NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford

FROM: Howard K. Shapar
Executive Legal Director

THRU: Lee V. Gossick
Executive Director for Operations

SUBJECT: OGC COMMENTS ON SECY-78-44 CONCERNING EMERGENCY PLANNING REQUIREMENTS OUTSIDE A REACTOR'S LOW POPULATION ZONE

Background

At Policy Session 77-48 on October 25, 1977, the Commission discussed SECY-77-461 dealing with emergency planning policy, and approved the rule change to 10 CFR Part 50, Appendix E recommended by the Staff. Some additional guidance to the Staff on this matter was set forth in a memorandum from the Secretary of the Commission dated November 3, 1977. SECY-78-44 was then prepared by the Staff in accordance with the Commission's directions and forwarded to the Commission on January 25, 1978. SECY-78-44 merely requested final Commission approval of the rule change previously approved in principle by the Commission at Policy Session 77-48. However, in a memorandum to the Commission dated February 14, 1978, the Office of the General Counsel (OGC) raised several objections to the rule change recommended in SECY-78-44 by the Office of Standards Development (SD). The purpose of this memorandum is to set forth OELD's views on OGC's objections to SD's proposal.

(1) The Assertion that the Staff's Proposal Is Misleading

OGC asserts that the SD recommendation in SECY-78-44 is "packaged misleadingly as a 'clarification' of the rules" and that it is, in fact, a substantive rule change.

Enclosure 7

SD pointed out specifically in both SECY-77-461 and SECY-78-44 that the recommended rule change would have the effect of reversing the decision by the Atomic Safety and Licensing Appeal Board in New England Power Company et al. and Public Service Company of New Hampshire; ALAB-390, 5 NRC 733 (1977). Indeed, the recommended preamble to the rule set forth in SECY-78-44 would specifically point out for the benefit of those affected by the rule that the Appeal Board's decision in ALAB-390 is being reversed by the rule. Thus, there can be no serious claim that SECY-78-44 does not adequately inform the Commission and the public that a prior adjudicatory decision would be affected by the rule change. What remains is a disagreement between OGC and the Staff as to the nature of present and past Commission policy on emergency planning. As reflected in SECY-77-461 and SECY-78-44, the Staff believes that its recommended rule change is in accord with Staff emergency planning licensing reviews as they are now conducted and have been conducted over the past several years. OGC, relying on ALAB-390 and the adjudicatory decisions cited therein, argues to the contrary.1/

The subject of past and present Commission emergency planning licensing review policy was dealt with at length in SECY 77-461 and was discussed at length by the Staff with the Commission at Policy Session 77-48.2/ OGC has not been deeply involved in the emergency planning licensing reviews that have been conducted over the years by the Staff--this perhaps explains some errors in the memorandum.3/ As indicated above, OGC relies on ALAB-390 for its conclusion that the

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1/ It is not clear what one should make of OGC's reference in footnote 4 of its memorandum to ALAB-390 as, in effect, an "en banc" decision. The Commission's rules make no mention of an "en banc" decision and such a decision is not entitled to any special weight under the Commission's rules. In any event, a decision by the Appeal Board can always be reversed by the Commission, either on review or (as here recommended by the Staff) by rule. For example, after consideration of SECY-77-226 and 76-528, the Commission decided to reverse the Appeal Board's decision in Consumers Power Company, ALAB-283 and ALAB-315, by rule. See 42 FR 37406 (July 21, 1977).

2/ OGC did not disagree with the description by the Staff of its emergency planning policy when SECY-77-461 was discussed at Policy Session 77-48.

3/ For example, OGC is incorrect in asserting that NRC regulations assume that the guideline doses in 10 CFR Part 100 are "safe" doses. See 10 CFR §100.11 (a), footnote 2. It is fundamental to the Commission approach to siting under 10 CFR Part 100 and emergency planning under 10 CFR Part 50, Appendix E, that the dose guideline values in Part 100 not be regarded as "safe" or "acceptable" doses under accident conditions. Also, throughout the memo, OGC confuses the broader terms "emergency plan" with the narrower terms "evacuation plan". An evacuation plan is but one element an emergency plan. Both the Appeal Board (ALAB-390, 5 NRC 733, 736, note 5) and the Staff are in agreement that some facets of emergency planning (e.g., arrangements with local hospitals) can and must extend beyond the low population zone. The issue in ALAB-390, and the subject of the recommended rule change, are confined to the narrower issue of evacuation of persons beyond the low population zone.

recommendation in SECY-78-44 is a substantive departure from present and past review practice. The discussion in SECY-77-461 indicates that ALAB-390 was not in accord with Staff review policies concerning one element of emergency planning--evacuation of persons outside of the low population zone. Unfortunately, as reflected in SECY-77-461, Staff licensing review practices under 10 CFR Part 50, Appendix E and Appeal Board adjudicatory decisions on evacuation of persons outside of the low population zone evolved along different lines in the last several years without the Staff becoming fully aware of the extent of the divergence until the issue was joined in ALAB-390. The Appeal Board does not exercise Staff licensing review functions, and must deal with prior adjudicatory decisions construing the Commission's regulations as it finds them. Viewed in this light, the decision in ALAB-390 is a reasonable one. But ALAB-390 is not dispositive on the question of the nature of the Staff review practices. The Staff itself is in the best position to inform the Commission on this matter.4/ If, after evaluation, it turns out that the Commission's regulations as construed in adjudicatory decisions are not in tune with the actual nature of Staff reviews, then either the reviews or the regulations must be changed. In SECY-77-461 the Staff recommended that the regulations be changed to conform to the Staff review practices. In preparing the recommended rule change in SECY-78-44 following Policy Session 77-48, the Staff reasonably assumed that the Commission agreed with its views on this matter.

It is true, as OGC states, that "if the Commission wants to change those regulations [10 CFR Part 50, Appendix E] now, it must do so by rulemaking." But this is hardly a novel thought--SECY-77-461 and SECY-78-44 recommended precisely that. OGC also argues that if a regulation change is desired, "the Staff should explicitly articulate why it believes such a change is necessary." SECY-77-461 did just that.

(2) The Need For Public Comment

OGC asserts that "unless some legitimate reason exists for haste, the public should have an opportunity to comment on the [rule] change before it is made effective." The Administrative Procedure Act (APA) makes specific provision for an effective rule change without prior opportunity for public comment.

4/ The discussion of Staff emergency planning licensing review policy in SECY-77-461 is consistent with the discussion in NRC Regulatory Guide 1.101, Section 6.4.3.2.

Under APA section 4, prior opportunity for public comment need not be afforded in the case of "interpretative rules" or "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon [would be] ... contrary to the public interest." The recommended notice of rulemaking in SECY-78-44 fully complies with the APA in this regard by stating:

> The amendment is interpretative in nature, and is intended to more clearly reflect the current practice of the Commission in its licensing review of emergency plans. There is also need for prompt action because the cited decision (ALAB-390) has the effect of improperly restricting the scope of Commission review of emergency plans. For these reasons the amendment is being made effective upon publication without prior notice of proposed rulemaking and public procedure thereon. However, the Commission is providing an opportunity for public comment upon the amendment with a view to possible changes.

The recommendation that the rule be made effective without prior public comment is legally supportable both because the rule in interpretative in nature and because prior public comment would be contrary to the public interest in view of the health and safety considerations described below.

On the first point, 10 CFR Part 50, Appendix E, is not clear on its face regarding evacuation plans beyond the LPZ. Indeed, the decision in ALAB-390 is not based on the "clear" language of the regulations in 10 CFR Parts 50 or 100. Rather, the decision in ALAB-390 rested primarily on a review of prior adjudicatory decisions on evacuation plans. Thus, it is reasonable to conclude that the recommended rule change is "interpretative" in nature.5/ On the second point, certainly the need for adequate licensing reviews of evacuation plans to protect the public health and safety is sufficient public interest justification for dispensing with prior opportunity for public comment under the APA.6/ The fact that substantial time has passed since ALAB-390 was issued is unfortunate but does not legally disable the Commission from now acting promptly. Nor is the fact, cited by OGC, that "industry and other interests" might object to the rule, dispositive on the matter of requesting prior public comment.

5/ As another example of an immediately effective "interpretative" rule, see the amendment to 10 CFR §110.11(a)(2) promulgated by the Commission in response to Porter County Chapter v. AEC, 515 F.2d 513 (7th Cir. 1975) reversed and remanded sub nom. Public Service Co. v. Porter County Chapter, 423 U.S. 12 (1975).

6/ As another example of an immediately effective rule change grounded on the public interest, see the AEC's ECCS Interim Acceptance Criteria, 36 F.R. 17747 (June 29, 1971), upheld in Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

Finally, it should be noted that SECY-78-44 recommends that public comment be solicited on the effective rule with a view to possible changes.

(3) The Relation Between Parts 50 and 100

OGC states that the "Supplementary Information" material, from the last paragraph on page 2 through page 4 of the recommended notice of rulemaking in SECY-78-44, is not part of the material approved by the Commission and is confusing. In fact, the material, with several essentially editorial changes, is included on pages 1-2 of Enclosure D to SECY-77-461. OGC's assertion that the language is confusing cannot be addressed without knowing exactly how and where OGC finds the language confusing.

OGC also expresses doubt whether the Commission's direction to the Staff at Policy Session 77-48 to distinguish between "site suitability" and Part 50 emergency planning reviews is "appropriate". This matter, and the pros and cons of the option of amending both Parts 50 and 100 to deal with emergency planning, are discussed in detail in SECY-77-461. We agree that in some cases evacuation measures for persons beyond the low population zone will logically be a factor in site evaluation. The recommended rule change will not preclude this. On the other hand, there is no legal reason why this factor must now be included specifically in 10 CFR Part 100. Indeed, as the Commission has been informed in past papers and briefings on the general subject of reactor site suitability, Part 100 has for years been merely the "tip of the iceberg" on reactor site suitability licensing reviews. The time has long past when Part 100 was regarded as the definitive Commission policy statement on site suitability questions--even questions dealing with population density matters.7/ Specific inclusion of the matter of evacuation of persons beyond the low population zone in Part 100 will contribute very little to the goal of a comprehensive siting regulation. Of course, what is needed is a wholesale evaluation of and revision to Part 100 that would address emergency planning and other site issues in a comprehensive fashion. Such an effort is presently under way by the Staff.

(4) Consequences of the Rule Change

We agree that publication of the rule change recommended in SECY-78-44 will likely give rise to requests to reopen proceedings in which there was a controversy regarding need to evacuate persons beyond the low population zone. The principal difficulty would be that actual Staff evaluation of the need for evacuation measures outside the low population zone may not be documented in many cases. OGC makes no suggestion how this difficulty may be avoided. One could

7/ An extensive discussion of reactor site evaluation policy and practice is set forth in SECY-76-286, May 25, 1976. Additional views by OELD on the deficiencies in Part 100, focusing specifically on accident evaluation and population density, are set forth in enclosure E to that document.

add language to the recommended notice of rulemaking to make clear that the change is only to be applied prospectively. However, this will be difficult to justify in the light of the Staff's belief that the change reflects current and past practice.

Under the proposal in SECY 77-461, requests to reconsider the matter of evacuation plans beyond the low population zone in such cases as Midland, Point Beach, San Onofre, and Limerick would be addressed within the framework of 10 CFR §2.206 relating to requests for enforcement action or where related proceedings are still pending before the Licensing Boards, Appeal Board, or Commission, addressed as motions to reopen the record.

(5) Need for Standards

OGC urges that more precise criteria be developed for determining when evacuation plans should include measures for evacuating persons beyond the low population zone. This is a matter not only addressed in ALAB-390 (cited by OGC) but also in SECY 77-461 (Enclosure D, pages 7-8). The "Supplementary Information" in the recommended notice of rulemaking in SECY-78-44 provides substantial additional guidance on this matter that could be cited by the Licensing Boards and Appeal Board as authoritative. We agree as a general matter that more specificity would be desirable,8/ but OGC's suggested language--"'reasonable assurance' that people can be evacuated from populous areas close to the reactor"--adds very little specificity. We find it hard to believe that a reviewing court, troubled by a lack of standards, would find solace in OGC's suggested regulatory language.

In any event, OGC cites no judicial decisions to support its concern that a reviewing court "might be inclined to give little deference to the Commission's decision" on evacuation plans because under the recommended rule change it "will be presented with the appearance of an unguided exercise of discretion". An examination of Morningside Renewal Council v. AEC, 482 F.2d 234 (2d Cir. 1973), cert. denied, 417 U.S. 951 (1974) would have been instructive on this point. There Commission licensing of a research reactor in a densely populated area in the total absence of any Commission siting regulations was upheld in the face of petitioner's argument that objective criteria were legally required.

8/ During its review of the draft SECY-77-461, OELD expressed concern to the Staff regarding the lack of specific criteria for determining when evacuation plans should extend beyond the low population zone. The Staff was not then in a position to suggest more specific criteria.

Finally, the Staff has under way a revision to its Standard Review Plan on the issue of public evacuation (Section 13.3). OELD believes that if more specificity is desired, then consideration could be given to incorporation of some or all of the concepts of the Standard Review Plan into the regulations. Of course, some consideration could also be given to recommendations of the NRC/EPA Emergency Planning Task Force recommendations.

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ENCLOSURE 8

ELD Note on additional language in rule

The Office of the Executive Legal Director has no legal objection to the proposed rule change to Appendix E, but believes that litigation in individual cases could be lessened by adding a substantive standard to the proposed rule that would define the circumstances when protective actions may be required beyond the LPZ. Such a substantive standard would also provide some helpful guidance to industry and the public regarding the NRC's emergency planning policy. The following language, which is acceptable to ONRR, is suggested:

> Provisions for protective actions beyond the LPZ will only be required when the expected conditions following a postulated accident exceed the applicable protective action criteria. Further, whenever these conditions are such that protective action criteria are exceeded, provisions for protective actions will only be required after consideration of both the expected benefits to the public of reduced radiological exposures and the probable risks to the public associated with the implementation of protective actions.

ENCLOSURE 9

Standards Development Evaluation of ELD comment

Standards Development's Evaluation of the Comments

Received from the Office of the Executive Legal Director

ELD noted that they have no legal objection to the proposed amendment but suggested adding additional wording (presented in Enclosure 8 to this paper) to the proposed rule change in the hope that "...litigation in individual cases could be lessened by adding a substantive standard to the proposed rule that would define the circumstances when protective actions may be required beyond the LPZ."

OSD concurs with ELD's suggestion that adding a "substantive standard" to the proposed rule change would be beneficial to industry, the public and the staff by limiting litigation but considers that the specific wording suggested falls short of providing this "substantive standard." It is neither clear nor specific enough to enable industry, the public or the staff to make a valid judgement as to when protective actions may be required beyond the LPZ.

OSD doubts that it is possible to develop definite wording that would accomplish this objective and still be brief enough to be appropriate for inclusion in the proposed rule. More importantly, however, OSD believes that any such additional wording would be contrary to the intent of the guidance that the Commission provided to the staff in the November 3, 1977, memo from Chilk to Gossick which stated that:

> "The statement of considerations should be limited to necessary explanation and perspective for the rule change. It should be carefully drafted to avoid placing obstacles in the way of possible broader changes in emergency planning and relevant siting policy."

Nonetheless, in an attempt to be responsive to ELD's suggestion and to try to resolve other Office differences that surface as a result of ELD's request for adding Enclosure 8, a meeting was held on May 11, 1978, with representatives from NRR, OPE, OGC, ELD & SD. At the meeting a compromise was agreed upon in that the following words, which are a modification of ELD's suggested words, would be added to the already existing proposed rule change.

> "Provisions for protective actions beyond the LPZ will only be required when the anticipated conditions following an accident may exceed the applicable protective action criteria. Further, whenever these conditions are such that protective action criteria may be exceeded, provisions for protective actions beyond the LPZ will only be required after consideration of both the expected benefits to the public of reduced radiological exposures and the probable risks to the public associated with the implementation of protective actions."

The primary change from ELD's suggested wording was the deletion of the word "postulated" modifying the word "accident". This compromise was thought to be in accordance with the November 3, 1977 Chilk memo to "...avoid placing obstacles in the way of possible broader changes in emergency planning and relevant siting policy." The compromise was to provide some additional guidance on when protective actions may be required beyond the LPZ and would allow possible future consideration of Class 9 accidents rather than the current policy of limiting consideration to Class 8 accidents.

Subsequent to the meeting, notice of nonconcurrence to the compromise wording was received from OPE & OGC.

As a result, the final situation is as follows: NRR and SD have no technical objection to the compromise wording but believe that it does not provide significant additional guidance and would prefer that it not be added to the wording of the rule change already approved by the Commission. ELD has no legal objection to the proposed amendment without the compromise words but suggests that they be added and OPE and OGC do not want the compromise words added.

SD is therefore sending this paper forward with the proposed rule change to 10 CFR Part 50 Appendix E (Enclosure 1) as proposed in the original paper, SECY-77-461, which was discussed and approved by the Commission in Policy Session 77-48 (October 25, 1977).