristics. Conversely, if it is still, people in the outlying area will not be immediately affected. See NUREG-0396, I-17 Table I-2, n. 4. In either case it is reasonable to assume that the outlying population is not in need of the same degree of notification as those near the accident. The question then becomes one of defining nearby and outlying populations. From the information contained in NUREG-0396, the line of demarcation appears to be in the range of 2-3 miles. NUREG-0396, I-17, Table I-2.

In light of the above, it appears reasonable to commence notification within a short time-frame for the nearby population out to approximately 2-3 miles. However, for those individuals in outlying areas (i.e., beyond 2-3 miles), additional notification time should be provided. Petitioners endorse the footnote contained in the document approved by the Commission on December 5, 1979, for publication in the Federal Register, to wit:

"It is expected that the capability will be provided to begin alerting the public within the plume exposure pathway EPZ within 15 minutes of the notification by the licensee of local and State officials."

Curiously, this footnote was changed between the last public session of the Commission and publication.

the relationship between FEMA and NRC and would require a concurred-in State plan as a condition of operation. On December 4, 1979, the House passed its version of the NRC Authorization Bill, H.R. 2608. This legislation is silent as to a FEMA/NRC relationship. The matter is presently in Conference. Resolution is anticipated in the near term. Petitioners assert that this legislation could have a significant bearing upon emergency planning. The Commission itself notes that "the already extensive record made on emergency planning improvements will be supplemented...by any requirements of the NRC Authorization Act...". 44 Fed. Reg. at 75169. Accordingly, action on the proposed regulations should be deferred until such time as the legislation is passed. 13/

Collectively, the above items demonstrate the rapid development of, and increased interest in, emergency planning. To comport with the lesson of Three Mile Island it is necessary that the these matters be reflected in the proposed rule, for only then will confusion abate.

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13/ As noted previously, reports of Congressional oversight Committees were an important moving force in rushing the Commission into rulemaking. If Congress cannot timely resolve its differences with respect to emergency planning, it should refrain from urging the Commission to have regulations in place in the immediate near term.



Petitioners maintain that the above matters will perforce affect Commission action. Yet the public has not been advised how these matters will impact upon such action nor has it been given an opportunity to effectively comment thereon. Because the NRC staff itself admits the proposed interim final regulations were prepared in haste, petitioners urge that the NRC defer issuing the regulations until such time that these above matters and any remaining unarticulated factors are placed in the record and until all interested parties are given the opportunity to comment on them. Only then will the administrative procedures achieve their fundamental purpose.

The danger of imposing obligations in a hurried manner are obvious: "Administrative procedures fail of their fundamental purpose if the goal of expedition is bought at the sacrifice of reasoned decision-making and substantial fairness to the parties concerned." Municipal Electric Utility Association of Alabama v. Federal Power Commission, 485 F.2d 967, 973 (D.C. Cir. 1973). 14/

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14/ See also, U.S. v. Florida East Coast R. Co., 410 U.S. 225, 241 (1973); NCRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969); American Iron and Steel Institute v. EPA, 568 F.2d 284, 293 (3d Cir. 1977). When the notice of proposed rulemaking does not apprise interested parties of even a single specific important subject or issue that is subsequently addressed in the final rule, the initial notice of proposed rule is inadequate and does not satisfy the requirements of the Administrative Procedure Act (APA). (footnote continued)



B. The Commission Has Failed to Consider Several Significant Jurisdictional Issues.

In addition to the proposed regulations' failure to consider recent significant events, such regulations have adopted positions concerning the role of the States and FEMA which simply lack a statutory basis. Accordingly, until these two jurisdictional disputes are resolved, the Commission cannot hope to issue regulations which will be helpful in delineating clear and concise emergency plan requirements.

1. The Unresolved State-NRC Relationship

In its proposed regulations, the NRC indicates that it will require the submittal of "emergency response plans of States and local entities," (Section 50.33); that no operating license will be issued unless such plans are "reviewed and concurred in by the NRC," (Section 50.47);

(footnote continued)

Wagner Electric Corporation v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972). This is so even if particularly knowledgeable parties might nonetheless comment on the subject or issue not spelled out in the notice of proposed rulemaking. Id. at 1019. In other words, it must be possible for all interested parties to offer informed criticism and comments. See, Ethyl Corporation v. EPA, 541 F.2d 1, 48 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).

Finally, when the proposed regulations will have 'a substantial impact' on the 'purportedly regulated parties' the lack of compliance with the prior notice and comment requirements of the APA can be fatal. National Helium Corp. v. FEA, 569 F.2d 1137, 1146 (Emer. Ct. App. 1978). See also, Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975) vacated and remanded on other grounds sub nom. EPA v Brown, 431 U.S. 99 (1977).

that previously issued operating licenses may be withdrawn if NRC concurrence in the State and local emergency response plans is not obtained, (Section 50.54); and that alerting the public within the plume exposure emergency planning zone (EPZ) must be essentially completed by local and State officials within fifteen minutes of notification by the licensee, (footnote 3 to Appendix E, IV, D.3).

Petitioners suggest that these regulations, as presently worded, are tantamount to requiring NRC review and approval of State and local plans. 15/ Such review and approval is not statutorily authorized.

The NRC has stated that "it cannot direct any government unit to prepare a plan, much less compel its adequacy." 44 Fed. Reg. 75169 (1979). However, it went on to state that its ability to require concurrence lies in its authority to "condition a license on the existence of adequate plans." 44 Fed. Reg. 75169.

The courts have long recognized that specific statutory authority is necessary for federal law to displace State authority in an area of traditional State responsibility.

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15/ The Supplementary Information accompanying the proposed regulations states that

The main thrust of the proposed rule is that prior concurrence in State and local emergency response plans will be a condition for licensing and operation of a nuclear powerplant. 44 Fed. Reg. at 75169.

Palmer v. Massachusetts, 308 U.S. 79 (1939). Thus, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). See also, Gulf Oil Corporation v. Copp Paving Company, 419 U.S. 183, 201 (1974); West Helena Savings & Loan Association v. Federal Home Loan Bank Board, 417 F. Supp. 220 (E.D. Ark. 1976), aff'd 553 F.2d 1175 (8th Cir. 1977).

No one, not even the Commission itself, can point to such specific authority. Indeed, a consensus seems to have emerged indicating that just the opposite is true.

(1) Enclosure #3 of the staff's previously referenced November 21, 1979, letter regarding upgraded plans states that the NRC's role in assisting State and local governments in the preparation and evaluation of their radiological emergency response plans "does not rest on any statutory authority..." Id. at 2.

(2) At page 5 of the referenced attachment to the November 21, 1979, letter, the staff writes, "There is growing sentiment in Congress to legislate NRC concurrence." Such a statement strongly suggests that, absent legislation, concurrence is not authorized.

(3) The General Accounting Office (GAO), in its report entitled "Areas Around Nuclear Facilities Should be Better Prepared for Radiological Emergency," March 30, 1979, recognized "the fact that NRC has no statutory authority over State and local governments requiring them to develop and maintain peacetime nuclear emergency plans." Id. at 50. Responding to the GAO, the NRC staff on December 18, 1978, stated that, unlike the mandatory approach under consideration,

"through the [existing] concurrence approach, we have been able to achieve significant improvements by cooperative means without entering into confrontation with State and local issues of Federal Preemption v. State Sovereignty or Federal Competence v. Specialized Local Knowledge of Local Capabilities and Local Intent." See, Appendix VII to the GAO Report.

(4) The Memorandum of Understanding between the NRC and FEMA states that "the Atomic Energy Act does not specifically require emergency plans and related preparedness measures", 45 Fed. Reg. 5848 (1980).

(5) The Supplementary Information accompanying the proposed regulations acknowledges that requiring a concurred-in State plan as a condition of operation, as set forth in the NRC Authorization Bill (S.562) would require an amendment to the Atomic Energy Act. See, 44 Fed. Reg. 75169.

Moreover, to the extent that the Commission is specifically authorized to concern itself with off-site radiological emergency plans, its statutory basis is premised on a 1975 assignment of authority from the Federal Preparedness Agency (FPA). 16/ However, the jurisdiction has, or is about to, revert to FEMA. 17/ In addition, FPA's statutory authority, found in the Defense Production Act of 1950, 5 U.S.C.A.

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16/ See 40 Fed. Reg. 59494 (December 24, 1975).

17/ See NUREG-0654/FEMA-REP-1 wherein it is stated:

In light of the President's statement of December 7, 1979, the agency responsibilities assigned on January 24, 1973, by the Office of Emergency Preparedness (and later reassigned on December 24, 1975, by the Federal Preparedness Agency/GSA) [i.e., off-site measures] are being revised and will be promulgated by FEMA in the near future. at p. 1, n. 1.

§2061 (1972), appears to be limited to military and civil defense related planning. Accordingly, it is questionable whether such authority extends to control over State and local radiological emergency plans relating to non-military nuclear facilities.

In light of the above, the proposed state concurrence requirement is improper and must be deleted.

The above situation is not resolved by merely asserting that the NRC will avoid compelling State and local government action, but rather will look to the applicant/licensee to provide relevant information that will enable the Commission to make, what it deems to be, relevant findings. The relevant information sought will, as presently structured, encompass State plans. Accordingly, the NRC would be improperly attempting to do indirectly what it cannot do directly. Of immediate concern in such a situation is the violation of due process rights that would result. Specifically, NRC would require information of an applicant/licensee, which information is in the possession of State and local governments. If State and local governments refuse to provide such information, the applicant/licensee would be placed in a situation wherein it is without legal recourse



to compel production of the required information. <sup>18/</sup> Such a situation is violative of recognized due process rights.

The federal courts have consistently held that public utility licenses are property entitled to constitutional protection. In Los Angeles v. Los Angeles & Electric Corp., 251 U.S. 32, 39 (1919), the Supreme Court explicitly held that the grant of a franchise to a public utility to operate street lights "conveys rights . . . making them a matter of investments and property, and entitled as such against being taken without the proper process of law." Accord: Monogahela Navigation Company v. United States, 148 U.S. 312, 336-37 (1893); United States v. Brooklyn Union Gas Company, 168 F.2d 391, 394 (2d Cir. 1948); City of Thibodeaux v. Louisiana Power & Light Co., 225 F. Supp. 657, 661 (E.D. La. 1963), cert. denied 389 U.S. 975 (1967).

More recently, the Court indicated that a wide variety of entitlements, including professional licenses, routes for airlines and channels for television stations, have the characteristics of property interest such that their deprivation requires adherence to due process standards. Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970).

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<sup>18/</sup> The compensatory actions set out in the proposed regulations with respect to demonstrations that an applicant/licensee can take in the event a State is not cooperative cannot be viewed as resolving the matter. Based upon the nature of the problem, an applicant/licensee can undertake only limited tasks (i.e., notification). Much of emergency response planning involves the invocation of State and local police powers (i.e., ordering evacuation), an action applicants/licenses are constitutionally prohibited from taking.

Finally, the proposed regulations, as worded, would allow the State and local governments to veto permits and licenses. Such a result is contrary to the well-recognized doctrine of federal preemption. Northern States Power Company v. Minnesota 447 F.2d 1143 (8th Cir. 1970), aff'd mem., 405 U.S. 1035 (1972). Legal Foundation v. State Energy Resources Conservation and Development Commission, 472 F. Supp. 191 (S.D. Cal. 1979). United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978).

To remedy this dilemma, petitioners urge a return to the cooperative approach previously utilized by the NRC in its dealings with the States. As noted, the NRC has published proposed Criteria for emergency response planning. NUREG-0654/FEMA-REP-1. Rather than taking the form of regulation, which is presently the case, 19/ the Criteria could serve as the basis for discussions with State and local governments with a view toward developing plans tailored to the needs and capabilities of such entities.

Recognition must be given to the fact that State and local governments have expertise in these matters. Indeed, in the Supplementary Information to the proposed regulations, the Commission noted that "State and local governments have

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19/ See n. 11, supra.

the primary responsibility under their constitutional police powers to protect their public ..." (emphasis added) 44 Fed. Reg. 75169. 20/ Their guidance must be sought. Through such a cooperative spirit, memoranda of understanding could be entered into with State and local governments that would assure satisfactory results. Petitioners hasten to point out that their approach would not result in a return to a pre-Three Mile Island accident climate. Since the Three Mile Island accident, increased attention has been given to emergency response planning by all concerned parties. This fact should result in better cooperation between federal, state and local governments and resulting improvement in emergency planning.

2. The Unresolved NRC-FEMA Relationship.

In the past few weeks, considerable uncertainty has developed concerning the exact role of FEMA in the development

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20/ State and local governments have traditionally played a major role in protecting civilian populations from natural and man-made emergencies. And, Congress has always intended that they play such a role. For example, the Disaster Relief Act of 1974, 42 U.S.C.A. §5121 (1977), provides in pertinent part that the federal government should provide assistance to State and local governments in

carrying out their responsibilities to alleviate the suffering and damage which result from disasters by...encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments.  
42 U.S.C.A. §5121(b)(2), (1977).

and implementation of emergency plans and procedures. The agency was recently created as part of President Carter's reorganization plan for the federal government. It was formed by consolidating five pre-existing agencies into a combined unit to administer the federal government's emergency preparedness and disaster response program. See Reorganization Plan No. 3 of 1978, 43 Fed. Reg. (Sept. 19, 1978), which was implemented by Executive Order 12127, March 31, 1979. A description of the role FEMA is to play is presented in The President's Response to the Recommendations of the President's Commission on the Accident at Three Mile Island, December 7, 1979. Therein, President Carter unequivocally endorsed the recommendations of the Commission and at pp. 10-11 of the detailed Fact Sheet accompanying his prepared remarks, stated:

The Federal government's ability to deal with emergencies has already been improved by consolidating the widely scattered and uncoordinated programs for emergency preparedness and response under FEMA. Recognizing that the NRC has statutory responsibility for on-site preparedness and response, the President is taking the following action:

FEMA is directed to: (1) take the lead in off-site emergency planning and response; (2) complete by June 1980 the review of State emergency plans in those States with operating reactors; (3) complete as soon as possible the review of State emergency plans in those States with plants scheduled for operation in the near future;...

The President also addressed the role of the NRC, specifying that the Commission "is asked to assist FEMA."



See, Fact Sheet at p. 11. In this regard, he expressed his desire to restrict the NRC's jurisdiction to on-site emergency planning. Specifically, President Carter stated that he is "transferring responsibility to [FEMA] to head up all off-site emergency activities, and complete a thorough review of emergency plans in all States of our country with operating nuclear reactors by June 1980." 15 Weekly Comp. of Pres. Docs. 2202, 2203 (1979).

The Commission has apparently taken a different approach. It stated that "NRC and FEMA have agreed to exercise joint responsibility for concurring in State emergency response plans prior to NRC issuance of operating licenses." 44 Fed. Reg. 75169 (1979) (emphasis added). The extent to which "joint responsibility" is compatible with FEMA's lead agency status is an unresolved question. Moreover, whether the President has the authority to directly interfere in the Commission's operations is, likewise, an open question. See, e.g., Weiner v. U.S., 357 U.S. 349 (1958) and Humphrey's Executor v. U.S., 295 U.S. 602 (1935) (holding regulatory agencies created by Congress should be independent of Executive Branch control). What is clear, however, is that there is confusion over which regulatory entity should have lead agency status in developing and implementing the emergency plans.

To complete the already chaotic picture, legislation, as previously noted, is now pending which would resolve, to a large extent, much of this confusion.



The NRC itself is aware of these jurisdictional questions. In its November 19, 1979, meeting, it expressed concern that a delineation of FEMA's role was not factored into the proposed regulations. However, in its haste to act, the Commission nevertheless voted to proceed with the proposal, hoping that this issue could subsequently be integrated into the final rule. Unofficial transcript of Commission's November 19, 1979 public meeting at 16-18, 62-65.

To promulgate any type of "final" requirements in such a climate is inevitably going to create greater confusion than is already the case. If Congress ultimately enacts legislation inconsistent with that of the NRC's regulations, or if the existing and temporary Memorandum of Understanding between the NRC and FEMA is not renegotiated in substantially identical form, or if the Commission guessed incorrectly about the extent to which it was bound by President Carter's decision on FEMA, then the regulations will have to be substantially revised. But to proceed on the existing course requires the applicants and licensees to present their emergency plans to both agencies. Such a situation is inconsistent with the lessons of Three Mile Island and does not eliminate the confusion surrounding approval and implementation of emergency plans. Indeed, if anything, it would add to the difficulty in adopting and implementing the

plans because of the constantly changing jurisdictional boundaries between FEMA and the Commission. 21/

### Conclusion

Because the proposed regulations rest on factors not in the record, because it has been impossible for the public to comment on those factors, and because of the unresolved jurisdictional disputes, the NRC is about to issue "final interim" regulations, the practical nature of which is unknown. Petitioners readily understand and agree with the importance of adopting and implementing emergency plan regulations. However, they also recognize that unless the regulations ultimately promulgated have a sound statutory basis and a firm factual foundation, such regulations cannot be effective.

There are several critical issues which, as yet, are unresolved. The Commission is well aware of those issues. Therefore, instead of blindly moving ahead to impose requirements designed more to satisfy public pressure than to effectively regulate the industry, petitioners request that

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21/ Petitioners see logic in keeping the matter with NRC due to its familiarity with plant operation. This knowledge is important in evaluating the need for, and the detail of, emergency plans. On the other hand, FEMA has a long-time relationship with States. Further, it has experience in a wide range of emergency response plans; it can bring that experience to bear. It can also integrate radiological emergency responses with existing capabilities.

those requirements not be promulgated until the unresolved issues are solved. Petitioners likewise request the Commission to allow an additional notice and comment period on the regulations once such issues are refined. In addition, petitioners request an extension of time by which emergency plans must be implemented commensurate with at least the extended period of reconsideration. 22/ Lastly, petitioners would request the Commission to direct its staff to refrain from imposing NUREG-0654/FEMA-REP-1 as if it were a regulation; rather, the NRC staff should be instructed that such is for guidance only.

Petitioners would stress that the relief they seek should not delay the Commission's evaluation of emergency plans. Such evaluation should continue on a case-by-case basis. Petitioners' position is based upon the increased efforts of utilities, States, and local governments with regard to emergency planning. 23/ Such increased awareness

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22/ Petitioners take issue with the unnecessarily constrained timeframe the proposed regulations provide with respect to compliance.

23/ For example, see letter of E. Erie Jones, Director, State of Illinois Emergency Services and Disaster Agency to NRC (Ryan) dated January 18, 1980 when it is stated

In Illinois, because of strong direction of Governor Thompson and the excellent support of a concerned legislature, we are progressing at a timely rate toward the development of a meaningful and to-be-published Illinois Plan for Radiological Accidents (IPRA).

provides an additional interim layer of protection with regard to public health and safety until such time as the Commission adopts final emergency plan regulations.

Respectfully submitted,

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March 12, 1980

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