

June 17, 1980


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

SECY-8C-291

CONSENT CALENDAR ITEM

For: The Commissioners

From: Howard K. Shapar, Executive Legal Director

Thru: William J. Dircks, Acting Executive Director
for Operations 

Subject: DOCKET NO. PRM 2-8 PETITION FOR RULEMAKING FILED BY
UNION OF CONCERNED SCIENTISTS AND NATURAL RESOURCES
DEFENSE COUNCIL, INC. TO AMEND RULEMAKING PROCEDURES

Purpose: To obtain Commission approval to publish a notice of
denial of the petition (Enclosure A) in the FEDERAL
REGISTER.

Category: This paper covers a routine matter.

Discussion: On March 2, 1979, the Union of Concerned Scientists
(UCS) and Natural Resources Defense Council, Inc. (NRDC)
filed comments on certain recent amendments to 10 CFR
Part 21, "Reporting of Defects and Noncompliance,"
adopted in effective form by the Commission on October 19,
1978 (43 FR 48621).^{1/} In their comments, UCS and NRDC
proposed that the Commission adopt the following proce-
dures: (1) all proposed regulations should be preceded
by an advance notice of intent to develop a regulation
and (2) staff proposals for regulations should be treated
no differently from those generated by the public, i.e.,
a staff submittal to the Commission should be followed
by a Federal Register notice and opportunity for comment
on the staff proposal, prior to any Commission action.
By letter dated June 8, 1979, counsel for NRDC was
advised that these procedural comments would be consid-
ered as a petition for rulemaking as provided in 10 CFR
§ 2.802 of the Commission regulations.

A notice of filing of the petition requesting comments
by August 6, 1979 was published in the FEDERAL REGISTER
on June 6, 1979 (44 FR 32489-90). Three letters of
public comment were received, all of which dealt only

Contact: Bruce A. Berson, OELD
492-7678

^{1/} NRDC has also brought suit against NRC, seeking repeal of the amend-
ments. The matter is pending before the Circuit Court of Appeals for
the District of Columbia. I understand that the petitioner's brief is
due to be filed this month. NRC will then file its response brief.

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with that part of petitioners' letter concerning the substance of the amendment to 10 CFR Part 21. No comments were received regarding petitioners' suggestion to revise NRC procedures for handling staff proposed regulations.

The attached Federal Register notice of denial of the petition (Enclosure A) explains that the Commission's rulemaking procedures comply with the Administrative Procedure Act and that both provide for a certain amount of flexibility and discretion regarding issuance of advance notice of intent to develop a regulation, as well as issuance of effective rules (without prior notice and opportunity for comment) in appropriate circumstances.

The notice of denial further explains that the Commission's review and approval of staff proposed rules and regulations is appropriate for the orderly conduct of agency business and does not constitute prejudgment of the final rule or regulation.

Recommendation:

That the Commission

1. Approve the attached Notice of Denial of Petition for Rulemaking (Enclosure A) for publication in the FEDERAL REGISTER and close Docket No. PRM-2-8.
2. Note:
 - a. A letter transmitting a copy of the Notice of Denial will be sent to UCS and NRDC at the same time that the notice is dispatched to the FEDERAL REGISTER for publication (Enclosures B & C).
 - b. Denial of the petition for rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment. Accordingly, no environmental impact statement, negative declaration or environmental impact appraisal need be prepared.
 - c. The House Committees on Interior and Insular Affairs, Interstate and Foreign Commerce, and Government Operations, and the Senate Committee on Environment and Public Works will be informed (Enclosure E).
 - d. A public announcement will not be issued.

Coordination:

The Division of Rules and Records in the Office of Administration and the Office of Standards Development concur with the recommended denial.

Thomas F. Engelhardt 6/13/80
Howard K. Shapar
Executive Legal Director

Enclosures:

- "A" Notice of Denial of Petition
for Rulemaking
- "B" Draft letter to J. Lash
- "C" Draft letter to R. Pollard
- "D" Petition for Rulemaking
- "E" Draft ltr. for Congressional
Committees

Commissioners' comments or consent should be provided directly to the Office of the Secretary by cob. Thursday, July 3, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 26, 1980, 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 affirmation at an Open Meeting during the Week of July 7, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-8]

Union of Concerned Scientists and Natural Resources
Defense Council, Inc.; Notice of Denial of
Petition for Rulemaking

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Denial of Petition for Rulemaking

SUMMARY: The Nuclear Regulatory Commission is hereby denying a petition for rulemaking (PRM-2-8) submitted by the Union of Concerned Scientists and the Natural Resources Defense Council, Inc. The petitioners had requested the Commission to amend its regulations to precede all proposed regulations by an advance notice of proposed rulemaking and treat staff proposals for regulations procedurally the same as those generated by members of the public.

FOR FURTHER INFORMATION CONTACT: Bruce A. Berson, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 492-7678.

SUPPLEMENTARY INFORMATION: The petition for rulemaking (PRM-2-8) submitted by the Union of Concerned Scientists and Natural Resources Defense Council,

Inc. was part of a letter commenting upon certain amendments to 10 CFR Part 21, "Reporting of Defects and Noncompliance," adopted by the Commission on October 19, 1978 (43 FR 48621). Petitioners requested the Commission to adopt the following modifications in the policy applicable to consideration of regulatory actions:

1. All proposed regulations should be preceded by an advance notice of intent to develop a regulation.
2. Staff proposals for regulations should be treated no differently from those generated by the public--i.e., a staff submittal of a proposal to the Commission should trigger a Federal Register notice and opportunity for public comment on the staff proposal. Only after receipt of the public comment should the Commission take action on the proposal. The staff proposal could be treated as the proposed amendment, provided its publication did not represent a prejudgment of the merits by the Commission.

The petitioners' revised procedures for noticing and treating staff-proposed regulations are designed to prevent the staff from acting in an "adversarial" fashion in its presentations to the Commission.

A notice of filing of the petition, requesting comments by August 6, 1979, was published in the Federal Register on June 6, 1979 (44 FR 32489). No letters of public comment were received regarding petitioners' suggestion to

revise NRC procedures for handling staff-proposed regulations. (However, three persons did comment on the substance of the amendments to Part 21.) Both the petition and the comments are available for public inspection and copying at the NRC Public Document Room at 1717 H Street, N.W., Washington, D. C.

The Commission has carefully considered the two proposals--(1) that all proposed regulations should be preceded by an advance notice of proposed rulemaking, and (2) that staff proposals for regulations should be treated procedurally no differently than those generated by members of the public. For the reasons set forth below, the Commission has concluded that adoption of these proposals is unnecessary and is not in accordance with good administrative practice.

The procedures which the Commission follows in exercising its authority to promulgate rules and regulations are codified in sections 2.800 through 2.808 of Title 10 of the Code of Federal Regulations. Under these procedures, which comply with the provisions of the Administrative Procedure Act (APA) applicable to rulemaking (5 U.S.C. §553), the Commission may initiate a rulemaking proceeding on its own initiative, on the recommendation of another Federal agency, or on the petition of any other interested person. The first step in most NRC rulemaking proceedings is publication in the Federal Register of a notice of proposed rulemaking; neither the APA nor the Commission's implementing rules requires publication of an advance notice of proposed rulemaking.

The petitioners' first proposal would require that all proposed regulations be preceded by an advance notice of intent to develop a regulation. The Commission's current practice is to publish advance notice of proposed rulemaking only when it deems it appropriate to do so. Such circumstances include matters on which the Commission desires early comments from potentially affected members of the public to assist it in determining the need for a rule, or, if a rule is necessary, the possible components and parameters of a subsequent rulemaking. Hence, the Commission considers an advance notice of proposed rulemaking a useful tool to gauge public interest or obtain public assistance on certain issues in early stages of development.

It does not appear useful or appropriate for the Commission to require an advance notice in all cases. In most cases, the notice of a proposed rulemaking with opportunity for public comment is sufficient to gauge public interest in the proposal and to elicit suggestions relative to such rulemaking. In those matters where the Commission perceives a benefit to be derived from an advance notice, such as those mentioned above, the Commission has in the past and will continue to exercise its discretionary authority to publish an advance notice of proposed rulemaking which seeks early advice from the public.^{1/} It should also be noted that the authority of the Commission extends in certain circumstances to issuing rules without prior notice and comment. While the APA (5 U.S.C. §553(b)(B) and (d)(3)) and the

^{1/} The Commission believes this procedure is consistent with E.O. 12044 (43 FR 12661, March 23, 1978). The Commission has previously expressed full support for the basic objectives of the Executive Order which is to improve existing and future government regulations.

Commission's implementing rules (10 CFR § 2.807) require that, in most cases, 30 days notice must precede the effective date of a rule, the APA and Commission rules do provide, in certain circumstances, for publication of immediately effective rules.

The petitioners' second proposal would require that the staff be treated no differently from the public in the procedures applicable to proposals for regulations. In effect this means that if the staff wished to propose a rulemaking to initiate a new rule or amend an existing one, it would do so by publishing its proposal in the Federal Register for public comment without prior Commission review and approval. This suggestion appears to misapprehend the nature and organization of the Nuclear Regulatory Commission and is inconsistent with accepted administrative agency practice.

It has long been recognized that the staff's expertise is central to and an inherent part of the execution of the agency's mission. The staff's advice is considered vital to effective regulation. Hence, pursuant to 10 CFR Part 1, "Statement of Organization and General Information," §§ 1.40-1.64, the staff is directed to recommend to the Commission proposed regulations in a variety of procedural and substantive areas. Only in certain delegated instances may the Executive Director for Operations issue, without prior Commission review and approval, proposed amendments to regulations and amendments in final form.

Unless specifically authorized by the Commission to do otherwise, it is the staff's role to provide advice and expertise to the Commission. In the case of rulemaking, the Commission's review and approval of a recommendation that a proposed rulemaking be instituted (or that an advance notice of proposed rulemaking be published) does not mean that the matter has been finally decided. By assuring that proposed rules comport generally with Commission policy before they are approved for publication, the Commission does not prejudge the final rule (which may differ from the proposal as a result of comments received) but rather intends to achieve sound, effective, economical, and consistent agency practice.

In sum, it is entirely appropriate for the Commission to consult informally with staff experts in matters of policy and rulemaking. The Attorney General's Manual on the Administrative Procedure Act explains:

. . . [T]he purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads relying heavily upon the expert staffs which have been hired for that purpose. . . . Id. at 15 (emphasis added).

Accordingly, the separation of functions requirement does not and should not apply in informal rulemaking. Association of National Advertisers, Inc. v. Federal Trade Commission, ___ F.2d ___ No. 78-1421 (D.C. Cir. Dec. '7, 1979), slip op., at 35-36.

Thus, pursuant to its statutory authority, the Commission reviews and approves staff action such as proposals for regulations prior to publication.

The Commission is not aware of any Federal agency that treats staff proposals in the same manner as those generated by the public. The Commission considers it necessary and appropriate in the interest of proper leadership and conduct of agency business that there be ongoing coordination between the staff and the Commission in rulemaking matters.^{2/}

In view of the foregoing, the Commission denies the petition for rulemaking filed by UCS and NRDC on March 2, 1979.^{3/} A copy of the Commission's letter of denial is available for public inspection and copying at the NRC Public Document Room at 1717 H Street, N.W., Washington, D.C.

Dated at Washington, D.C., this ____ day of _____, 1980.

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk
Secretary of the Commission

^{2/} On October 4, 1979 the Commission was provided a report entitled "Review of Delegations of Authority Within NRC" (dated September 1979) and in response to a recommendation of that report requested that a draft proposal be prepared to delegate substantial rulemaking powers to the Office of Standards Development and other staff offices.

^{3/} We have also considered the petition in light of the President's Reorganization Plan No. 1 of 1980, transmitted to the Congress on March 27, 1980, and the Amended Reorganization Plan transmitted to the Congress on May 5, 1980. Our disposition of the petition would be the same if we were functioning under either of those plans since most rulemaking would remain a function of the Commission acting as a collegial body.



UNITED STATES
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WASHINGTON, D. C. 20555

DRAFT

Mr. Jonathan Lash
Natural Resources Defense Council, Inc.
917 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Lash:

This is in regard to the Union of Concerned Scientists and Natural Resources Defense Council, Inc. petition for rulemaking dated March 2, 1979, Docket No. PRM 2-8, requesting the Commission to adopt the following procedures: (1) all proposed regulations should be preceded by an advance notice of intent to develop a regulation; and (2) staff proposals for regulations should be treated procedurally no differently from those generated by the public.

After careful review and consideration of these proposals, the Nuclear Regulatory Commission has denied the petition for rulemaking for the reasons set forth in the attached Notice of Denial of Petition for Rulemaking.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

Enclosure "B"



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

DRAFT

Mr. Robert Pollard
Union of Concerned Scientists
1025 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Pollard:

This is in regard to the Union of Concerned Scientists and Natural Resources Defense Council, Inc. petition for rulemaking dated March 2, 1979, Docket No. PRM 2-8, requesting the Commission to adopt the following procedures: (1) all proposed regulations should be preceded by an advance notice of intent to develop a regulation; and (2) staff proposals for regulations should be treated procedurally no differently from those generated by the public.

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Sincerely,

Samuel J. Chilk
Secretary of the Commission

Enclosure "C"