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

CHAIRMAN

PDR

January 17, 1990

The Honorable Peter H. Kostmayer, Chairman
Subcommittee on General Oversight
and Investigations
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D.C 20515

Dear Mr. Chairman:

I have received your letter of January 6, 1990. The Commission recognizes its responsibility to keep the Congress currently and fully informed, but we are also bound by applicable law and our regulations to protect the integrity of our formal adjudicatory proceedings. We continue to be concerned that many of the questions that you posed raise issues central to the ongoing Seabrook proceeding and that responses may be inappropriate under the principles enunciated in Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966). We have, however, attempted to respond to your questions to the extent that the law allows in these circumstances. The responses reflect generic views on the Commission's requirements for emergency preparedness and do not express a position on the acceptability of any particular emergency plan, including any matter relating to the Seabrook facility.

Sincerely,

Kenneth M. Carr

Enclosures:
As Stated

cc: Representative Barbara V. Vucanovich
Seabrook Service List

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QUESTION 1. Does the NRC agree that it is legally required to deny an operating license to a new plant for which a state, local or utility plan meeting the "reasonable assurance" standard legislated in the 1980 Authorization bill has not been approved?

ANSWER.

The Commission's emergency planning regulations include a "reasonable assurance" standard for the issuance of an operating license ("reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency") (see 10 CFR 50.47(a)(1)). The regulations also include a provision, 10 CFR § 50.47(c)(1), which states that failure to meet the standards set forth in 10 CFR § 50.47(b) for determining the adequacy of an emergency plan may result in denial of an operating license but that the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that the deficiencies in the plan are not significant for the plant, that adequate interim compensating measures have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. In considering these matters, the Commission has, from the outset, indicated that it will determine whether deficiencies in a plan (state, local, or utility) can be compensated for by provisions in another plan for that site. See 45 FR 55402 (August 19, 1980) and 52 FR 42078 (November 3, 1987).

QUESTION 2a. Is it relevant to judging the adequacy of a proposed emergency evacuation plan that:

(a) The site of a plant makes it unusually difficult to evacuate? If not, why not?

ANSWER.

Yes. In preparing the Preliminary Safety Analysis Report during the Construction Permit review, a nuclear power plant applicant is required to note major impediments to evacuation or to the ability to take protective actions (10 CFR Part 50, Appendix E.II.G). The staff requires that the proposed Emergency Plan address such difficulties and include the necessary arrangements and resources to remedy the difficulties.

There are approximately 70 licensed plant sites in the United States for which emergency plans have been developed and approved. Many of these sites present evacuation difficulties of one type or another, but FEMA and NRC have worked with the licensee and state and local governments to ensure appropriate response to these difficulties. In all cases, it has been concluded that there is reasonable assurance that adequate protective actions can and will be taken in the event of a radiological emergency at each of the sites.

The Commission has also addressed this issue directly in its new regulation on early site permits (10 CFR Part 52, Subpart A). Section 52.17(b)(1) of that rule requires that "the applications must identify physical characteristics unique to the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans."

(b) A significant number of people that the plan is intended to protect are not likely to avoid lethal radiation doses within the first eight hours after a major accident? If not, why not?

ANSWER.

Commission regulations and practice applicable to the siting and design of reactors, for example those in 10 CFR Parts 50 and 100, provide assurance that licensed nuclear power reactors do not pose any significant risk of lethal doses of radiation to the public. The Commission's emergency planning regulations further the Commission's objective of assuring adequate protection of the public health and safety by requiring measures to accommodate a spectrum of accidents (including those beyond design basis) to further enhance the protection offered by design, siting, and operational controls. In light of the foregoing, then, the premise of the question is incorrect.

Analyses of severe accidents conducted by NRC indicate that the vast majority of severe accidents would not lead to lethal radiation doses off site within the first eight hours after a major accident. All of the information available to the NRC indicates that the chances of a severe fuel damage accident are very low, perhaps one chance in ten thousand reactor years of operation. Even in the event of a severe fuel damage accident, associated safety systems would, in the great majority of cases, prevent lethal radiation doses off site within the first eight

hours after the onset of the accident. Consequently, for the major portion of the spectrum of potential accidents, including all design basis accidents, there are no projected early fatalities, and protective actions would significantly reduce radiation exposure for nearby populations. Thus, protection of the public from the consequences of extremely low probability accidents is accomplished by limiting the probability of their occurrence through system design and operating procedures, and by providing mitigation features, such as containment systems, as well as by requiring the capability for emergency response protective actions.

(c) The radiation dose savings are lower and the evacuation times are higher than for similar plants in other locations? If not, why not?

ANSWER.

The compliance of a specific emergency plan with the Commission's requirements is not judged on a comparative basis. Rather, each plan must in and of itself be shown to meet the NRC regulations. Factors such as topography, meteorology, demography and others, which vary widely from site to site, will have great influence on both dose savings and evacuation times. What is relevant is whether an applicant has established appropriate evacuation time estimates and otherwise ensured that, for the specific facility in question, appropriate actions in an emergency can be taken.

QUESTION 3: Please provide the Subcommittee with a legislative and regulatory history of the "reasonable assurance" standard. Please include:

(a) any opinion of the General Counsel of the NRC which deals with the interpretation of this standard.

(b) any reference in the statute or the legislative history which supports the view that this standard could be lower for a plant with a site which is relatively difficult to evacuate than for a plant which is relatively easy to evacuate.

ANSWER.

(NOTE: the answer to this question assumes that the question refers to the phrase "reasonable assurance" as it was used in the 1980 NRC Authorization Act with respect to emergency planning.)

The legislative history of the 1980 Authorization Act is silent as to the level of risk that Congress contemplated when it enacted the "reasonable assurance" standard. Rather, Congress provided a standard that had some flexibility with the intent that the Commission would apply its expertise in developing implementing regulations. This statutory scheme was

discussed by the United States Court of Appeals in Commonwealth of Massachusetts v. United States, 856 F.2d 378 (1988), the case in which the Commission's 1987 emergency planning rule was upheld against, among other things, a claim that the Commission was acting contrary to Congressional intent. Rejecting the argument that no deference was due to the Commission's judgment, the court said:

> They [petitioners] argue that, for example, offsite emergency planning -- as opposed to technical matters relating to plant construction and design -- is outside the NRC's area of expertise. We do not agree. The substantive area in which an agency is deemed to be expert is determined by statute; here, under the relevant congressional enactments, see supra, the NRC is specifically authorized and directed to determine whether emergency plans adequately protect the public. [citation omitted.] We also reject petitioners' argument that the NRC is owed no deference because the issue in this case is a "pure question of statutory construction." The issue is not a pure question of statutory construction. Petitioners do not ask us "purely" to construe a statute; they ask us to hold that, given the statutes, the agency has acted unreasonably. Even if we were to assume, for the sake of argument, that the issue were purely one of statutory construction, petitioners still have not directed us to any enactment in which Congress has clearly indicated a view of emergency planning that is at variance with the NRC rule or that forecloses the NRC's adoption of the approach here adopted. Without such an indication of contrary congressional intent, we should normally defer to the agency's reasonable construction of the statute it administers. 856 F.2d 378, 382.

The question thus becomes what the Commission intended at the time it adopted the 1980 emergency planning regulations. A discussion of the Commission's 1980 rulemaking, including numerous references to the relevant Congressional enactments, committee reports, and NRC Federal Register notices, appears in the Commission's 1987 emergency planning

final rule, published in the Federal Register at 52 Fed. Reg. 42078 (November 3, 1987). A copy of that notice appears as Attachment A, and a copy of the court opinion sustaining that rulemaking appears as Attachment B.

Attachments:

A. 10 CFR Part 50, "Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where States and/or Local Governments Decline to Participate in Off-Site Emergency Planning," 52 Fed. Reg. 42078 (Nov. 3, 1987).

B. Commonwealth of Massachusetts v. United States, 856 F.2d 378 (1988).

e. *Maximum Sales Price Per Pound:* There were a number of comments with respect to the changes in the mohair and wool price support regulations to limit the amount of price support payments based on the sales price per pound for mohair and wool. A number of commentors objected to the deletion of the provision in § 1472.1507 which provided that a bona fide marketing was a "sale based on a reasonably appraised price for wool." Their comments suggest that the price support payments for their speciality wool be based on the full free market value of such speciality wool or the appraised price of such wool in the speciality market for such wool.

The phrase "reasonable appraised price of wool" in § 1472.1507 and a comparable phrase "fair market value for mohair" in § 1468.107(c) were deleted because they were inconsistent provisions and also because they were intended to prevent price support payments to be made where the sales price of the mohair or wool was substantially higher than the reasonable appraised price of wool or the fair market value for mohair in the traditional wool or mohair markets, respectively. In such case the entire sales price would have been ineligible for price support payments. However, these provisions were deleted because CCC/USDA did not wish to make the entire sales proceeds of wool and mohair sold to hobby crafters, hand-spinners, and similar individuals ineligible for price support payments.

Another comment urged that since the premium prices received by the producers on sales of high quality wool to hobby crafters and handspinners have been used to calculate the national average price for wool, the same premium price should be used to calculate the wool price support payment. The premium prices for high quality wool are included in the determination of the national average market price which is determined by taking the average weighted market price of all wool sold by producers. Section 704 of the Wool Act provides that the price support payments shall be such as the Secretary of Agriculture determines to be sufficient when added to the national average price to equal the price support level for wool. This amount expressed in percentage is applied against the producer sales price to determine the price support payment due the producer. This percentage is applicable to all sales of wool. However, the interim rule would apply the percentage to each sales price up to the maximum sales price determined by DASCO for each marketing year.

There were also comments to the effect that sales by hobby crafters and handspinners should be considered sales through "normal channels" for high quality wool. We believe this is a matter of semantics. While the point of the comment is true, since only a small fraction of all the wool marketed is sold to hobby crafters and handspinners, the term "normal channels" was intended to mean the traditional sales of wool made to large commercial wool buyers.

There were also comments criticizing the limitation of the amount of the sales proceeds which would be eligible for price support payments to four times the national average price ("four times rule") as being unfair. The four times rule was effective for the 1985 and 1986 marketings of mohair and wool. Under the interim rule, the maximum sales price for which price support payments would be made is determined by DASCO at the end of each marketing year based on the national average market price and is an amount which DASCO determines will encourage the continued domestic production of wool at prices fair to both producers and consumers in a manner which would assure a viable domestic mohair and wool industry.

As indicated earlier, the Comptroller General of the United States reviewed the interim rule and concluded that CCC/USDA had authority to limit the amount of the sales price per pound on which price support payments would be made. The Comptroller General stated that since under the Wool Act the Secretary can set the amounts, terms, and conditions of price support operations, he had the authority to establish price support payment limitations to prevent abuses, based on the reasonably appraised prices for wool.

The final rule provides that the effective date will be retroactive to the dates the 1985 amendments were made to the mohair and wool price support regulations: November 14, 1985 and August 23, 1985, respectively. It is necessary that the interim rule be made effective retroactively in order to nullify the unintended effects of the 1985 amendments with respect to the eligibility of certain producers to receive price support payments who would otherwise not be eligible for price support payments. The retroactive application will not affect other producers who were otherwise eligible for price support payments.

List of Subjects

7 CFR Part 1468

Commodity Credit Corporation, Price Support Program—Mohair, Reporting and recordkeeping requirements.

7 CFR Part 1472

Commodity Credit Corporation, Price Support Program—Wool, Reporting and recordkeeping requirements.

Final Rule

Accordingly, the interim rule published at 52 FR 4275 (February 11, 1987), which amended 7 CFR Parts 1468 and 1472, is hereby adopted as a final rule without change.

Authority: Secs. 4 and 5, 62 Stat. 1070, as amended (15 U.S.C. 714b, 714c); secs. 703–708, 69 Stat. 910–912, as amended (7 U.S.C. 1781–1787).

Signed at Washington, DC, on October 27, 1987.

Vera Neppl,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 87-25352 Filed 11-2-87; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline To Participate in Off-Site Emergency Planning

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its rules to provide criteria for the evaluation at the operating license review stage of utility-prepared emergency plans in situations in which state and/or local governments decline to participate further in emergency planning. The rule is consistent with the approach adopted by Congress in section 109 of the NRC Authorization Act of 1980, Pub. L. 96-295, described in the Conference Report on that statute (H.R. 96-1070, June 4, 1980), twice re-enacted by the Congress (in Pub. L. 97-415, Jan. 4, 1983, and Pub. L. 98-553, Oct. 30, 1984), and followed in a prior adjudicatory decision of the Commission, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule

recognizes that though state and local participation in emergency planning is highly desirable, and indeed is essential for maximum effectiveness of emergency planning and preparedness, Congress did not intend that the absence of such participation should preclude licensing of substantially completed nuclear power plants where there is a utility-prepared emergency plan that provides reasonable assurance of adequate protection to the public.

EFFECTIVE DATE: December 3, 1987.

FOR FURTHER INFORMATION CONTACT:

Peter G. Crane, Office of the General Counsel, USNRC, Washington, DC 20555, 202-634-1465

Michael T. Jamgochian, Office of Nuclear Regulatory Research, USNRC, Washington, DC 20555, 301-443-7657.

David B. Matthews, Office of Nuclear Reactor Regulation, USNRC, Washington, DC 20555, 301-492-0847.

SUPPLEMENTARY INFORMATION:

Discussion

On March 6, 1987, the NRC published its notice of proposed rulemaking in the Federal Register, at 52 FR 6980. The period for public comment (60 days, subsequently extended for an additional 30 days) expired on June 4, 1987.

The proposed rule drew an unprecedentedly large number of comments. Some 11,500, individual letters were sent to NRC, as well as 27,000 individually signed form letters sent to Congress or the White House and forwarded to NRC. Approximately 16,300 persons signed petitions to the NRC. Every comment was read, including form letters, which were examined one by one so that any indivdual messages added by the signatories could be taken into account. NRC attempted to send cards of acknowledgment to each commenter.

The sheer volume of the comments received makes it clearly impracticable to discuss them individually. As a result, the following discussion will focus on the principal issues raised in the comments.

Issue #1. Is the proposed rule legal? Specifically, is it in accord with the language and legislative history of the emergency planning provisions enacted by the Congress in 1980?

Answer: Yes. The intent of the proposed rule, as clarified in Commission testimony and in other responses to the Congress, is to give effect to the Congress's 1980 compromise approach to emergency planning, not go beyond it. To explain this requires a somewhat detailed discussion of the background of the actions taken in 1980 by Congress and by the Commission with regard to emergency planning.

The backdrop for the actions taken by the Congress and the Commission in 1980 was, of course, the 1979 accident at Three Mile Island. The accident changed the NRC's regulatory approach to radiological emergency planning. Before the accident, emergency planning received relatively little attention from nuclear regulators. The prevailing assumption was that engineered safety features in nuclear power plants, coupled with sound operation and management, made it unlikely that emergency planning would ever be needed. At that time, only a limited evaluation of offsite emergency planning issues took place in the pre-construction review of applications to build nuclear power plants. The Three Mile Island accident led to the widespread recognition that, while there is no substitute for a well built, well run, and well regulated nuclear power plant, a substantial upgrading of the role of emergency planning was necessary if the public health and safety were to be adequately protected.

The Commission issued an advance notice of proposed rulemaking in July 1979, and in September and December of the same year it issued proposed emergency planning rules. 44 FR 54308 (September 19, 1979); 44 FR 75167 (December 19, 1979). Before the Commission took final action on the rules, however, the Congress took action, writing emergency planning provisions into the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96-295. It is extremely important to focus on what the Congress did in that Act, because Congress' actions were the starting point for all the NRC did subsequently in the emergency planning area, as the written record makes clear.

Section 109 of the NRC Authorization Act directed the Commission to establish regulations making the existence of an adequate emergency plan a prerequisite for issuance of an operating license to a nuclear facility. The NRC was further directed to promulgate standards for state radiological response plans.

In the same section of the 1980 Act, Congress specified the conditions under which the Commission could issue operating licenses, and in doing so, it made clear its preferences with regard to state and local participation. Its first preference, reflected in section 109(b)(1)(B)(i)(I), is for a "State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans." In section 109(b)(1)(B)(i)(II), however, the Congress set out a second option: "In the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, *or utility* plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." (Emphasis added.) In addition, section 109 provided that the Commission's determination under the first but not the second of the two options could be made "only in consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies." Section 109(b)(1)(B)(ii). The statute further directed the Commission to "establish by rule * * * a mechanism to encourage and assist States to comply as expeditiously as practicable" with the NRC's standards for State radiological emergency response plans. Section 109(b)(1)(C).

The Conference Report on the legislation, H. 96-1070 (June 4, 1980) explained in clear terms, at p. 27, the rationale for the two-tiered approach: "The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local *or utility* plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility." (Emphasis added.)

The statute, which was enacted on June 30, 1980, and the Conference Report make abundantly clear that in Congress' view, the ideal situation was one in which there is a state or local plan that meets all NRC standards. It is generally clear that in Congress' view, there could be emergency planning under a utility plan that to some degree fell short of the ideal but was nevertheless adequate to protect the health and safety of the public.

That Congressional judgment was before the Commission when it considered final emergency planning rules only a few weeks later, and the Commission took pains to make clear on the record that it was following the Congress' approach. As the Commission stated in its notice of final rulemaking, published on August 19, 1980, at 45 FR 55602:

measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures can and will be taken."

To sum up, therefore, the rule is in accord with legal requirements for emergency planning at nuclear power plants because:

—The rule is consistent with section 109 of the NRC Authorization Act of 1980, a measure which has twice reenacted by the Congress, though it has since expired. In addition, the House of Representatives recently rejected an amendment designed to bar implementation of the rule for two specific plants.

—The rule is consistent with existing NRC regulations, and is well within NRC's rulemaking authority.

—Since the rule provides for no diminution of public protection from what was provided under existing regulations, it cannot be in contravention of any statutory requirements governing the level of NRC safety standards.

Issue #2: Is this a generic rule, or is this proposal really aimed at the Shoreham and Seabrook plants?

The rule is generic in the sense that it is of general applicability and future effect, covering future plants as well as existing plants. At present, however, there are only two plants with pending operating license applications for which state and/or local non-participation is an issue. Those plants are Shoreham and Seabrook. The NRC's 1980 rules, perhaps because of optimism that states and localities would always choose to be partners in emergency planning, included only a general provision, 10 CFR 50.47(c), dealing with cases in which utilities are unable to satisfy the standards for state and local emergency plans, and had no specific discussion of the evaluation of a utility plan in cases of state or local non-participation. This does not mean that the NRC was compelled to adopt new regulations in order to act on the Shoreham and Seabrook license applications. On the contrary, the NRC has always had the option of proceeding by case-by-case adjudication under its 1980 regulations.

Issue #3: Will this rule assure licenses to the Shoreham and Seabrook plants?

It will not assure a license to any particular plant or plants. It will establish a framework in which a utility seeking an operating license can, in a case of state and/or local non-participation, attempt to demonstrate to the NRC that emergency planning is adequate. Whether a utility could succeed in making that showing would depend on the record developed in a specific adjudication, the results of which would be subject to multiple levels of review within the Commission as well as to review in the courts.

Issue #4: Is state or local participation essential for the NRC to determine that there will be adequate protection of the public health and safety?

We do not have a basis at this time for determining generically whether state and local participation in emergency planning is essential for NRC to determine that there will be adequate protection of the public health and safety. There has yet to be a final adjudicatory determination in any proceeding on the adequacy of a utility plan where state and local governmental authorities decline to participate in emergency planning. Clearly, it will be more difficult for a utility to satisfy the NRC of the adequacy of its plan in the absence of state and local participation, but whether it would be impossible remains to be seen. The fact that Congress provided for evaluation of a utility plan in section 109 of the NRC Authorization Act of 1980 (and in two subsequent Authorization Acts) indicates that Congress believed that it was at least possible in some cases for a utility plan to be found to provide "reasonable assurance that public health and safety is not endangered by operation of the facility concerned," in the words of the "second tier" provided in section 109.

Issue #5: Is emergency planning as important to safety as proper plant design and operation?

First of all, this issue does not have to be addressed in the context of the final rule announced in this notice, since the present rule involves no redrawing by NRC of the balance between emergency planning and other provisions for the protection of health and safety. Having said that, we turn to the question of the place of emergency planning in the overall regulatory scheme for the protection of public health and safety.

Though the Commission in its 1980 rulemaking explicitly described emergency planning as "essential," it is less clear what importance the Commission assigned to emergency planning, as compared to the importance accorded to other means of protecting public health and safety, notably sound siting, design, and operation. In the Supplementary Information explaining the 1980 rulemaking, the Commission stated that "adequate emergency preparedness is an *essential* aspect in the protection of the public health and safety," 55 FR 55404, and commented that "onsite and offsite emergency preparedness as well as proper siting and engineered design features are *needed* to protect the health and safety of the public." (Emphasis added.) 45 FR 55403. The Commission also explained that in light of the Three Mile Island accident it had become "clear that the protection provided by siting and engineered design features must be bolstered by the ability to take protective measures during the course of an accident." *Id.* Though the word "bolstered" suggests that the Commission of 1980 viewed emergency planning as a backstop for other means of public protection rather than as of equal importance to them, the issue cannot be resolved definitively by microscopic analysis of the particular words chosen in 1980.

More relevant to the task of ascertaining the intent of the 1980 rulemaking is the regulatory structure established under the 1980 rules. In 10 CFR 50.54(s)(2)(ii), the Commission provided that if it "finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency * * * and if the deficiencies * * * are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate." In other words, a plant ordinarily may operate for at least four months with deficiencies in emergency planning before the NRC is required even to decide whether remedial action should be taken. This approach, the Commission said in the Supplementary Information to the 1980 rule, was consistent with section 109 of the NRC Authorization Act of 1980. 45 FR 55407. At the time that the Commission created the so-called "120-day clock" for deficiencies in emergency planning, it was settled Commission law (and remains so today) that the NRC must issue an order directing a licensee to show cause why its license should not be modified, revoked or suspended whenever it concludes that "substantial health or safety issues ha[ve] been raised" about the activities authorized by the license. *Consolidated Edison Company of New York* (Indian Point, Units No. 1, 2 and 3), CLI-75-8, 2 NRC 173, 176. That standard was endorsed by the Court of Appeals for the District of Columbia Circuit in *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (1978). In the context of that standard, the 120-day clock provision for emergency planning deficiencies amounts to a Commission

finding that, at least for the first 120 days, even a major deficiency in emergency planning does not automatically raise a "substantial health or safety issue" with regard to plant operation. By contrast, a major safety deficiency relating to emergency conditions—for example, the availability of the emergency core cooling system—would warrant immediate shutdown.

In sum, despite language indicating that emergency planning was "essential," the Commission in 1980 created a regulatory structure in which emergency planning was treated somewhat differently, in terms of the corrective actions to be taken when deficiencies are identified, from the engineered safety features ("hardware") that would be relied on in an emergency.

Issue #6: Assuming that NRC should consider a utility plan, what criteria should apply? In particular:

(a) Should the utility plan provide just as much protection as a state or local plan, or may less protection be adequate?

(b) If less protection may be adequate, must NRC still find reasonable assurance that under the utility plan, adequate protective measures can and will be taken? Or is it sufficient for NRC to find that the totality of the risk, including all relevant factors, including the likelihood of an accident, assures that there is adequate protection of public health and safety?

Under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e. a state or local plan with full state and local participation, but that it *may* nevertheless be adequate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Issue #7: May NRC assume that a state or local government which refuses to cooperate in emergency planning will still respond to the best of its ability in an actual emergency? If so:

(a) May NRC assume that the state or local response will be in accord with the utility plan?

(b) May NRC assume that the state or local response will be adequate?

(c) If the NRC rule calls for reliance on FEMA, and FEMA says that it can't judge emergency planning except when there is state and local participation in an exercise, how can the NRC ever make a judgment on emergency planning in a situation in which state and local authorities do not participate?

In this rule, the Commission adheres to the "realism doctrine," enunciated in its 1986 decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, which holds that in an actual emergency, state and local governmental authorities will act to protect their citizenry, and that it is appropriate for the NRC to take account of that self-evident fact in evaluating the adequacy of a utility's emergency plan. The NRC's realism doctrine is grounded squarely in common sense. As the Commission stated in *LILCO*, even where state and local officials "deny they ever would or could cooperate with [a utility] either before or even during an accident," the NRC "simply cannot accept these statements at face value." 24 NRC 22, 29 fn. 8. It would be irrational for anyone to suppose that in a real radiological emergency, state and local public officials would refuse to do what they have always done in the event of emergencies of all kinds: do their best to help protect the affected public.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take. However, the rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and a timely proffer of an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

At the present time, the Commission does not have a basis in its adjudicatory experience to judge either that a utility plan would be adequate in every case or that it would be inadequate in every case. Implementation of this rule may ultimately provide that informational basis.

The problem of how the NRC can decide the adequacy of emergency planning in the face of FEMA's declared reluctance to make judgments on emergency planning in cases of state and local non-participation does not appear insoluble. Though FEMA has expressed its reluctance to make judgments in such circumstances, because of the degree of conjecture that would in FEMA's view be called for, we do not interpret its position as one of refusal to apply its expertise to the evaluation of a utility plan. For FEMA to engage in the evaluation of a utility plan would necessitate no retreat from its stated view that it is highly desirable to have, for each nuclear power plant, a state or local plan with full state and local participation in emergency planning, including emergency exercises. (The Commission shares that view.) FEMA's advice would undoubtedly include identification of areas in which judgments are necessarily conjectural, and NRC's overall judgment on whether a utility's plan is adequate would in turn have to take account of the uncertainties included in FEMA's judgment. Beyond a certain point, uncertainty as to underlying facts would plainly make a positive finding on "reasonable assurance" increasingly difficult. These are issues, however, which can be addressed in the case-by-case adjudications on individual fact-specific situations. It should be noted that while the rule makes clear that ultimate decisional authority resides with NRC, it does envision a role for FEMA in the evaluation of utility plans, although section 109 of the NRC Authorization Act of 1980 did not specify any role for

FEMA in the evaluation of utility plans (as opposed to state and local plans).

Issue #8: If this is a national policy question, why doesn't the Commission leave the issue to the Congress to resolve?

Congress did address, in 1980, the issue of what should be done in the event there is no acceptable state or local emergency plan: it directed the NRC to evaluate a state, local, or utility plan to determine whether it provided "reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Perhaps because it was overly optimistic that there would be an acceptable state or local plan in every case, the Commission did not, except in general terms (at 10 CFR 50.47(c)), provide in its regulations for the evaluation of a utility plan. The present rule is an effort to make up for that omission by incorporating provisions implementing the Congress's 1980 policy decision into the NRC's rules. As noted elsewhere, the 1980 statute, twice re-enacted, has expired, but the NRC does not need the specific authority of that statute to adopt this rule, which is promulgated pursuant to the NRC's general authority, under section 161(b) and other provisions of the Atomic Energy Act, to regulate the use of nuclear energy.

The House of Representatives, as has been described above, voted 261–160 on August 5, 1987 to reject an amendment which would have barred the application of this rule to two specific plants. The Congress is thus well aware of the Commission's emergency planning rulemaking.

For the Commission to terminate its rulemaking and ask the Congress to address the policy issues involved thus seems unwarranted at this time. The Commission is still well within the framework of the guidiance which the Congress gave it in 1980 (and in the two re-renactments of the statute) and also well within its rulemaking authority. It has yet to carry through that guidance to the point of making an adjudicatory decision on the adequacy of a utility plan. If and when the Commission determines, through adjudications in individual cases, that there is a continuing problem which only Congressional action can solve, it can so notify the Congress, but that point has not yet been reached.

Issue #9: Doesn't the proposed rule still leave open the possibility that state or local action or inaction can have the effect of blocking operation of a plant? If so, how can the proposed rule be said to effectuate the Congressional intent that licensees not be penalized for the inaction or inadequate action of state and local authorities?

Yes, the proposed rule does leave open the possibility that state or local non-participation can indirectly block the operation of a nuclear plant. This is so because under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule. That does not mean, however, that the Congress's intent, as expressed in the 1980 statute and its re-enactments, is thereby frustrated. The Congress was concerned that utilities not be "penalized," but not to the extent that it was willing to countenance operation of a nuclear power plant in a situation where the public was not adequately protected. Congress intended to give a utility the opportunity to demonstrate that its plan provided "reasonable assurance," but it also provided that the NRC could not permit a plant to operate unless it found that the utility had met that burden.

Issue #10: Will the proposed rule discourage cooperation between licensees and state and local governments in emergency planning?

There is no reason to believe that the rule would discourage cooperation between licensees and state and local governments in emergency planning. Realistically, the only way in which the rule could discourage such cooperation would be if utilities were to decide that because of the new rule, they had less of an incentive to be accommodating to the needs and desires of state and local authorities. That might be a possible result if it appeared that the new rule make it easy and fast for a utility to obtain approval for its plan in cases of state and local non-participation.

In reality, it is likely to be much more difficult and time-consuming for a utility to obtain approval of its plan in the face of state and local opposition. The problems highlighted by this rulemaking are likely, if anything, to impress utilities anew with the desirability of doing everything necessary to obtain and retain full state and local participation in emergency planning.

Issue #11: Is the proposed rule based on an NRC consideration of economic costs?

The NRC rule is an effort to bring the NRC's regulations more clearly into line with a policy decision made by the Congress in 1980. The NRC's rule is thus based on economic considerations only to the extent that the Congress's policy decision of 1980 was based on economic considerations. In the Conference Report on the NRC Authorization Act of 1980 (H.96–1070, June 4, 1980), the conferees stated that they did not wish utilities to be "penalized" in situations in which there was no acceptable state or local plan. That could be taken as a reference to economic costs or simply to considerations of fairness, in that the issue was whether a utility was to be barred from operating a plant by the actions of third parties over which it had no control.

The NRC's motivation in promulgating this rule is not economics. Its motivation is to assure that the NRC is in a position to make the decisions that Congress intended that it make, and that the Commission has declared that it would make.

Issue #12: Is the proposed rule intended to read states and localities out of the emergency planning process?

Emphatically not. The rule leaves the existing regulatory structure unchanged for cases in which state and local authorities elect to participate in emergency planning. The NRC, in common with the Congress and FEMA, regards full state and local participation in emergency planning to be necessary for optimal emergency planning. The rule change is directed to the question of what the NRC's regulatory approach should be in which states and localities decide to take *themselves* out of the emergency planning process. Ideally, in the NRC's view, the new rule would never have to be used, because states and localities would never refuse to participate in emergency planning.

Issue #13: Does the proposed rule alter the place of emergency planning in the overall safety finding that the Commission must make?

It does not. As described above, the Commission must make both a finding of "adequate protective measures * * * in an emergency" and an overall safety finding of "reasonable assurance that the health and safety of the public will not be endangered" (10 CFR 50.35(c), implementing section 182 of the Atomic Energy Act, 42 U.S.C. 2232). The rule does nothing to alter either the requirement that emergency planning must be found adequate or the place of emergency planning in the overall safety finding.

Issue #14: What effect if any does the proposed rule have on nuclear plants that are already in operation?

The rule does not specifically apply to plants that already have operating licenses. As described above, 10 CFR 50.54(s)(2)(ii) of the Commission's regulations already provides a mechanism (the "120-day clock") for addressing situations in which deficiencies are identified in emergency planning at operating plants. To the extent that this rule provides criteria by

which a utility plan would be judged by state and local withdrawal from participation in emergency planning, those criteria would presumably be of assistance to decisionmakers in determining, under 10 CFR 50.54(s)(2)(ii), whether remedial action should be taken, and if so, what kind, where deficiencies in emergency planning remain uncorrected after 120 days.

Issue #15: Does the Commission's rule mean that the NRC does not have to find that a utility plan would offer protection equivalent to what a plan with full state and local participation would provide?

As stated previously, under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e. a state or local plan with full state and local participation, but that it may nevertheless be adequate.

The Commission's rule, as modified and clarified, would establish a process by which a utility plan can be evaluated against the same standards that are used to evaluate a state or local plan (with allowances made both for those areas in which compliance is infeasible because of governmental non-participation and for the compensatory measures proposed by the utility). It must be recognized that emergency planning rules are necessarily flexible. Other than "adequacy," there is no uniform "passing grade" for emergency plans, whether they are prepared by a state, a locality, or a utility. Rather, there is a case-by-case evaluation of whether the plan meets the standard of "adequate protective measures . . . in the event of an emergency." Likewise, the acceptability of a plan for one plant is not measured against plans for other nuclear plants. The Commission, in its 1986 *LILCO* decision, stressed the need for flexibilty in the evaluation of emergency plans. In that decision, the Commission observed that it "might look favorably" on a utility plan "if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation." 24 NRC 22, 30. We do not read that decision as requiring a finding of the precise dose reductions that would be accomplished either by the utility's plan or by a hypothetical plan that had full state and local participation: such findings are never a requirement in the evaluation of emergency plans. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The rule change is designed to establish procedures and criteria governing the case-by-case adjudicatory evaluation, at the operating license review stage, of the adequacy of emergency planning in situations in which state and/or local authorities decline to participate further in emergency planning. It is not intended to assure the licensing of any particular plant or plants. The rule is intended to remedy the omission of specific procedures for the evaluation of a utility plan from the NRC's existing rules, adopted in 1980. In providing for the evaluation of a utility plan, however, the rule represents no departure from the approach envisioned in 1980 by the Congress and by the Commission. In 1980, the supplementary information to NRC's final rule stated that the rule was consistent with the approach taken by Congress in Section 109 of the NRC Authorization Act of 1980 (which, in a compromise between House and Senate versions, provided for the NRC to evaluate a utility's emergency plan in situations where a state or local plan was either nonexistent or inadequate), though the rule itself included no explicit provisions governing the NRC's evaluation of a utility plan in such circumstances. It should be emphasized that the rule is not intended to diminish public protection from the levels previously established by the Congress or the Commission's rules, since the Commission's rules and the Congress have since 1980 provided for a two-tier approach to emergency planning. The rule takes as its starting point the Congressional policy decision reflected in section 109 of the NRC Authorization Act of 1980. That statute adopted a two-tier approach to emergency planning. The preferred approach was for operating licenses to be issued upon a finding that there is a "State or local radiological emergency response plan * * * which complies with the Commission's standards for such plans," but failing that, it also permitted licensing on a showing that there is a "State, local, or utility plan which provides reasonable assurance that the public health and safety is not endangered by operation of the facility concerned."

Under the Commission's 1980 rules, the regulatory provision that implemented the second of the two tiers of Section 109 was general and unspecific. The relevant regulation, 10 CFR 50.47(c), allowed a nuclear power plant to be licensed to operate, notwithstanding its failure to comply with the planning standard of 10 CFR 50.47(b), on a showing that "deficiencies in the plans are not significant for the plant in question, that adequate interim compensating measures have been or will be taken promptly, or that there are other compelling reasons to permit plant operation," without defining those terms further. The Commission currently believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures" can and will be taken.

The approach reflected in this rule amplifies and clarifies the guidance provided in the Commission's decision in *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule incorporates the "realism doctrine," set forth in that decision, which holds that in an actual emergency, state and local governmental authorities will act to protect the public, and that it is appropriate therefore for the NRC, in evaluating the adequacy of a utility's emergency plan, to take into account the probable response of state and local authorities, to be determined on a case-by-case basis.

That decision also included language which could be interpreted as envisioning that the NRC must estimate the radiological dose reductions which a utility plan would achieve, compare them with the radiological dose reductions which would be achieved if there were a state or local plan with full

Finally, on July 23, 1980, at the final Commission consideration of these rules, the Commission was briefed by the General Counsel on the substance of conversations with Congressional staff members who were involved with the passage of the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96-295. The General Counsel advised the Commission that the NRC final rules were consistent with that Act. The Commission has relied on all of the above information in its consideration of these final rules. In addition, the Commission directs that the transcripts of these meetings shall be part of the administrative record in this rulemaking.

In addition, in a key portion of the rule, dealing with the question of whether NRC should automatically shut down nuclear plants in the absence of an NRC-approved state or local emergency plan, or should instead evaluate all the relevant circumstances before deciding on remedial action, the NRC again explicitly followed the Congress' lead. In determining what action to take, the Commission said, it would look at the significance of deficiencies in emergency planning, the availability of compensating measures, and any compelling reasons arguing in favor of continued operation, 10 CFR 50.47(c). The Commission explained: "This interpretation is consistent with the provisions of the NRC Authorization Act for fiscal year 1980, Pub. L. 96-295." 45 FR 55403. Thus in deciding that the lack of an approved state or local plan should not be grounds for automatic shutdown of a nuclear power plant, the Commission expressly declared itself to be following the statutory approach.

This background sheds considerable light on a passage from the **Federal Register** notice which some commenters saw as indication that the Commission consciously decided in 1980 that states and localities should have the power to exercise a veto over nuclear power plant operation. The Commission said:

> The Commission recognizes that there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind and effect from the means already available to prohibit reactor operation. . . . Relative to applying this rule in actual practice, however, the Commission need not shut down a facility until all factors have been thoroughly examined.

45 FR 55404. (Emphasis added.)

It has been argued that the language just quoted indicates that the Commission made a conscious decision in 1980 to allow states and localities to exercise a veto power over completed nuclear power plants. Seen in context, however, it is apparent that the Commission did no such thing. Rather, the Commission was acknowledging the fact that under the approach it was taking, the action (or inaction) of a state or locality had the potential to affect the operation of nuclear power plants, since state and local non-participation would clearly make it more difficult for an applicant to demonstrate the adequacy of emergency planning. It is worth emphasizing the word "potential" in the quoted passage. It indicates that the Commission believed that in some cases, state and local action or inaction might have the effect of restricting plant operation, while in other cases it would not. In other words, the Commission foresaw a case-by-case evaluation, with the result not foreordained either in the direction of plant operation or of shutdown. Clearly, neither the Commission nor the Congress envisioned that state or local non-participation should automatically bar plant operation without further inquiry.

The mechanism adopted by the Commission for implementing the two-tiered approach was set forth in 10 CFR 50.47 of the Commission's regulations. For the first tier, sixteen planning standards for a state or local emergency plan were spelled out in 10 CFR 50.47(b)(1-16) of the Commission's regulations. The second tier, by contrast, was dealt with in a brief and unspecific provision, 10 CFR 50.47(c)(1):

> Failure to meet the [16] applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

In a 1986 decision, the Commission declared that in a situation in which state and local authorities decline to participate in emergency planning, the NRC has the authority and the legal obligation to consider a utility plan and render a judgment on the adequacy of emergency planning and preparedness. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22. The Commission observed in *LILCO* that the emergency planning standards of 10 CFR 50.47(b)—the regulation which establishes the 16 planning standards by which a state and local plan is to be measured—"are premised on a high level of coordination between the utility and State and local governments," so that "[i]t should come as no surprise that without governmental cooperation [the utility] has encountered great difficulty complying with all of these detailed planning standards." 22 NRC 22, 29. The Commission noted, however, that its emergency planning rules were intended to be "flexible," and that a utility plan will pass muster under 10 CFR 50.47(c) "notwithstanding noncompliance with the NRC's detailed planning standards * * * (1) if the defects are 'not significant'; (2) if there are 'adequate interim compensating actions'; or (3) if there are 'other compelling reasons.'" The Commission added: "The decisions below focus on (1) and (2) and we do likewise."

The Commission then explained that the "measure of significance under (1) and adequacy under (2) is the fundamental emergency planning standard of § 50.47(a) that 'no operating license * * * will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.'" The "root question," the Commission said, was whether a utility plan "can provide for 'adequate protective measures * * * in the event of a radiological emergency.'" To answer that question, the Commission continued, requires recognition of the fact that emergency planning requirements do not have fixed criteria, such as prescribed evacuation times or radiation dose savings, but rather aim at "reasonable and feasible dose reduction under the circumstances." 24 NRC 22, 30.

Thus the Commission is already on record as believing itself legally obligated to consider the adequacy of a utility plan in a situation of state and/or local non-participation in emergency planning. Likewise, it is on record as believing that the evaluation of a utility plan takes place in the context of the overriding obligation that no license can be issued unless the emergency plan is found to provide reasonable assurance of adequate protective measures in an emergency. The Commission believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory

state and local participation in emergency planning, and permit licensing only if the dose reductions are "generally comparable." Such an interpretation would be contrary to NRC practice, under which emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished, and without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take, but that judgment would be made in accordance with certain guidelines set forth in the rule and explained further below. The rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus, the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and timely proffer or an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

The rule thus establishes the framework by which the adequacy of emergency planning, in cases of state and/or local non-participation, can be evaluated on a case-by-case basis in operating license proceedings. The rule does not presuppose, nor does it dictate, what the outcome of that case-by-case evaluation will be. As with other issues adjudicated in NRC proceedings, the outcome of case-by-case evaluations of the adequacy of emergency planning using a utility's plan will be subject to multiple layers of administrative review within the Commission and to judicial review in the courts.

Backfit Analysis

This amendment does not impose any new requirements on production or utilization facilities; it only provides an alternative method to meet the Commission's emergency planning regulations. The amendment therefore is not a backfit under 10 CFR 50.109 and a backfit analysis is not required.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. The proposed rule applies only to nuclear power plant licensees which are electric utility companies dominant in their service areas. These licensees are not "small entities" as set forth in the Regulatory Flexibility Act and do not meet the small business size standards set forth in Small Business Administration regulations in 13 CFR Part 121.

Paperwork Reduction Act

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, approval No. 3150-0011.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and Recordkeeping requirements.

Environmental Assessment and Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required. The Commission has prepared, in support of this finding, an environmental assessment which is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street NW., Washington, DC.

Regulatory Analysis

The Commission has prepared a regulatory analysis for this regulation. This analysis further examines the costs and benefits of the proposed action and the alternatives considered by the Commission. The analysis is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Commission is adopting the following amendments to 10 CFR Part 50:

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68, Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2238, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91 and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2071, 2073 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100–50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), secs. 50.10(a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); secs. 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and secs. 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 50.47 [Amended]

2. In 10 CFR Part 50, paragraph (c)(1) of § 50.47 is revised to read as follows:

* * * * *

(c)(1) Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the

Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operations. Where an applicant for an operating license asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, an operating license may be issued if the applicant demonstrates to the Commission's satisfaction that:

(i) The applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of the non-participation of state and/or local governments.

(ii) The applicant has made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local governmental authorities, including the furnishing of copies of its emergency plan.

(iii) The applicant's emergency plan provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. To make that finding, the applicant must demonstrate that, as outlined below, adequate protective measures can and will be taken in the event of an emergency. A utility plan will be evaluated against the same planning standards applicable to a state or local plan, as listed in paragraph (b) of this section, with due allowance made both for—

(A) Those elements for which state and/or local non-participation makes compliance infeasible and

(B) The utility's measures designed to compensate for any deficiencies resulting from state and/or local non-participation.

In making its determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.

Appendix E—[Amended]

8. In 10 CFR Part 50, Appendix E, a new paragraph 6 is added to section IV.F to read as follows:

6. The participation of state and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities, pursuant to 10 CFR 50.47(c)(1). In such cases, an exercise shall be held with the applicant or licensee and such governmental entities as elect to participate in the emergency planning process.

Dated at Washington, DC, this 29th day of October, 1987.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[Editorial note: The following regulatory analysis and environmental assessment will not appear in the Code of Federal Regulations]

Regulatory Analysis—Evaluation of the Adequacy of Offsite Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Statement of the Problem

In 1980, Congress enacted provisions dealing with emergency planning for nuclear power plants in the NRC Authorization Act for fiscal year 1980. Section 109 of that Act provided for the NRC to review a utility's emergency plan in situations in which a state or local emergency plan either did not exist or was inadequate. The NRC published regulations later than year that were designed to be consistent with the Congressionally mandated approach, but they did not include specific mention of utility plans. The absence of such a provision has led to uncertainty about the NRC's authority to consider a utility plan and the criteria by which such a plan would be judged. The present rulemaking is designed to clarify both the NRC's obligation to consider a utility plan at the operating license stage in cases of state and/or local non-participation in emergency planning and the standards against which such a plan would be evaluated.

Objective

The objective of the proposed amendments are to implement the policy underlying the 1980 Authorization Act and to resolve, for future licensing, what offsite emergency planning criteria should apply where state or local governments decide not to participate in offsite emergency planning or preparedness.

Alternatives

Five alternatives were considered, including leaving the existing rules unchanged. The pros and cons of these alternatives are discussed in the rule preamble published in the Federal Register.

Consequences

NRC

The amendments will probably not impact on NRC resources currently being used in licensing cases because current NRC policy, developed in the adjudicatory case law, is to evaluate utility plans as possible interim compensating actions under 10 CFR 50.47(c)(1). Thus, while there could be extensive litigation and review regarding whether the rule's criteria are met, this would likely be similar to the review and litigation under current practice.

Other Government Agencies

No impact on other agency resources should result with the possible exception that FEMA will need to devote resources to develop criteria for review of utility plans and/or to review the plans on a case-by-case basis.

Industry

Impacts on the industry are speculative because there is no way to predict, in advance of their actual application, whether any particular utility plan will satisfy the rule. However, industry should generally benefit from knowing that rules are in place so that plans for compliance can be formulated.

Public

Under the rule being adopted a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that while no utility plan is likely to be able to provide precisely the same degree of public protection that would obtain under ideal conditions, i.e. a state or local plan with full state and local participation, such a plan may nevertheless be adquate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Impact on Other Requirements

The proposed amendments would not affect other NRC requirements.

Constraints

No constraints have been identified that affect implementation of the proposed amendments.

Decision Rationale

The decision rationale is set forth in detail in the preamble to the rule change published in the **Federal Register**.

Implementation

The rule should become effective 30 days after publication in the **Federal Register**. Implementation will involve cooperation with FEMA and the development of FEMA/NRC criteria for review of utility plans may be required before the rule is applied to specific cases.

Environmental Assessment for Amendments to Emergency Planning Regulations Dealing With Evaluation of Offsite Emergency Planning for Nuclear Power Plants at the Operating license Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Identification of the Action

The Commission is amending its regulations to provide criteria for the evaluation at the operating license stage of offsite emergency planning where, because of the non-participation of state and/or local governmental authorities, a utility has proposed its own emergency plan.

The Need for the Action

As described in the **Federal Register** notice accompanying the final rule, the Commission's emergency planning regulations, promulgated in 1980, did not explicitly discuss the evaluation of a utility emergency plan, although Congress expressly provided that in the absence of a state or local emergency plan, or in cases where a state or local plan was inadequate, the NRC should consider a utility plan. That omission has led to uncertainty as to whether the NRC is empowered to consider a utility plan in cases of state and/or local non-participation, as well as about what the standards for the evaluation of such a plan would be.

Alternatives Considered

The Commission published a proposed rule change on March 6, 1987, at 52 FR 6980. In deciding on a final rule, the Commission considered four options in addition to the one reflected in the final rule. These were: issuance of the rule as originally proposed and described; issuance of a rule making clear that in cases of state and/or local non-participation, licenses could be issued on the basis of the utility's best efforts; issuance of a rule barring the issuance of licenses in cases of state and/or local non-participation; and termination of the rulemaking without the issuance of any rule change.

Environmental Impacts of the Action

The rule does not alter in any way the requirement that for an operating license to be issued, emergency planning for the plant in question must be adequate. The rule is designed to effectuate the second track of the two-track approach adopted by the Congress in the NRC Authorization Act of 1980 and two successive authorization acts, as described in detail in the **Federal Register** notice. The rule does not affect the place of emergency planning in the overall safety finding which the Commission must make prior to the licensing of any plant. Accordingly, the rule change does not diminish public protection and has no environmental impact.

Agencies and Persons Consulted

A summary of the very numerous comments appears as part of the **Federal Register** notice. Shortly before presenting an options paper to the Commission, NRC representatives briefed representatives of the Federal Emergency Management Agency on the contents of the options paper.

Finding of No Significant Impact

Based on the above, the Commission has decided not to prepare an environmental impact statement for the rule changes.

[FR Doc. 87-25439 Filed 11-2-87; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Regulation H; Docket No. R-0615]

Agricultural Loan Loss Amortization

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule with request for comments.

SUMMARY: This regulation implements Title VIII of the Competitive Equality Banking Act of 1987 ("CEBA") which permits state member agricultural banks to amortize losses on qualified agricultural loans. The regulation describes the procedures and standards applicable to state member banks desiring to amortize losses under that statute. It also describes the manner in which such amortizations are to be done. Title VIII of CEBA requires regulations implementing Title VIII to be issued not less than 90 days after enactment, that is, by November 9, 1987. Therefore, the Board is publishing the rule as a final rule effective November 9, 1987, for the Call Report for December 31, 1987, but is allowing interested parties to comment through December 3, 1987. Should changes be indicated by the comments, the Board will endeavor to adopt them shortly after the close of the comment period but before the Call Report for December 31, 1987, is filed. Banks wishing to amortize losses may file an application any time after publication of the rule.

DATES: The rule will be effective November 9, 1987, and the first Call Report affected will be the Call Report for December 31, 1987. Comments must be received on or before December 3, 1987.

ADDRESSES: All comments should refer to Docket No. R-0615 and should be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, or delivered to Room B-2223, 20th Street and Constitution Avenue NW., Washington, DC, between 8:45 a.m. and 5:15 p.m. weekdays. Comments may be inspected in Room B-1122 between 8:45 a.m. and 5:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Rhoger H. Pugh, Manager (202) 728-5883, Stanley B. Rediger, Senior Financial Analyst (202) 452-2629, Division of Banking Supervision and Regulation (202) 728-5883; Helen Lewis (202) 452-3490, Economist, Financial Reports Section, Division of Research and Statistics; or John Harry Jorgenson, Senior Attorney (202) 452-3778, Legal Division; Board of Governors of the Federal Reserve System, Washington, DC 20551. For the hearing impaired ONLY, Telecommunications Device for the Deaf, Earnestine Hill or Dorothea Thompson, (202) 452-3544.

SUPPLEMENTARY INFORMATION: Title VIII of the Competitive Equality Banking Act of 1987 ("CEBA") permits agricultural banks to amortize: (1) Losses on qualified agricultural loans shown on its annual financial statement for any year between December 31, 1983 and January 1, 1992; and (2) losses suffered as the result of an appraisal of other assets (related to a qualified agricultural loan) that it owned on January 1, 1983, or acquires prior to January 1, 1992. Title VIII of CEBA also requires that the federal banking agencies issue implementing regulations no later than 90 days after the effective date of the Act (that is, no later than November 9, 1987). This regulation is intended to comply with this requirement. The other federal banking agencies (the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation ("FDIC")) are proposing substantially identical regulations containing only technical variations necessary to accommodate their own regulatory and organizational systems. The standards to be applied are unchanged.

Statutory Requirements for Loan Loss Amortization

Title VIII of CEBA includes the following elements: (1) To be eligible to amortize losses, a bank must meet the following requirements:

(a) Its deposits must be insured by the FDIC;

(b) It must be located in an area the economy of which is dependent upon agriculture;

(c) It must have assets of $100 million or less;

The COMMONWEALTH OF MASSACHUSETTS, Petitioner,

v.

UNITED STATES of America, and United States Nuclear Regulatory Commission, Respondents.

Public Service Company of New Hampshire, Scientists and Engineers for Secure Energy, Inc., Long Island Lighting Company, Nuclear Management and Resources Council, Inc., and Edison Electric Institute, Intervenors.

UNION OF CONCERNED SCIENTISTS, et al., Petitioners,

v.

UNITED STATES REGULATORY COMMISSION and United States of America, Respondents.

Public Service Company of New Hampshire, Nuclear Management and Resources Council, Inc., Edison Electric Institute, Long Island Lighting Company, Citizens Within the 10-Mile Radius, Inc., and Scientists and Engineers for Secure Energy, Inc., Intervenors.

STATE OF NEW YORK, Mario Cuomo, Governor, and County of Suffolk, Petitioners,

v.

UNITED STATES of America and United States Nuclear Regulatory Commission, Respondents.

Public Service Company of New Hampshire, Nuclear Management and Resources Council, Inc., Edison Electric Institute, Long Island Lighting Company, and Scientists and Engineers for Secure Energy, Inc., Intervenors.

Nos. 87-2032, 87-2033, 88-1121.

United States Court of Appeals, First Circuit.

Heard June 8, 1988.

Decided Sept. 6, 1988.

States and various other groups sought facial review of regulation of Nuclear Regulatory Commission which allowed licensure of nuclear power facility upon submission of radiological emergency plan in which state and local governments had refused to cooperate in developing. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) regulation was entitled to deference on review; (2) regulation and underlying realism doctrine were not arbitrary and capricious; (3) challengers failed to demonstrate that utility could factor economic cost into its emergency plan; and (4) notice about regulation and realism doctrine were sufficient.

Review denied.

1. Electricity ⇐8.5(2)

Nuclear Regulatory Commission regulation, allowing licensure of nuclear power facility upon presentation of adequate emergency plan for radiological emergency, developed without assistance from state and local governments, was entitled to deference on judicial review; plain language of Atomic Energy Act allowed approval of a utility plan. Atomic Energy Act of 1954, § 161(i)(3), as amended, 42 U.S.C.A. § 2201(i)(3).

2. Electricity ⇐8.5(2)

Nuclear Regulatory Commission's regulation, allowing licensure of a nuclear power facility upon utility's development of radiological emergency plan, in which state and local officials had refused to cooperate in developing, was not arbitrary and capricious even though Commission's acceptance of plan was predicated on part by Commission's "realism doctrine"—that in case of actual radiological emergency, state and local officials who refused to cooperate in developing plan, would cooperate with a plan which is in place. Atomic Energy Act of 1954, § 161(i)(3), as amended, 42 U.S.C.A. § 2201(i)(3).

3. Administrative Law and Procedure ⇐460

Agencies are permitted to adopt and apply presumption of proven facts and inferred facts which are rationally correct.

ATTACHMENT "B"

4. Electricity ⇐8.5(2)

In light of proven nonparticipation of States in developing radiological emergency plans with utilities operating nuclear power plants, Nuclear Regulatory Commission could rationally have decided to allow licensure of plants for which emergency plan had been developed without state and local government assistance. Atomic Energy Act of 1954, § 161(i)(3), as amended, 42 U.S.C.A. § 2201(i)(3).

5. Administrative Law and Procedure ⇐395

Electricity ⇐8.5(2)

Nuclear Regulatory Commission's notice, concerning its adoption of new regulation, allowing licensure of nuclear power facilities upon presentation of radiological emergency plans which were developed without state or local government assistance, was sufficient, even though in adopting regulation, Commission relied on its realism doctrine—that in case of radiological emergency, state and local officials would follow emergency plan previously developed without them—since in notice of proposed regulation, Commission included a statement explaining the realism doctrine.

6. Electricity ⇐8.5(2)

Challengers failed to demonstrate, that on its face, utility using nuclear power was able to consider economic costs in determining adequate protection for public in case of radiological emergency, during facial challenge to Nuclear Regulatory Commission's adoption of regulation allowing nuclear power plants to be licensed upon submission of an emergency plan in which state and local governments had refused to cooperate in developing. Atomic Energy Act of 1954, § 161(i)(3), as amended, 42 U.S.C.A. § 2201(i)(3).

7. Administrative Law and Procedure ⇐797

During facial challenge to administrative agency's adoption of regulation, arguments about potential unlawful applications were inappropriate.

James M. Shannon, Atty. Gen., with whom Stephen A. Jonas, Frank W. Ostrander and John Traficonte, Asst. Attys. Gen., Boston, Mass., were on brief, for petitioner Com. of Mass.

Karla J. Letache with whom Herbert H. Brown, Jonathan N. Eisenberg, Frederick W. Yette, Kirkpatrick & Lockhart, Washington, D.C., Robert Abrams, Atty. Gen., Alfred L. Nardelli, Asst. Atty. Gen., New York City, Fabian G. Palomino, Sp. Counsel to the Governor, Albany, N.Y., and E. Thomas Boyle, Suffolk Co. Atty., Stony Brook, N.Y., were on brief, for petitioners of New York State, Governor Mario M. Cuomo, and Suffolk County.

Ellyn R. Weiss with whom Diane Curran, Andrea C. Ferster, Anne Spielberg, Dean R. Tousley and Harmon & Weiss, Washington, D.C., were on brief, for petitioners Union of Concerned Scientists, et al.

Robert A. Backus and Backus, Meyer & Solomon, Manchester, N.H., on brief, for intervenor Citizens Within The 10-Mile Radius, Inc.

William H. Briggs, Jr., Sol., with whom William C. Parler, Gen. Counsel, E. Leo Slaggie, Deputy Sol., Peter G. Crane, Counsel for Sp. Projects, Office of the Gen. Counsel, U.S. Nuclear Regulatory Com'n, Roger J. Marzulla, Asst. Atty. Gen., Anne S. Almy, Asst. Chief, Appellate Section, and John T. Stahr, Appellate Section, Land and Natural Resources Div., Dept. of Justice, Washington, D.C., were on brief, for respondents.

Thomas G. Dignan, Jr., George H. Lewald, Deborah S. Steenland and Ropes & Gray, Boston, Mass., on brief, for intervenor Public Service Co. of New Hampshire.

James P. McGranery, Jr., Washington, D.C., on brief, for intervenor Scientists and Engineers for Secure Energy, Inc.

Donald P. Irwin, Lee B. Zeugin, Jessine A. Monaghan, Charles L. Ingebretson and Hunton & Williams, Richmond, Va., on brief, for intervenor Long Island Lighting Co.

Jay E. Silberg, Robert E. Zahler, Delissa A. Ridgway, Shaw, Pittman, Potts & Trow-

bridge, Robert W. Bishop, Gen. Counsel, Nuclear Management and Resources Council, Inc., Robert L. Baum, Sr. Vice President and Gen. Counsel, Edison Elec. Institute, Washington, D.C., on brief, for intervenors Nuclear Management and Resources Council, Inc., and Edison Elec. Institute.

Before CAMPBELL, Chief Judge, BREYER, Circuit Judge, and ACOSTA,* District Judge.

LEVIN H. CAMPBELL, Chief Judge.

These consolidated petitions [1] are for review of a regulation promulgated by the Nuclear Regulatory Commission ("NRC"). The regulation provides standards by which the NRC, in deciding whether to license a utility to operate a nuclear power plant, evaluates a radiological emergency plan that is prepared by the utility alone because local governments have refused to participate in emergency planning. Petitioners specifically contest the rule's incorporation of what is known in NRC parlance as the "realism doctrine," a doctrine that allows the NRC, in evaluating a utility emergency plan, to make the following pair of presumptions: 1) in the event of an actual radiological emergency state local officials will do their best to protect the affected public, and 2) in such an emergency these officials will look to the utility plan for guidance and will generally follow that plan. Petitioners contend the rule is arbitrary and capricious, was promulgated under deficient "notice and comment" procedures, and is beyond the scope of the NRC's statutory authority.

* Of the District of Puerto Rico, sitting by designation.

1. Petitioners are the Commonwealth of Massachusetts (No. 87-2032), the State of New York (No. 88-1121), and the Union of Concerned Scientists ("UCS"), the New England Coalition on Nuclear Pollution, the Seacoast Anti-Pollution League, the town of Hampton, New Hampshire, the towns of Amesbury and Kensington, Massachusetts, and United States Representative Edward J. Markey (No. 87-2033). An organization called Citizens Within the 10-Mile Radius has intervened on behalf of petitioners. Five parties have intervened on behalf of respondent, the Nuclear Regulatory Commission: Public Service Company of New Hampshire, Long Island Lighting Company, Scientists and Engineers for Secure Energy, Inc., Nuclear Management and Resources Council, Inc., and Edison Electric Institute.

The arguments advanced by the various petitioners and intervenor-petitioners are substantially similar, as are those of the respondent and intervenor-respondents. For brevity's sake, we refer to the opponents in this case only as "petitioners" and "NRC."

I.

Under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1982), the Nuclear Regulatory Commission is empowered to

> prescribe such regulations or orders as it may deem necessary ... to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property....

Id. § 2201(i)(3). Prior to the 1979 accident at the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania, both Congress and the NRC had directed their regulatory efforts primarily at plant design. However, in response to the perceived inadequacy of prior planning and coordination between the utility and local governments during the Three Mile Island accident, Congress included in the NRC's 1980 authorization legislation new provisions aimed to ensure that "offsite" emergency planning was taken into consideration as well. The relevant part of the 1980 authorization legislation provided as follows:

> (a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that—
>
> (1) there exists a State or local emergency plan which—
>
> (A) provides for responding to accidents at the facility concerned, and

(B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or

(2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

Pub.L. No. 96-295, § 109(a)(1), 94 Stat. 780 (1980). The disjunctive language in subsection (2)—"State, local *or utility plan*"—indicates that this legislation did not condition the issuance of a license exclusively upon the existence of a state or local emergency plan. Rather, the statute's emergency planning requirements may be satisfied by either 1) a state or local plan complying with NRC guidelines or 2) a state, local, *or utility plan* that provides "reasonable assurance that public health and safety is not endangered."

After the accident at Three Mile Island, but prior to the 1980 authorization legislation, the NRC began revising its own emergency planning requirements. Its final emergency planning rule was promulgated in August 1980, just a few weeks after Congress had passed the authorization legislation. The NRC rule provided generally, in its initial paragraph, that "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1) (1980). Paragraph (b) of the regulation, along with Appendix E, provided specific substantive standards for emergency response plans. Under subsection (c), however, a licensing applicant's failure to meet paragraph (b)'s standards was not necessarily fatal: an applicant could still demonstrate to the Commission that certain deficiencies were not significant for the plant in question, that interim compensating actions had already been taken or were imminent, or that there were other "compelling reasons" to permit plant operation. The rule did not specifically discuss or refer to emergency plans that were prepared by a utility without input from state or local governments.

The 1980 rule remained unchanged until the 1987 amendment here in issue. Two developments occurred in the meantime, however, that are worthy of note. First, in two authorization acts subsequent to the 1980 authorization act discussed above, Congress reaffirmed that a plant could be licensed by the NRC on the basis of a "State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Pub.L. No. 97-415, 96 Stat. 2067, § 5 (1982-83 Authorization Act); Pub.L. No. 98-553, 98 Stat. 2825, § 108 (1984-85 Authorization Act). These are the only post-1980 authorization acts. Second, in a 1986 adjudicatory ruling, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986), the NRC explained how its 1980 rule would apply in evaluating the adequacy of a utility emergency plan. The question then before the NRC was whether the Long Island Lighting Company's emergency plan for its Shoreham Nuclear Power Plant was inadequate as a matter of law because of the refusal of Suffolk County and New York State to participate in the planning. Noting that it was legally obligated to consider whether a utility plan prepared without government cooperation could pass muster, the Commission stated that such a plan might be adequate under 10 C.F.R. § 50.47(c), *see supra*, notwithstanding its inability to comply with the specific standards of paragraph (b), which are premised upon a high level of utility-government cooperation. *Id.* at 29. The Commission stated that the "root question" under paragraph (c) was identical to the question posed by the "fundamental licensing standard of § 50.47(a)," namely, whether "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." In its decision, the Commission also put forth what has become known as the "realism doctrine":

[I]f Shoreham were to go into operation and there were to be a serious accident requiring consideration of protective ac-

> tions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. Thus, in evaluating the LILCO plan we believe that we can reasonably assume some "best effort" State and County response in the event of an accident. We also believe that their "best effort" would utilize the LILCO plan as the best source for emergency planning information and options. After all, when faced with a serious accident, the State and County must recognize that the LILCO plan is clearly superior to no plan at all.

Id. at 31 (citations omitted).

Against this backdrop, the NRC promulgated the regulation in dispute here, amending paragraph (c) of the 1980 rule. *See supra.* The current rule reads in relevant part as follows:

> In making its determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.

10 C.F.R. § 50.47(c)(iii)(B) (1988). In short, the amendment reflects the "realism doctrine" the NRC announced in the *Long Island Lighting Co.* adjudication, modified by an express provision that the doctrine's second presumption is rebuttable.

II.

[1] Petitioners contend as a threshold matter that the disputed rule is not entitled to the judicial deference normally owed agency action. *See* 5 U.S.C. § 706(2)(A) (1982) (courts can set aside agency action only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). They argue that, for example, offsite emergency planning—as opposed to technical matters relating to plant construction and design—is outside the NRC's area of expertise. We do not agree. The substantive area in which an agency is deemed to be expert is determined by statute; here, under the relevant congressional enactments, *see supra*, the NRC is specifically authorized and directed to determine whether emergency plans adequately protect the public. *See Duke Power Co. v. United States Nuclear Regulatory Commission*, 770 F.2d 386, 390 (4th Cir.1985). We also reject petitioners' argument that the NRC is owed no deference because the issue in this case is a "pure question of statutory construction." The issue is *not* a pure question of statutory construction. Petitioners do not ask us "purely" to construe a statute; they ask us to hold that, given the statutes, the agency has acted unreasonably. Even if we were to assume, for the sake of argument, that the issue were purely one of statutory construction, petitioners still have not directed us to any enactment in which Congress has clearly indicated a view of emergency planning that is at variance with the NRC rule or that forecloses the NRC's adoption of the approach here adopted. Without such an indication of contrary congressional intent, we should normally defer to the agency's reasonable construction of the statute it administers. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45, 104 S.Ct. 2778, 2781–83, 81 L.Ed.2d 694 (1984); *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100 (1st Cir.1984). As it is, our standard of review here is dictated by section 706(2)(A) of the Administrative Procedure Act, and we must uphold the agency's action so long

as it is "reasonable and defensible." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 & n. 7, 104 S.Ct. 439, 444 & n. 7, 78 L.Ed.2d 195 (1983).

[2] Petitioners advance a host of arguments why the NRC rule—specifically, its incorporation of the second presumption contained in the "realism doctrine"—is unreasonable. Petitioners' primary contention is that it is unreasonable for the NRC to presume that, in the event of an actual radiological emergency, states and localities that have previously refused to participate in emergency planning will follow an emergency plan adopted by the utility.[2] We cannot say that this presumption is unreasonable. That state and local governments have refused to participate in emergency planning, or have indicated a belief that such planning is inherently impossible in a particular plant location, does not indicate how these governments would respond in an actual emergency. It is hardly unreasonable for the NRC to predict that state and local governments, notwithstanding their misgivings about the adequacy of a utility plan or their opposition to a particular plant location, would, in the event of an actual emergency at a plant they were lawfully obligated to coexist with, follow the only existing emergency plan. This prediction is supported by common sense, and also by the uncontested fact—part of the administrative record of this rule—that state and local governments prefer a planned emergency response to an ad hoc response. *See* 52 Fed.Reg. 42,082 (1987).

[3] Nor is the NRC rule objectionable because it is a "presumption." Agencies are permitted to adopt and apply presumptions if the proven facts and the inferred facts are rationally connected. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787, 99 S.Ct. 2598, 2606, 61 L.Ed.2d 251 (1979). As we indicated above, the inferred fact of state and local adherence to a utility plan is rationally related to the proven (in this case, hypothesized) fact of an actual radiological emergency. Moreover, the presumption here is expressly made rebuttable:

> It may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in an emergency.

10 C.F.R. § 50.47(c)(iii)(B). The proffer of an adequate state or local plan—an option that some states and localities may have expressly rejected—is only one possible method of rebutting the presumption. Nothing in the rule's language precludes other means of rebuttal.

[4] Petitioners also contend that the amended rule reflects an impermissible deviation from the NRC's regulatory position in 1980. Assuming, without deciding, that the NRC has in fact changed its position with respect to the role of states and localities in emergency planning, we conclude that such a change was not irrational. The NRC might reasonably have believed that, in light of the proven nonparticipation of states in emergency planning subsequent to 1980, the new rule was necessary to serve Congress's policy that the NRC consider plans prepared by utilities without governmental participation. *See Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1973) (agency may alter policy in light of changed circumstances in order to serve congressional policy). There is adequate on-the-record justification for the NRC's adoption of the new rule. *See NAACP v. FCC*, 682 F.2d 993,

2. None of the petitioners seriously contests the first presumption of the realism doctrine, the presumption that state and local governments will try to protect the public in an emergency. Petitioner UCS argues that the rule contains an implicit third assumption that states and localities have the resources necessary to comply with the utility plan in the event of an emergency. We do not consider this third presumption to be implicit in the realism doctrine, and to the extent that this part of UCS's argument is a challenge to "interim criteria" adopted by the NRC subsequent to the promulgation of the disputed rule, the issue is not properly before us.

998 (D.C.Cir.1982) (deference is owed to an agency's determination that circumstances have changed and to the agency's response thereto).

[5] Another of petitioners' contentions is that the NRC failed to comply with the notice and comment procedures required under section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). They contend the NRC's notice of proposed rulemaking failed to address the realism doctrine. Petitioners ignore, inter alia, the following statement, which appeared in information accompanying the notice:

> the Commission believes that State and local governments which have not cooperated in planning will carry out their traditional public health and safety roles and would therefore respond to an accident. It is reasonable to expect that this response would follow a comprehensive utility plan.

52 Fed.Reg. 6983 (col. 2). *See also id.* at 6980 (col. 1), 6986 (col. 1). This notice was satisfactory, *see Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1282–86 (1st Cir.1987); petitioners' argument is without merit.

[6] Petitioners also contend on a miscellany of grounds that the NRC rule violates the Atomic Energy Act. For example, they claim the new rule permits the NRC to consider a utility's economic costs in determining whether a plan provides "adequate protection" to the public, a result arguably in conflict with the D.C. Circuit's decision in *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C.Cir.1987). But even if we were to think that that case controlled here, we do not believe the regulation necessarily opens the door to such economic considerations. Nothing on the rule's face suggests this, and such a motivation is specifically disclaimed by the NRC. 52 Fed.Reg. 42,083 (1987). Nor can we accept petitioners' claim that such an inference is warranted by the rule's provision that, in evaluating a utility plan, the NRC shall make due allowance for the possibility that state and/or local nonparticipation will make the utility plan's compliance with enumerated safety standards "infeasible." 10 C.F.R. § 50.47(c)(iii)(A). Petitioners claim the word "infeasible" necessarily invites cost-benefit analysis. We reject this argument. A fair reading of this provision of the rule in context suggests that compliance would be "infeasible" simply because some of the specific safety standards clearly contemplate utility-government cooperation.

[7] We have considered and rejected petitioners' other arguments about the rule's statutory invalidity. These arguments are unpersuasive either because they fail to acknowledge the discretion the Act itself vests in the Nuclear Regulatory Commission, *see Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir.), *cert. denied*, 439 U.S. 1046, 99 S.Ct. 721, 58 L.Ed.2d 705 (1978), or because they attack an imagined unlawful application of the rule. The latter arguments are inappropriate here, where the rule is being challenged on its face. Our holding is, of course, limited to the question of whether the rule is invalid on its face; petitioners remain free to challenge the NRC's application of the rule in an individual case.

The petitions for review are denied.

(c) a list of all decisions made by the Commission or its lower boards in which the "reasonable assurance" standard was applied.

ANSWER.

Since the Commission's emergency planning rules are expressed in terms of "reasonable assurance," every decision on emergency planning explicitly or implicitly involves a finding of whether "reasonable assurance" has been demonstrated with respect to the specific matters in controversy.

Attachment C is a representative sample of those decisions of the Commission and its subordinate Boards issued since 1980 in which emergency planning issues have been decided.

Attachment:

C. List of Decisions on Emergency Planning.

LIST OF DECISIONS ON EMERGENCY PLANNING

In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL (Emergency Planning Issues); LBP-82-39, Nuclear Regulatory Commission, Atomic Safety and Licensing Board, 15 NRC 1163 (May 14, 1982)

In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL (Emergency Planning); LBP-82-70, Nuclear Regulatory Commission Atomic Safety and Licensing Board, 16 NRC 756 (August 31, 1982)

In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL (Offsite Emergency Planning Issues); LBP-85-14, Nuclear Regulatory Commission Atomic Safety and Licensing Board, 21 NRC 1219 (May 2, 1985)

In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning) CLI-86-13, Nuclear Regulatory Commission, 24 NRC 22 (July 24, 1986)

In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5 (EP Exercise); ALAB-900, Nuclear Regulatory Commission Atomic Safety and Licensing Appeal Board, 28 NRC 275 (September 20, 1988)

In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5 (EP Exercise); ALAB-903, Nuclear Regulatory Commission Atomic Safety and Licensing Appeal Board, 28 NRC 499 (November 10, 1988)

In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); LBP-88-32, Nuclear Regulatory Commission Atomic Safety and Licensing Board, 28 NRC 667 (December 30, 1988)

In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); ALAB-922, Nuclear Regulatory Commission Atomic Safety and Licensing Appeal Board, __ NRC ___ (October 11, 1989)

ATTACHMENT "C"

QUESTION 4. When the Commission adopted the emergency response rules in response to the Three Mile Island accident, it declared that it "recognizes that this proposal, to view emergency planning as equivalent to, rather than secondary to siting and design in public protection, departs from its prior regulatory approach to emergency planning." 44 Fed. Reg. 75169. Has the Commission departed from this view as expressed when the rule was adopted? If yes, why?

ANSWER.

The question proceeds from the slightly inaccurate premise that the quoted language accompanied the rules "adopted" by the Commission. In fact, the quoted language appeared in a notice of proposed rulemaking issued on December 19, 1979. The relevant question, therefore, is what the Commission said and intended at the time the rules were actually adopted on August 19, 1980 (45 Fed. Reg. 55402). That precise issue was discussed in detail, and the Commission's position was clarified in the 1987 final rule on emergency planning in cases of state and/or local non-participation in emergency planning, 52 Fed. Reg. 42078, 42081-82 (See "Issue #5: Is emergency planning as important to safety as proper plant design and operation?"). Rather than try to paraphrase that discussion, we refer you to the Federal Register notice which is appended as Attachment A to the answer to Question 3. The validity of the 1987 final rule was upheld by the U.S. Court of Appeals for the First Circuit in Commonwealth of Massachusetts v. United States, 856 F.2d 378 (1988). A copy of that decision is appended as Attachment B to the answer to Question 3.

QUESTION 5. Does the Commission agree that it is not sufficient to meet the "reasonable assurance" standard for an applicant to show that it has done its best to plan for as efficient an evacuation as possible?

ANSWER.

The Commission in 1987 considered and rejected the option of making its findings on emergency planning turn on whether the applicant for a license had exercised its "best efforts." Specifically, in the 1987 proposed rule on emergency planning, the Commission asked for comment on this question: Should the focus of the emergency planning inquiry continue to be whether there is reasonable assurance that adequate protective measures can and will be taken in an emergency, or should it ask instead whether the utility had done all within its power to make emergency planning satisfactory? 52 Fed. Reg. 6980 (March 6, 1987). The Commission's final rule resolved the question in favor of the existing approach, declaring that "a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in [an] emergency." 52 Fed. Reg. 42078, 42084. As the Commission told the First Circuit Court of Appeals in its appellate brief, "in its final rule the Commission rejected the proposed alternative which would have shifted the NRC's focus from evaluating the adequacy of the utility's emergency plan to evaluating whether the utility had done all it could to provide effective emergency planning." Brief at 19.

QUESTION 6. On what basis did the Commission decide to take the unusual step of interfering with the normal appeal rights of the Seabrook intervenors by removing the Appeal Board from the appellate process after it reversed the Licensing Board and by initiating an "immediate effectiveness" review? Please provide the Subcommittee with the opinion of the General Counsel or any other similar opinion used by the Commission to guide its decision to review the consistency of LBP-89-32 with ALAB-924 as a matter of "immediate effectiveness" rather than on the merits.

ANSWER.

This question goes directly to the heart of the adjudicatory decision-making process, and it would therefore be inappropriate for the Commission to answer under the principles enunciated in Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966), and related cases.

QUESTION 7. Since 1980, has the NRC ever issued a full power operating license to an applicant who did not have an approved emergency response plan at the time the license was issued? If yes, please provide a detailed explanation for each decision and an explanation of how each decision is consistent with the 1980 NRC Authorization Act.

ANSWER.

Since November 3, 1980, the date NRC's emergency planning regulations became effective, the Commission has not issued a full power operating license to an applicant who did not have an NRC-approved emergency response plan at the time the license was issued. Some of these approvals were conditioned on the correction of deficiencies.

QUESTION 8. Have decisions of the Atomic Safety and Licensing Appeal Board ever before been overruled by the Atomic Safety and Licensing Board? If yes, please provide a detailed explanation of the circumstances and a justification that addresses how this is consistent with the Administrative Procedures Act, relevant statutes, and fundamental fairness to the parties.

ANSWER.

Without taking any position on whether in the Seabrook proceeding the Licensing Board has overruled an Appeal Board decision (to express any view would be inappropriate under the principles enunciated in Pillsbury, cited earlier), we are not aware of any instance in which a Licensing Board has "overruled" an Appeal Board decision.

QUESTION 9. Has the Licensing Board ever before granted authority to issue an operating license while an appeal is pending before the Appeal Board? If yes, please provide a detailed explanation and justification consistent with the Administrative Procedures Act, relevant statutes and fundamental fairness to the parties.

ANSWER.

This happens frequently. Because power reactor operating license proceedings are complex and frequently involve many issues, the Licensing Board in many cases issues several partial initial decisions, each of which addresses a limited number of issues. Parties who disagree with the Licensing Board's decisions are required to file a notice of appeal with the Appeal Board within ten days after service of a Licensing Board's initial decision. 10 CFR § 2.762. Typically, appeals have been filed but are not resolved at the time the Licensing Board issues its final partial initial decision authorizing the grant of an operating license. This practice is provided for by longstanding Commission regulations set forth in 10 CFR 2.764 and was upheld in Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir 1986)(per curiam).

QUESTION 10. Has the Licensing Board ever before granted authority to issue an operating license while an issue described as "pivotal" to approving the application has been certified to the full Commission and is still pending there? If yes, please explain.

ANSWER.

Again, without taking a position on whether in the Seabrook proceeding the Licensing Board has granted authority to issue an operating license while a pivotal issue has been certified to the Commission, we are unaware of any instance where certified questions on "pivotal" issues have been pending before the Commission at the time a Licensing Board authorized issuance of an operating license.

QUESTION 11. Are any of the current Commissioners precluded from deliberating matters concerning the licensing of Seabrook? If yes, please list the person affected and the nature of the problem.

ANSWER.

We previously answered this question in our December 20, 1989 response to you. A copy of that response is attached.

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

CHAIRMAN

December 20, 1989

The Honorable Peter H. Kostmayer, Chairman
Subcommittee on Oversight and Investigations
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D. C. 20515

Dear Chairman Kostmayer:

This letter responds to your letter dated December 12, 1989. That letter informed the Commission that the Oversight and Investigations Subcommittee is initiating an inquiry into NRC licensing proceedings and interpretations of law that govern those proceedings. Your letter suggests that we have permitted an erosion of safety standards enacted by Congress with respect to requirements for emergency planning at nuclear power plants. Most particularly you express concern about recent actions taken by the Commission and its Licensing Board concerning the application for a full power operating license for Seabrook Station in New Hampshire. In this connection, you sent eleven questions, some with multiple parts, for our response by December 20, 1989.

At the outset, let me state that the Commission is committed to the protection of the public health and safety through emergency planning. Protective responses must be planned and available in the unlikely event that, despite the redundancy of our safety requirements, there should be a serious radiological emergency at a nuclear power plant.

As you are aware, the Commission is currently and actively engaged in considering whether the emergency planning for Seabrook satisfies the Commission's standards for the grant of a full power license. That consideration is a part of the formal adjudicatory proceeding that is required by our regulations issued to implement Section 189 of the Atomic Energy Act. As your letter acknowledges, your inquiry is directed in significant part to the very question certified to the Commission by the Appeal Board in ALAB-922, issued October 11, 1989, as well as to other matters before it on motion of a party or parties or in the course of the regulatory process.

Under the Administrative Procedure Act and the Commission's own regulations, it is clear that the Commission cannot consider comment received outside the record of the proceeding on matters before it for adjudication, nor may it discuss those matters off the record of the proceeding before decision. For those reasons the Commission is not able to directly respond to your questions. While it may be suggested that some questions are not Seabrook-specific but rather are generic in nature, even those questions are so intertwined with the Seabrook issues that it would be improper for us to respond, especially in the context of your letter which explicitly referred to your interest in the Seabrook proceeding.

When the Commission has concluded its deliberations on the Seabrook issues, it will publish its decisions. We will, of course, promptly provide you with a copy of any such decision. The Commission's forthcoming decisions on the issues in Seabrook obviously will encompass answers to many, if not all, of the questions you set forth. However, no Commission decision was issued before December 20, 1989.

In addition, your letter along with this response will be served on the participants of this proceeding and placed in our public document room for informational purposes.

In response to Question 11, Commissioners Curtiss and Remick have enclosed materials regarding their participation in certain Seabrook matters.

Sincerely,

Kenneth M. Carr

Enclosures: As stated

cc: The Honorable Barbara Vucanovich

Submitted to the Congressional Record, October 14, 1988

(S 16265)

STATEMENT OF JAMES R. CURTISS

If I am confirmed, it would be my intention, prior to participating in any agency action or decision involving a matter with respect to which I had a substantial involvement in my previous capacity as a staff member for the Committee on Environment and Public Works, to first consider whether I can approach any such decision or action with an open and impartial mind. In that regard, I would intend to consult with the Commission's Office of General Counsel on the relevant statutory and judicial standards, prior to reaching a judgment about whether it would be appropriate for me to participate in any such decision or action. Additionally, with respect to any adjudicatory proceeding, it would be my intention to first examine the contested issues before the Commission for decision and to recuse myself from participating in any such decision if there is a reasonable basis for questioning my ability to consider and resolve such issues in an impartial manner because of prior involvement on my part in such issues during my previous capacity as a staff member.

In addition, in any case where the action or decision of the agency is required to be made based upon a formal administrative record, it would be my intention first to review the record in any such proceeding in a thorough manner prior to participating in any agency decision or action involving a contested issue in such proceeding. In that regard, in view of the complexity of the Shoreham proceeding and the contested issues that have arisen in that proceeding, as well as the voluminous administrative record already compiled, I believe that for the near future, I will not be in a position to have reviewed this lengthy record with the thoroughness that would be necessary for me to participate in the upcoming Commission review process regarding the Licensing Board's Concluding Initial Decision on Emergency Planning, LBP-88-24, (September 23, 1988), including any subsequent Appeal Board decisions on review of that Licensing Board decision, or to participate in pending or upcoming Commission decisions on contested issues that might arise in future litigation regarding NRC's review of the June, 1988, emergency planning exercise at the Shoreham facility.

Finally, as an attorney and former Senate employee, I am extremely sensitive to the importance of avoiding the appearance of conflict of interest or impropriety for subsequent decisions I might make on matters previously within my responsibility. In particular, I am aware of concerns that have been expressed about my participation as a staff member of the Committee on Environment and Public Works in matters related to emergency planning for the Seabrook Nuclear Power Plant and, because of that, my ability to approach Commission decisions involving emergency preparedness for this facility with an open and impartial mind.

I should say that while I have been involved in the broad legislative policy issues related to emergency planning for nuclear power plants in my capacity as a staff member of the Committee on Environment and Public Works, representing the views and positions of the members for whom I have worked, I do not have a view—nor do I think it would be appropriate for me to have a view—on the contested issues in the Seabrook proceeding currently pending before the NRC.

Nonetheless, I do believe that the perception of objectivity and impartiality is critical to the integrity of the Commission's decisionmaking process.

For this reason, I intend to abstain from participating in Commission decisions on contested issues that have arisen or might arise in this proceeding involving the adequacy of the emergency preparedness plan for the Seabrook facility.

FORREST J. REMICK
305 EAST HAMILTON AVENUE
STATE COLLEGE, PA 16801

16 November 1989

The Honorable John F. Kerry
United States Senate
Washington, DC 20510-2102

Dear Senator Kerry:

This letter is in response to the concerns which you expressed in our meetings of October 24, 1989 and November 15, 1989 relating to my nomination to serve as a member of the Nuclear Regulatory Commission.

As Chairman of the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, I have signed on behalf of the Committee a letter to the Commissioners expressing the Committee's view on emergency planning at the Seabrook Station (Seabrook). That letter was developed on the basis of presentations made to the Committee by interested persons and representatives of cognizant agencies and expresses the collegial and advisory views of the Committee. I do not believe that my participation as a member of the Committee would necessarily disqualify me from acting impartially on Seabrook issues coming to me for action in an adjudicatory context as a Commissioner.

I have no doubt that I could and would act on Seabrook matters as an impartial adjudicator and would make my decision solely on the basis of the adjudicatory record. Nonetheless, I can understand why some members of the public might question whether I would be able to consider openmindedly the Seabrook issues now pending before the Commission. Consequently, I have reached the conclusion that I should disqualify myself from voting on contested issues in the matter of the initial authorization for full power operation of the Seabrook Station. In reaching my conclusion, I have been particularly sensitive to the possible perception of some members of the public of the need for my disqualification on Seabrook rather than any reality of bias or lack of objectivity on my part.

I have reached this conclusion after consultation with the Nuclear Regulatory Commission's General Counsel.

I appreciate the opportunity to set forth my views on this matter.

Sincerely yours,

Forrest J. Remick