UNITED STATES
NUCLEAR REGULATORY COMMISSION
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INFORMATION REPORT

SECY-80-220

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: ANALYSIS OF BASIC LEGAL ISSUES IN EMERGENCY PLANNING RULEMAKING

Discussion: In preparation for final rulemaking on emergency planning, and in response to several comments, OGC has reviewed the NRC's legal authority to undertake this rulemaking which proposes to condition reactor operation on a finding that State and local governments have adequate emergency plans. We conclude that NRC has sufficient authority to promulgate these rules, which are premised on the Commission's judgment about the significance of adequate emergency plans as an essential ingredient to protect the public health and safety. As such, these rules would not be arbitrary, capricious, unreasonable, or contrary to any law. They can be legally applied, not only to original license applications, but also to existing licenses. Our detailed analysis follows. ELD concurs in the conclusions reached in this paper.

Licenses and External Conditions Generally

When the Nuclear Regulatory Commission grants a license to an applicant, it authorizes that applicant to carry on some particular activity which could not be engaged in without a license. "The word 'license' means permission, or authority ... to do what is within the terms of the license." Gibbons v. Ogden, 22 U.S. 1, 213 (1824). The terms of a license, however, express more than a positive grant of power. It is well settled that "the right to engage in" regulated activities is "not unqualified. It" can "only be done

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when authorized by the Government, in the mode prescribed. No one" is compelled "to procure that authorization, but whosoever" elects "to do so" takes "it necessarily cum onere, and hence has no right to complain of any condition imposed...." Finch v. United States, 102 U.S. 269, 272 (1880). There is no dispute over the ability of an agency to predicate the granting of a license upon a set of conditions. Indeed, the "power to approve [a grant of authority] implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to condition on approval." Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205, 208 (1922). The proposed NRC rule here at issue, however, raises the question of the extent to which an agency may consider external conditions when deciding whether to grant a license.

External conditions rest upon circumstances that lie beyond the control of the applicant. To our knowledge, no federal statute expressly mentions that consideration of external conditions is a proper concern in licensing actions. Instead, federal legislation directs licensing agencies to act in furtherance of broad notions of the public interest or public safety. The Supreme Court has recognized that NRC licenses "can be issued only consistently with the health and safety of the public." Power Reactor Development Co. v. International Union of Electrical Radio Machine Workers, 367 U.S. 39 , 404 (1961).*/ Acting pursuant to such a broad mandate, at least one other agency takes into account external conditions concerning emergency plans when discharging its licensing duty. The Federal Aviation Administration is "empowered to issue airport operating certificates ... and to establish minimum safety

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*/ For its part, the NRC conditions its licenses on, among other things, a showing that an applicant has the requisite financial qualifications. 10 CFR 50.33(f). Those qualifications rest to a great extent on a State's utility rate structure and bond approval system, matters external to the licensee or applicant. See generally Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 8-23, aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). Through its rate system, a State may, in effect, veto any nuclear power plant.

standards for the operation of such airports." 49 U.S.C. 1432(a). "Each airport operating certificate shall prescribe such terms, conditions and limitations as are reasonably necessary to assure safety in air transportation." 49 U.S.C. 1432(b). Pursuant to this authority, the FAA has adopted a regulation requiring applicants for an airport operating certificate to demonstrate that they have "an emergency plan that insures prompt response to all emergencies and other unusual conditions in order to minimize the possibility and extent of personal and property damage on the airport." 14 CFR 139.55 (1979).[1]

The requirements set forth in section 139.55 indicate that the FAA could refuse to grant an airport operating certificate to an applicant whose airport would be located in an area lacking the necessary medical facilities to handle flight-related accidents, or in an area where local emergency response authorities did not, for whatever reason, participate in the development of the emergency plan. The FAA regulation, like the proposed NRC rule, demonstrates the necessity of

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[1] This regulation provides in pertinent part:

*** The applicant must list in its plan the following:

(i) The name, location, and emergency capability of each hospital and other medical facility, and the business address of medical personnel, on the airport and in the communities it serves, that will provide medical assistance or transportation, or both.

(ii) The name and location of each rescue squad, ambulance service, and military installation, on the airport or in the communities it serves, that will provide medical assistance, or transportation, or both.

* * * * *

(c) The applicant must show before applying that it has coordinated its emergency plan with law enforcement and firefighting and rescue agencies, medical resources, the principal tenants at the airport, and other interested persons. In addition, after October 18, 1977, the applicant must show that all facilities, agencies, and personnel specified in this paragraph have participated in the development of the plan and have indicated that they will participate to the extent practicable, in the implementation of the plan during an emergency.

considering external conditions when attempting to insure that an operator in a pervasively regulated industry pursues his activity in a manner consistent with the public health and safety.

While the FAA rule supports the concept of accounting for external events,[2/] the NRC proposed rules must still be analyzed with respect to various statutory review criteria.

NRC Enabling Legislation

"The rulemaking power granted to an administrative agency charged with the administration of a Federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213 (1976). Where the will of Congress is expressed through a broad delegation of authority and "substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress." Public Service

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2/ While the FAA regulation lends support to the validity of the proposed NRC rule, this support should not be overestimated. First, unlike nuclear power plants, airports are almost universally operated by governmental entities. Of the 475 airports operating in this country in 1979, 473 were operated by the federal, State, or local government, while only two were operated by private concerns. See data on file with the National Flight Center, FAA, U.S. Dept. of Transportation, Washington, DC. These governmental entities would have much less difficulty establishing emergency plans with the network of surrounding medical facilities, than nuclear plant licensees would have doing the same with State governments. In addition, it seems a fair assumption that a community having a population large enough to support an airport, would likewise have existing medical facilities capable of handling flight-related injuries. No similar assumption can be made concerning the existence of evacuation plans within the States. Perhaps because of these factors, the FAA regulation has been accepted without challenge.

Co. of New Hampshire v. NRC, 582 F.2d 77, 82 (1st Cir.), cert. denied, 439 U.S. 1046 (1978). A valid rule must therefore effectuate the will of Congress and operate within the scope of delegated power. "Administrative regulations are not absolute rules of law and should not be followed when they conflict with the design of the statute or exceed administrative authority granted." Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1118 (10th Cir. 1977).

The legislation authorizing the Commission to regulate the development of nuclear power "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968). See Westinghouse Electric Corp. v. NRC, 598 F.2d 759, 771 & n.47 (3d Cir. 1979). "Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer broad regulatory functions on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts, 42 U.S.C. § 2201(p)." Public Service Co. of New Hampshire v. NRC, 582 F.2d at 82. One of the Commission's major responsibilities is the licensing of persons whose activities involve the use of nuclear material. It is unlawful "for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission ..." 42 U.S.C. § 2131. These licenses "shall be issued ... subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter." 42 U.S.C. § 2133(a).

The purpose of the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 is beyond dispute. Congress has declared that

the "regulation by the United States of the production and utilization of atomic energy ... is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public." 42 U.S.C. 2012(e). Pursuant to this objective, the "mission of the ... Commission is to ensure the safety and security of the nuclear industry ..." S. Rep. No. 93-980, 93rd Cong., 2d Sess., cited in [1974] U.S. Code Cong. & Adm. News 5470.

When the Commission considers whether to issue a license to a particular applicant, its decision must necessarily be based upon a thorough examination of the health and safety factors involved. "It is clear ... that before licensing the ... reactor, the AEC will have to make a positive finding that the operation of the facility will 'provide adequate protection to the health and safety of the public.'" Power Reactor Development Co., supra, 367 U.S. at 406. Indeed, 42 U.S.C. 2133 provides that "... no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of the license to such person would be inimical to the common defense and security or to the health and safety of the public."

Based upon the Commission's determination of the health and safety significance of emergency planning, the proposed NRC rule, insofar as it conditions the issuance of a license upon the existence and scope of off-site emergency preparedness plans, directly effectuates the congressional intention that nuclear activity be strictly regulated so as to protect the health and safety of those residing near nuclear facilities. Since the Atomic Energy Act "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act," Power Reactor Development Co., supra, 367 U.S. at 404, the NRC acts within the scope of its grant of authority when formulating such a rule.

Judicial Review

The determination that a rule is promulgated pursuant to delegated authority and that it is in line with the broad will or intent of Congress is not the end of the inquiry. Although "administrative regulations properly promulgated under statutory authority are presumed valid," Marshall v. Whirlpool Corp., 593 F.2d 715, 721 (6th Cir. 1979), reviewing courts will nevertheless examine the rule to insure that it is not (1) unreasonable, (2) arbitrary and capricious, or (3) contrary to other law.

(1) The "reasonableness" test is essentially nothing more than a determination that the rule is indeed consistent with the purpose of the authorizing statute. "The agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference ... and will not be overturned if reasonably related to the language and purposes of the statute." Public Service Co. of New Hampshire v. NRC, 582 F.2d at 82. As discussed above, the proposed rule would further the purpose of the enabling legislation. This being the case, the "court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 416 (1971). The court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, 380 U.S. 1, 16 (1965). "The NRC, not [the] court, is entrusted with the task of making sure that nuclear power is safe. [The court's] job is to see that the NRC performs that task in accordance with the law." New England Coalition v. NRC, 582 F.2d 87, 92 (1st Cir. 1978).

(2) After determining that agency action is "reasonable," section 706(2)(A) of the Administrative Procedure Act "requires a finding that the actual choice made was not

'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. at 416.[3/] Under that test, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id.

The Commission developed the proposed rule as a direct response to facts which indicated that emergency preparedness and evacuation plans would be essential to safeguard the public health in the event of a nuclear accident. Previously, the NRC had regarded "engineered safeguards" as sufficient protection. The "analysis of how close the accident at Three Mile Island came to a situation in which evacuation might have been required on a precautionary basis, at least, leads us to conclude that this philosophy simply is not valid."[4/] "The accident showed clearly that protection provided by siting and engineered safety features must be bolstered by the ability to take protective measures during the course of an accident."[5/]

The Commission reached its determination that emergency preparedness plans are necessary to protect the public health and safety after considering a number of studies and reports, all of which pointed to the same conclusion. The report of the EPA-NRC Joint Task Force on Emergency Planning, published in December

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3/ This standard, rather than the "substantial evidence" test, is used because the rule is developed through a "nonadjudicatory, quasi-legislative" process that "is not designed to produce a record that is the basis for agency action -- the basic requirement for substantial evidence review." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

4/ The Rogovin Study, "Three Mile Island: A Report to the Commissioners and to the Public"; Vol. 1, pg. 130 (1980).

5/ Supplementary information to proposed rule, 44 Fed. Reg. 75167 (Dec. 19, 1979).

1978, recommended that there be a deliberate effort to establish policy concerning the development of Federal-State emergency preparedness planning. A General Accounting Office study, issued coincident with the TMI accident, advised that no new nuclear power plants be permitted to operate "unless off-site emergency plans have been concurred in by the NRC."[6/] A report from the House of Representatives entitled "Emergency Planning Around U.S. Nuclear Power Plants" urged that the NRC "undertake efforts to upgrade its licensees' emergency plans and State and local plans."[7/] The President's Commission on the Accident at Three Mile Island (the Kemeny Report) recommended that approved State and local emergency plans be a condition for licensing new power plants.

Responding to the recommendations of the above studies, and guided by the findings of its own Emergency Planning Task Force which articulated the need for intensive NRC efforts to upgrade offsite emergency plans, the Commission has concluded that adequate emergency preparedness plans are essential to safeguard the public health and safety. This determination was based upon a consideration of all relevant factors, including dramatic recent experience, and can certainly not be deemed "a clear error of judgment." The United States Court of Appeals for the District of Columbia Circuit, while speaking about EPA regulations, uses language that is

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6/ GAO Rep., EMD-78-110 (March 30, 1979).

7/ H.R. Rep. No. 96-413, 96th Cong., 1st Sess. (Aug. 8, 1979). On the other hand, the House has given contrary messages on emergency planning issues. The House version of NRC's Authorization Bill for FY 1980 did not contain any express link between reactor operation and adequate off-site emergency plans, adopting only a requirement that NRC assess plans and report on their status, believing that such a link would raise serious constitutional problems. <u>See</u> H.R. Rep. No. 96-194 (Pt. II), 96th Cong., 1st Sess. 26-27 (June 29, 1979). The matter is still before a Conference Committee. Whether the proposed rule is constitutional is discussed below.

equally applicable here. The court states: "Yet the statutes -- and common sense -- demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." Ethyl Corp. v. EPA, 541 F.2d 1, 25 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).

(3) The validity of a rule that is neither unreasonable nor arbitrary and capricious is confirmed only after the rule is shown not to be contrary to other law. "The Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit." Standard Airlines, Inc. v. CAB, 177 F.2d 18, 20 (D.C. Cir. 1949).

(a) Tenth Amendment

Because the proposed NRC rule deals with emergency evacuation plans formulated by a State, the rule must be examined in light of the Tenth Amendment's reservation of power to the States. In National League of Cities v. Usery, the Supreme Court has stated that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the State as States by means of the commerce power." 426 U.S. 833, 842 (1976). NRC evaluation of State evacuation plans withstands Tenth Amendment scrutiny, however, because the proposed rule speaks directly to the licensee rather than to the States. "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States." Id. at 845. Unlike the Fair Labor Standards Act at issue in National League of Cities, the NRC rule does not speak "directly to the States qua States," nor does it directly impose substantial costs upon the States or displace "state policies regarding the manner in which they

will structure delivery of those governmental services which their citizens require." Id. at 847. Indeed, the States need not alter existing program:, nor need they take any action at all under the proposed rule.

Although the proposed rule does not directly require the States to act, there is a definite "string" attached to the State decision concerning emergency planning. Should a State decide not to establish the necessary evacuation plans, and it has total freedom to so decline, it makes such a decision with the knowledge that it will be unable to make use of nuclear power as a means of meeting the energy needs of its citizens. Hence, there is obviously a strong inducement for a State to develop the required emergency plans if it at all desires the benefits of nuclear power. The question becomes, however, whether this inducement rises to the level of impermissible coercion.

The federal government may not interfere with the right of a State to carry on those activities necessary to preserve its sovereignty. This may not be done directly, nor may it be done indirectly by forcing a State to make a prescribed "choice" under threat of fiscal and political destruction should it choose otherwise. The decision not to establish appropriate emergency plans under the proposed rule might necessitate reorganization of State energy resource plans, and it might even result in some economic loss (as States are required to buy substitute power), but it certainly would not threaten the continued existence of the State as a sovereign ent ty.

The courts have held that the federal government may condition grants of federal funds upon certain criteria, leaving the States the choice to accept or decline the offer with its "strings," without contravening the Tenth Amendment. King v. Smith, 392 U.S. 309 (1968). In upholding the Social Security Act (provisions requiring employers to pay a federal tax, but allowing a credit for

contributions made to a federally approved State unemployment fund) against claims that the Act coerced States into establishing unemployment funds, the Supreme Court stated: "There is only a condition which the State is free at pleasure to disregard or fulfill." Steward Machine Co. v. Davis, 301 U.S. 548, 595 (1937). The Court added that "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." Id. at 590.

Any distinction between attaching "strings" to a grant of funds and directing that no nuclear power plants will operate without the existence of approved off-site emergency plans carries little legal weight. The federal government, through its Article I spending power, has complete control over the federal purse. Similarly, through the Commerce Clause, the federal government exercises exclusive control over the radiological aspects of nuclear power, "including the imposition of federal controls over health and safety standards." Northern States Power Co. v. Minnesota 447 F.2d 1143, 1147 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). Just as the federal government may impose conditions upon the recipients of federal funds to insure that such funds are spent wisely, County of Los Angeles v. Adams, 574 F.2d 607 (D.C. Cir. 1978), it may likewise establish conditions necessary for the safe operation of nuclear facilities.

In the case of the proposed rule, the NRC has recognized the necessity of off-site emergency planning to insure the safety of the public, and, rather than mandate that the States develop off-site emergency plans (a mandate that could arguably contravene both the Atomic Energy Act and, if the statute were changed, the Tenth Amendment),8/ has instead conditioned the issuance of a license upon

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8/ A reviewing court would probably not reach the Tenth Amendment issue under the current statute, since that Act would appear not to sanction the direct exercise of authority against non-licensees in circumstances such as these.

> the existence of emergency plans, leaving to the States the choice of formulating such plans or declining to do so. "In no way does the administrative scheme diminish the States' sovereign powers or undercut their ability to discharge their sovereign responsibilities." Id. at 609 (upholding a challenge to the Secretary of Transportation's regulations requiring a metropolitan planning organization, designated by the involved State and composed of representatives of its local governments, to endorse a project's consistency with a long-range plan before the State may request federal aid). The conditioning of such licenses upon the existence of approved off-site emergency plans is neither a "direct" nor an "indirect" violation of the Tenth Amendment.[9]

9/ In addition to the Tenth Amendment issue, the proposed rule may also give rise to a strange twist of the federal preemption doctrine. The federal government, under the preemption doctrine, has exclusive authority to regulate the radiological aspects of nuclear power. The States, on the other hand, may regulate NRC licensees only for the manifold health, safety, and economic purposes "other than radiation protection." Northern States Power Co. v. Minnesota, 447 F.2d 1143. The argument could be raised, therefore, that by having the power to decline to establish emergency plans, the States exercise a "veto" over the development of nuclear power in contravention of the preemption doctrine.

This argument misses the mark. First, no State is being asked to exercise regulatory authority under the proposed rule. Rather, the Federal Government intends to evaluate as one of the facts relevant to its own regulatory decision the caliber of the State's emergency planning activity. This distinguishes the purpose of the Federal Government from that which was considered objectionable in Northern States Power. Moreover, unlike reactor design matters where NRC authority is plenary, offsite emergency planning authority has always been considered to be primarily within the purview of the State. Thus State action or inaction in this field is entirely within the State's authority and NRC is compelled to rely on exercise of State authority if it wishes to make offsite emergency planning a matter of primary importance to its licensing process. Thus the situation is entirely dissimilar to the situation in Northern States Power where the State attempted to act in a field reserved exclusively to the federal government.

In summary, although a congressional mandate directed at "the States as States" could run afoul of the Tenth Amendment, the Supreme Court has recognized "the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." National League of Cities v. Usery, 426 U.S. at 845. The proposed rule, derived from a valid delegation of congressional authority, does not violate the Tenth Amendment, nor does it give rise to preemption doctrine problems.

(b) Due Process

The proposed rule might also be challenged through resort to due process arguments arising under the Fifth Amendment.[10] In this context due process may be taken to mean that utilities are being required to assume the burden of showing that off-site planning is adequate at the same time that the Federal Emergency Management Agency (FEMA) process for reviewing such plans is incomplete and the criteria under which such plans will be judged have not been finally adopted. Under these circumstances, the licensee may complain that it is being bound to a requirement without adequate "notice" of what that burden entails. We believe that argument lacks merit.

Licensees have not been given inadequate notice of their responsibilities and burdens. The process by which NRC and now FEMA examine offsite preparedness is well known by custom. While it is being modified, it is not being fundamentally altered, and that fact has been made clear in guidance to licensees and State and local governments. In addition, the criteria for evaluating plans are also not new.

10/ The Fifth Amendment to the U.S. Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law ...." (It, rather than the identical phrasing in the Fourteenth Amendment, applies to the federal government.) Whether and to what extent this applies to license revocation will be treated below.

These criteria are a compilation of existing NRC staff guidance and various other documents into one document. Both the review process and the criteria are factored (by reference) into the proposed rules in such a way that persons subject to the rule are "'fairly advised' of exactly what the Commission proposed to do sufficiently in advance ... to give them adequate time to formulate and to present objections to the Commission's proposal." United States v. Florida East Coast R. Co., 410 U.S. 224, 243 (1973); K. Davis, Administrative Law of the Seventies, § 6.01-1, pp. 170-172 (1976). By the time the proposed rules are effective, these criteria, in present form, will have been available for about one year. The notice thus seems fully compatible with our process requirements.

(c) Fundamental Fairness

(i) The Siting Connection

The proposed NRC rule conditions the grant of a license upon the existence of an acceptable State evacuation plan. The State is not a party to the licensing proceeding, nor need the State take any action whatsoever under the rule. Potential licensees might be heard to complain that conditioning the license upon circumstances beyond their control violates some notion of fundamental fairness. Yet the prime concern of the Commission in the licensing context is the protection of the public health and safety. Conditions beyond the control of the applicant, most notably population density, are regularly considered by the NRC when analyzing the siting factors involved in a given application. The evaluation of local emergency preparedness and evacuation plans, insofar as this consideration is inextricably entwined with siting matters, should be included in the siting analysis.

"The regulations adopted, codified at 10 CFR part 100 (Reactor Site Criteria), attempt to accomplish the statutory mandate, inter

alia, through criteria designed to assure a safe separation between the reactor and surrounding population even in the event of a hypothetical 'major accident ...'" New England Coalition v. NRC, 582 F.2d at 91. Population density is a major factor considered by the Commission in making a siting decision. To effectuate a safe separation between a nuclear facility and the local population should a nuclear accident occur, the agency must have considered not only the size of the local population, but also the ability to evacuate these people should such action become necessary. "In developing criteria for future siting, we believe the NRC will have to give consideration to the specific characteristics of the area that influence the effectiveness of evacuation: population density; population centers ...; evacuation routes;" and any measures appropriate to minimize the possibility that large numbers of people will later move into the area surrounding the facility.11/

Although the emergency evacuation criterion is a new condition attached to the granting of a license, it should be noted that emergency plans were not totally absent from consideration in past licensing proceedings. The Commission required each applicant for an operating license to include in its final safety analysis report plans for coping with emergencies. 10 CFR § 50.34(b). The final safety analysis report was to include a description of procedures "for notifying, and agreements reached with local, State and Federal officials and agencies for the early warning of the public and for public evacuation or other protective measures should such warning, evacuation, or other protective measures become necessary or desirable ..." 10 CFR Part 50, App. E, IV(D). The Commission has since determined that off-site emergency plans are essential to safeguard the public health and safety. The evaluation of such plans could appropriately become an integral part of the siting analysis.

11/ The Rogovin Study, "Three Mile Island: A Report to the Commissioners and to the Public"; Vol. 1, pg. 130 (1980).

(ii) Revocation of Licenses

The revocation of a license because of failure to meet conditional criteria established subsequent to the initial grant of the license raises questions of fundamental fairness. "So the problem before us concerns the statutory and constitutional rights of one who has a substantial property investment acquired in dependence upon a Government permit which is subject to immediate suspension at any time. What are the requirements of the statute and of due process of law in such a situation?" Standard Airlines, Inc. v. CAB, 177 F.2d at 20.

A license condition based on the adequacy of off-site emergency plans would not be "fundamentally unfair." Clearly, the revocation of licenses may be based on new facts and circumstances. "Numerous cases are persuasive that the delegation to an administrative agency of discretion as to the revocation of a license is not unconstitutional." Wright v. SEC, 112 F.2d 89, 95 (2d Cir. 1940).12/ See 1 K. Davis, Administrative Law Treatise, § 2.13, 134 (1958). Congress has provided that "[a]ny license may be revoked ... because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application ..." 42 U.S.C. § 2236(a), 10 CFR 50.100. "Congress, when it enacted [this] section, ... must have envisioned that licensing standards, especially in the areas of health and safety regulation, would vary over time as more was learned about the hazards of generating nuclear energy. Insofar as those standards became more demanding, Congress surely would have wanted the new standards, if the Commission deemed it appropriate, to apply to those nuclear facilities already licensed." Ft. Pierce Utilities Authority v. United States, 606 F.2d 986, 996 (D.C. Cir. 1979).

12/ See Hall v. Geiger-Jones Co., 242 U.S. 539, 553 (1917); Brinkley v. Hassig, 83 F.2d 351, 354 (10th Cir. 1936); Board of Trade v. Wallace, 67 F.2d 402, 407 (7th Cir. 1933).

The provisions in the Code and the NRC regulations not only empower the Commission to revoke licenses when necessary, but also serve to place licensees on notice that subsequent developments may necessitate such revocation. Protection of the public health and safety takes precedence over a licensee's property rights in this situation.

Conclusic..

The Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 direct the Nuclear Regulatory Commission to regulate the nuclear industry so as to protect the public health and safety. "Thus, the task awaiting the [NRC] is considerable. It will require strong, effective regulation to keep pace with the industry, and to ensure its safe development." S. Rep. No. 93-980, supra. The proposed NRC rule is just such a regulation. It gives effect to the Commission's recognition that adequate emergency preparedness and evacuation plans are essential to safeguard the health of those residing near nuclear facilities.

It is true that the proposed rule involves consideration of an external condition, but external circumstances, notably the many siting factors, have been considered in past licensing proceedings. Likewise, a description of local evacuation plans, when existing, have been included in a licensee's final safety analysis report. The existence, however, of an effective State emergency or evacuation plan in case of an accident has not been a condition for granting a reactor operating license. Recent experience has demonstrated the need for such plans, and the proposed NRC rule squarely resolves this deficiency. "Thus, it may be fairly said that '[i]n the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given and that every grant of power carries with it the use of necessary and lawful means for its effective execution.' 1 Am. Jur. 2d,

Administrative Law § 44, at 846 (1962)." Chamber of Commerce v. Dept. of Agriculture, 459 F.Supp. 216, 221 (D.D.C. 1978). The proposed NRC rule is lawful.

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