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Environmental Law Society
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Joseph M. Hendrie, Chairman
United States Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Sir:

This letter is submitted as a public comment to the proposed Nuclear Regulatory Commission rule to eliminate formal discovery proceedings currently afforded in licensing hearings of nuclear power plants.

It is the position of this Society that the proposed rule should not be adopted for the following reasons.

I. Discovery proceedings are a necessary prerequisite for the effective challenge of agency decisions. Without discovery, the statutory provisions of the Administrative Procedure Act and the Hobbs Act, which are designed to upgrade agency decisions, cannot result in the improvement of agency action. Experience has clearly demonstrated that decisions of the Nuclear Regulatory Commission, and its predecessor the Atomic Energy Commission, with respect to certain subject matter, have been unacceptable to both the scientific and legal communities. Discovery procedures, which the proposed rule will abolish, provide the most efficient method of improving the quality of agency decisions.

A. Past decisions of the agency have been the subject of criticism in both the legal and scientific communities. ("Deception on Nuclear Power Risks: A Call for Action", Bulletin of the Atomic Scientists Vol. 36 No. 7 p. 50, Sept. 1980; "Vermont Yankee and the Evolution of Administrative Procedure", Harvard Law Review Vol. 91 No. 8 p. 1810, 1978). Specifically, the findings of the 1975 Reactor Safety Study compiled by the agency were sufficiently inaccurate as to require a congressional hearing, and eventual retraction of the study by the agency. ("High Technology and the Courts: Nuclear Power and the Need for Institutional Reform", Harvard Law Review Vol. 94 No. 3 p. 524-5, 1981; "Deception on Nuclear Power Risks: A Call for Action", Bulletin of the Atomic Scientists Vol. 36 No. 7 p. 50, Sept. 1980. These articles criticize past agency decisions and seriously question the ability of the agency to satisfactorily resolve the issues before it.)

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Agency decisions with respect to the handling of radioactive waste have also been unsatisfactory. Additionally, one documented instance suggests the misrepresentation of fact by agency personnel. Compare Vermont Yankee v. N.R.D.C., Joint Appendix p. 830 to Vermont Yankee v. N.R.D.C., Joint Appendix p. 895 and "High Technology and the Courts: Nuclear Power and the Need for Institutional Reform", Harvard Law Review Vol. 94 No.3 p. 535-6, 1981. These articles indicate that the waste management problem has been inadequately addressed. The Appendix demonstrates that the Director of Division of Waste Management and Transportation of the Atomic Energy Commission testified that radioactive waste had been stored without incident for ten years near Idaho Falls, Idaho. The Director failed to mention, however, that the waste was later unearthed after a report by the National Research Council of the National Academy of Sciences indicated the weaknesses that were inherent in the system.

The agency's handling of high level radioactive waste at the Hanford Reservation in Washington state has also been unsatisfactory: over a period of time from 1958-1974 high level waste from weapons production programs was stored in ground level tanks at Hanford. During that time period approximately 450,000 gallons of waste leaked from the containers. ("High Technology and the Courts: Nuclear Power and the Need for Institutional Reform", Harvard Law Review Vol. 94 No. 3 p. 435-6, 1981.)

B. Recent articles in the Harvard Law Review affirm the position of this Society that, "[t]hus far, the Atomic Energy Commission and the Nuclear Regulatory Commission have failed to deal adequately with the reactor safety and waste disposal problems [that are] at the heart of the nuclear controversy. Instead there have been serious reactor failures [foot note omitted] and regulators have not been able to define practical waste management strategies [foot note omitted]." ("High Technology and the Courts: Nuclear Power and the Need for Institutional Reform", Harvard Law Review Vol. 94 No.3 p. 435-6, 1981.) More importantly, little progress has been made by the agency in resolving the problems of long term storage of wastes. The agency contribution in this area appears to be a series of "paper studies", without data, and blue prints of a temporary storage facility designed to handle waste for up to one hundred years. The impression one receives in reviewing these materials is that the agency's unannounced policy is not to resolve the waste problem in a responsible manner, but rather to postpone the costs and consideration of waste management for future generations.

Further, the geologic waste disposal methods proposed by the agency have been criticized in "Nuclear Wastes: The Science of Geologic Disposal Seen as Weak", Science Vol. 200 No.4346 p. 1135, June 9, 1978. Additionally, effective commercial methods of handling waste materials appear even less viable

with the closing of Getty Oil's West Valley New York reprocessing plant. (New Times Vol. 10 No. 6 p. 15, March 20, 1978.)

II. Statutory provisions and public policy considerations dictate that the maintenance of discovery procedures is mandatory.

A. If discovery procedures are abolished, the only effective means of challenging agency action or findings will be through the independent performance of studies which would either prove or disprove the agency findings. It is unreasonable to require those individuals challenging agency action to perform experiments or studies identical to those performed by the agency. Although expertise exists outside the agency to accomplish this end, it is undoubted that the expense of these studies would be of such a magnitude as to totally preclude challenge in this manner.

B. Additionally, agency research and studies are funded by the American taxpayer; as such they are public property, are subject to the Freedom of Information Act, and do not, except in special circumstance, belong in the exclusive domain of the agency.

C. The Atomic Energy Act contains a general provision that the Administrative Procedure Act shall apply to all agency action taken. More importantly, sections 2239(a) and 2239(b) of the Atomic Energy Act provide that final orders of the agency shall be subject to judicial review in the manner prescribed in the Hobbs Act. Both the statutory language and legislative history of the statutes involved point unmistakably to the conclusion that the rules of the Commission "in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licencees. . ." were required to be made "on the record" and in accordance with the requirements of sections 556 and 557 of the A.P.A. These sections include provisions for trial-type hearings in which the agency and affected parties are given the right to introduce direct and rebuttal evidence through oral testimony, and are afforded the opportunity for cross examination. These statutory provisions are meaningless without adequate discovery procedures. ("The Vermont Yankee Nuclear Power Opinion: A masterpiece of Statutory Misinerpretation", San Diego Law Review Vol. 16 No. 2 p. 192, 1979; "The Development of Administrative Law and Quasi-Constitutional Law in Judicial Review. . .", Iowa Law Review Vol. 62 No.3 p. 729-33, 1977.)

D. It is the position of this Society that a decision on the proposed rule must also be subject to the procedures of sections 556 and 557 of the A.P.A., and not the "notice and comment" procedures of section 553 currently adopted by the agency. Sections 2239(a) and (b) of the Atomic Energy Act and the judicial review provisions of the Hobbs Act clearly demonstrate that "in

any proceeding for the issuance or modification of rules and regulations dealing with activities of licensees" sections 556 and 557 of the Administrative Procedures Act shall apply. The proposed rule to withdraw discovery procedures in licensing hearings of nuclear power plants deals with the most fundamental "activity" of the licensee: whether or not the licensee will go "on-line". In determining whether the nuclear facility should go "on-line", the agency should be advised of all pertinent issues concerning the application. As has been demonstrated by previous decisions, the agency has in licensing hearings, failed to adequately consider issues of vital importance. Undoubtedly, this most fundamental "activity" of licensees is appropriate subject matter for the application of procedural requirements of sections 556 and 557 of the A.P.A. The proposed rule to withdraw discovery should be subject to a decision utilizing these formalities and not hose of "notice and comment" currently being used by the Commission. ("The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation", San Diego Law Review Vol. 16 No.2 p. 192, 1979.)

E. Finally, the proposition that the proposed rule will reduce the costs of nuclear plants by reducing the time required in licensing hearings cannot withstand even initial scrutiny. Studies completed by the Nuclear Regulatory Commission have concluded that "generalizations on the sources and nature of delay in the licensing process are difficult to make." The circumstances of each separate incident differ widely. In examining the causes of nuclear plant "delays and cancellations", defined by the agency to mean any significant lengthening of the plants original schedule, the agency found that of sixty eight plants to announce such slippages, only fourteen were attributed to "licensing and litigation" problems of all types. Far more important were financial problems and construction delays brought on by labor disputes or other factors. ("Radioactive Waste Disposal - The Key to a Nuclear Future", The Center Magazine Vol. 11 No. 3 p. 71, May/June 1978). The withdrawal of discovery procedures, therefore, cannot be expected to produce a significant reduction in delay for most nuclear plants.

It is our position that to date, in certain areas, with respect to certain subject matter, responsible regulation of nuclear power has been grossly inadequate. Agency decisions have been shortsighted, poorly conceived, and have disregarded vital, environmental considerations. Specifically, in dealing with radioactive wastes, the agency's policies have been daringly cavalier in view of basic scientific principles and common sense. (This conclusion is particularly compelling after a consideration of the water solubility, the uncertaintly of lethal dosages, and half live of parent and daughter product isotopes of radioactive decay.)

The American people and the nuclear industry are entitled to responsible decision-making. Responsible development of resources demands better decisions from agencies like the Nuclear Regulatory

Commission; experience dictates that discovery procedures are a necessary prerequisite to this end.

The views expressed herein are the views of the Environmental Law Society and do not necessarily reflect those of the Law School or of Pepperdine University.

For the Society,

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cc: Environmental Defense Fund, Washington, D.C.
Natural Resource Defense Fund, Washington, D.C.
Critical Mass, Washington, D.C.