UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY COMMISSION

COMMENTS OF NATURAL RESOURCES DEFENSE COUNCIL, ON RECONSIDERATION OF 10 C.F.R. §2.700a

Introduction

The Natural Resources Defense Council, Inc. (NRDC) is pleased to be able to give its comments on the Commission's proposed reconsideration of its rule providing an exemption from adjudicatory procedures for proceedings involving military or foreign affairs functions. 46 Fed. Reg. 47799 (Sept. 30, 1981). The rule in question, 10 C.F.R. §2.700a, was originally promulgated without notice and comment on July 3, 1980. 45 Fed. Reg. 45253 (July 3, 1980) (Attached as Appendix A).

The preamble to the original rule stated that it "developed (sic) from the Commission's consideration of Natural Resources Defense Council's February 1980 request for a hearing in the matter of a proposed amendment to the special nuclear materials license of Nuclear Fuel Services at Erwin, Tennessee." Id at 45254. This rule, in turn, was challenged by NRDC and is currently under review by the U.S. Court of Appeals for the District of Columbia Circuit (NRDC v. NRC, Nos. 80-1863, 1864, filed July 28, 1980).

The preamble to the proposed "reconsideratior" strongly suggests that, as Commissioner Bradford notes in his

Separate Views, the Commission is unlikely to seriously reconsider whether the public interest would be served by adoption of this rule. It appears from NRDC's perspective that "the sole reason for seeking comment at this time is to shore up the court prospects of the Commission's dubious actions in the NFS-Erwin matter..." 46 Fed. Reg. at 47800. This notice, which was published two weeks prior to oral argument in NRDC's challenge to the original rule, has succeeded in delaying that court's resolution of that case for an indefinite period. Given this fact, and the fact that the notice repeats the same, conclusory description of NRC's alleged need for the military functions rule, it seems apparent that Commissioner Bradford is right.

Nonetheless, on the possibility that the Commission may be seriously reconsidering its hasty action in promulgating this rule and applying it to NRDC in the NRS-Erwin matter, we explain below our position that the Commission has no military or foreign affairs functions under its review, and therefore the rule should be repealed. Further, if the rule is retained, it should not apply to the NFS-Erwin proceeding both because of the unlawful prejudice that results to NRDC, and because NRC's regulation of the NFS-Erwin facility does not directly involve a military function. Finally, if the rule is not repealed, it should be conditioned to ensure that only legitimate military or foreign affairs functions are exempted from the adjudicatory process in the future.

I. The Rule Should Be Stricken Because The NRC Does Not Regulate "Military or Foreign Affairs Functions."

The Administrative Procedure Act (APA) includes parallel exemptions from its requirements for formal rulemaking and adjudicatory procedures "to the extent that there is involved (1) a military or foreign affairs function of the United States..." 5 U.S.C. §553(a). See also 5 U.S.C. §554(a)(4). As NRDC explained in its briefs to the Court of Appeals, these clauses have been interpreted as extremely narrow exemptions. NRDC Initial Brief, pp 19-24; Reply Brief pp 17-20, attached and incorporated hereto as Appendix B. The Senate Report accompanying the original APA language stated only that the exemption should "apply only to the extent' that the excepted subjects are directly involved." S. Doc. No.248, 79th Cong. 2d Sess. (1946)(emphasis added). Focusing on these two limiting phrases, Professor Arthur Bonfield explained (in reference to the rulemaking exemption) to the Administrative Conference of the United States that "rulemaking only indirectly or tangentially related to the exempted functions is not to be treated as within the exemptions, and that close cases should be treated as outside the exemption." */ In short, the presumption is against exempting agency actions from the provisions of the Administrative Procedure Act. Moreover, Bonfield notes in support of limiting the scope of the exemptions that Congress refused to exempt the War and Navy Departments in their entirety from the Administrative

*/Bonfield, Military and Foreign Affairs Function Rulemaking Under the APA, 71 Mich. L. Rev. 221, 237 (1972).

Procedure Act , but instead exempted only those functions which are military as opposed to "civil and regulatory." Id., at 236, n.44.

Finally, in reference to rulemaking, Professor Bonfield concludes:

> Section 553(a)(1) does not exclude all rules involving the armed forces; it is only rulemaking involving "military functions" that is excluded. Consequently, only rulemaking involving an activity that is specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, qualifications, or attributes is exempted. Furthermore, to be excluded under subsection (a)(1) the rulemaking in question must "clearly and directly" involve such an activity. Id., at 266 (emphasis in original).

As a further example of the limited scope of this exemption, the Attorney General's Manual on the Administrative Procedure Act (1947) cites only one example of a normally civilian agency which can claim the exemption. That example is the Federal Power Commission (now the Federal Energy Regulatory Commission) which is authorized by statute to provide emergency electrical facilities "during...any war." 16 U.S.C. §824a(c).

We believe that the NRC is an agency with solely "civil and regulatory" functions, not "military" ones. Military nuclear projects are carried out by the Department of Defense, outside of the purview of the NRC. The public's right to rigorous review of the Commission's licensing activities must be preserved, particularly in light of the legislative history and subsequent interpretation of this exemption.

II. Any Rule Exempting Military or Foreign Affairs Functions From Adjudicatory Procedures Should Be Tightly Circumscribed.

As stated above, the Senate Report advised that this exemption may be applied "only to the extent that the excepted subjects are directly involved." supra, p 3. Thus, the Congress repeated its longstanding preference for the traditional adjudicatory procedures in proceedings under 5 U.S.C. §554, and stated clearly that exemptions to these procedures should be narrowly applied. See, e.g., Joseph v. Civil Service Commission, 554 F.2d 1140, 1153, n.23 (D.C. Cir. 1970) (narrowly construing the exemption in 5 U.S.C. §553(a)(2) for personnel matters). This narrow interpretation is especially appropriate in this case, as licensing actions have always been held by the NRC to require formal adjudicatory proceedings. Siegel v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968).

Thus, if the NRC determines that its regulatory activities may involve military or foreign affairs functions, its rules exempting those functions from adjudicatory functions should be narrowly drafted and interpreted to ensure that the public retains its rights to those procedures where military or foreign affairs functions are not "directly" involved. Such an interpretation would not prejudice the national security, as the NRC is amply provided with regulatory authority to prevent the disclosure of any classified or military-related information which it may come across in the course of its regulatory duties. 10 C.F.R. §§ 2.900-2.914.

Therefore, NRDC proposes that if the rule is to be retained, it should be modified to include the following subsections to properly limit its scope:

> c) The term "military or foreign affairs function" shall be interpreted to include only the following activities:
>
> 1. any regulatory activity of the Commission specifically authorized by statute to be exempt from the requirements of 5 U.S.C. §554 during time of war;
>
> 2. any activity which is specially fitted for, appropriate to, or expected of either the armed forces as such because of their peculiar nature, qualifications or attributes, or the Department of State or the President in the conduct of foreign affairs.
>
> d) This section shall not apply to any proceeding, or any clearly identifiable issue in any proceeding under this Part which does not directly involve the conduct of military or foreign affairs functions as defined by this section.

III. If Retained, The Rule Should Not Apply Retroactively.

The Commission has also requested comment on whether their existing rule, if it is retained, should be applied to ongoing proceedings. As a practical matter, this additional proposal affects only NRDC in its request for a hearing regarding NFS-Erwin.

Retroactive application of this rule to the NFS-Erwin proceeding is both legally and factually improper. As we explained in our briefs to the Court of Appeals, this rule cannot be applied to the NFS-Erwin case, regardless of whether

it is adopted with public notice and comment. Initial Brief at 31-35; Reply Brief at 20-27 (Appendix B). The law is clear that parties involved in adjudicatory proceedings have a right to expect that those proceedings will not be altered in a way that prejudices their case. Pacific Molasses Co. v. F.T.C. 356 F.2d 386 (5th Cir. 1966). In this instance, the NRC has deprived NRDC (or, hypothetically, any other party) of its preexisting right to cross-examination, among other things -- a right which the caselaw and the NRC General Counsel admit to be substantial. Initial Brief at 34. Therefore, application of this exemption to preexisting proceedings is legally improper.

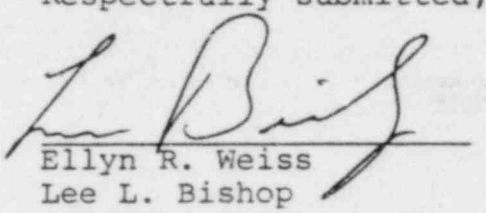
Secondly, it would be inappropriate to apply this rule to NFS-Erwin as that facility is not a "military function." Operation of the NFS-Erwin facility is not "specially fitted for, appropriate to, or expected of the armed forces." Rather, it is a civilian subcontractor of another civilian firm in which no military personnel are directly involved. See NRDC Initial Brief at 4. To apply this exemption to NFS-Erwin, in light of the limiting interpretation placed on its application by the legislative history and commentary, would be arbitrary, capricious, and contrary to law.

Conclusion

Therefore, we propose that the NRC repeal its existing rule. If the NRC decides instead to retain its rule, we propose that the rule be modified to preclude its application to the NFS-Erwin proceeding (the second alternative). Further,

to ensure that the rule will only be applied to direct military or foreign affairs functions we propose that the rule be modified as previously described.

Respectfully submitted,



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Counsel for NRDC

Dated: November 16, 1981

APPENDIX A

fruit in a No. 22D standard lug box, or in a 16-pound sample.

These grade and size requirements reflect the Department's appraisal of the need for regulating nectarines during the 1980 season, based on the available supply and market demand conditions. Production of 1980 season California nectarines is estimated at 185,000 tons compared with production of 172,000 tons in 1979, and 148,000 tons in 1978. Shipment of this season's nectarine crop, which is sizing well and of good quality, is currently underway.

After consideration of all matter presented, including the proposals in the notice and other available information, it is hereby found that this amendment is in accordance with the marketing agreement and order and it will tend to effectuate the declared policy of the act.

It is further found that good cause exists for not postponing the effective date of this amendment until 30 days after publication in the **Federal Register** (5 U.S.C. 553) in that: (1) Nectarines are currently being shipped and the regulatory provisions should apply to all shipments in order to effectuate the declared policy of the act; (2) The regulatory provisions are the same as those currently in effect as well as those in the notice to which no comments were filed; and (3) Handlers have been apprised of such provisions and the effective time.

Therefore, § 916.354 Nectarine Regulation 12 (45 FR 32308) is amended to read as follows: (§ 916.354 expires May 31, 1981, and will not be published in the annual Code of Federal Regulations).

§ 916.354 Nectarine Regulation 12.

(a) During the period July 7, 1980, through May 31, 1981, no handler shall handle:

(1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided,* That maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service: *Provided further,* That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed the aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further,* That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

(2) Any package or container of Mayred variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 112 nectarines in the lug box;

(ii) Such nectarines in any container when packed other than as specified in subdivision (i) of this subparagraph (2) are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 105 nectarines.

(3) Any package or container of Mayfair, Maybelle, or Aurelio Grand variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 108 nectarines in the lug box;

(ii) Such nectarines in any container when packed other than as specified in subdivision (i) of this subparagraph (3) are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 98 nectarines.

(4) Any package or container of Apache, Armking, Crimson Gold, Early Red, Early Star, Early Sungrand, Firebrite, Independence, June Belle, June Grand, Kent Grand, May Grand, Moon Grand, Red Diamond, Red June, Spring Grand, Spring Red, Star Grand I, Star Grand II, Summer Grand, Sun Grand, 73–40, or Zee Gold variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 96 nectarines in the lug box; or

(ii) Such nectarines in any container when packed other than as specified in subdivision (i) of this subparagraph (4) are of a size that a 16-pound sample, representative of the nectarines in the package or container, contains not more than 90 nectarines.

(5) Any package or container of Autumn Grand, Bob Grand, Clinton-Strawberry, Ed's Red, Fairlane Fantasia, Flamekist, Flavortop, Gold King, Granderli, Grand Prize, Hi-Red, Late Le Grand, Le Grand, Niagara-Grand, Red Free, Red Grand, Regal Grand, Richards Grand, Royal Giant, Royal Grand, Ruby Grand, September Grand, Tasty Free, Tom Grand, 61–61, Honey Gold, Larry's Grand, Son Red variety nectarines unless:

(i) Such nectarines, when packed in molded forms (tray pack) in a No. 22D standard lug box, are of a size that will pack, in accordance with the requirements of a standard pack, not more than 88 nectarines in the lug box; or

(ii) Such nectarines in any container when packed other than specified in subdivision (i) of this subparagraph (5) are of a size that a 16-pound sample representative of the nectarines in the package or container, contains not more than 78 nectarines.

(b) As used herein, "U.S. No 1" and "standard pack" means the same as defined in the United States Standards for Grades of Nectarines (7 CFR 2851.3145–3160); "No. 22D standard lug box" means the same as defined in § 1387.11 of the "Regulations of the California Department of Food and Agriculture." All other terms mean the same as defined in this marketing order.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: June 30, 1980.

D. S. Kuryloski,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 80-20089 Filed 7-2-80; 8:45 am]
BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Amendment To Provide Exception From Procedural Rules for Adjudications Involving Conduct of Military or Foreign Affairs Functions

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Immediately effective final rule.

SUMMARY: The Commission is amending its "Rules of General Applicability" for the conduct of adjudicatory proceedings in 10 CFR Part 2 to provide an exception from those rules for adjudications involving the conduct of military or foreign affairs functions. The amendment permits the Commission to exercise greater flexibility within due process limits in fashioning procedures for proceedings involving military or foreign affairs functions. The amendment involves the conduct of military or foreign affairs functions and is thereby exempt from the notice of proposed rulemaking and deferred effectiveness provisions of § 553 of the Administrative Procedure Act (APA). It is also exempt from these provisions as an interpretative rule and a rule of agency procedure.

DATE: The amendments are effective on July 3, 1980.

FOR FURTHER INFORMATION CONTACT: Marjorie S. Nordlinger, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; phone 202–634–1465.

SUPPLEMENTARY INFORMATION: The Commission is amending its rules governing procedures for adjudications in subpart G of 10 CFR Part 2 to provide an exception from those procedures for proceedings to the extent that there is involved the conduct of military or foreign affairs functions.

This rule change has developed from the Commission's consideration of Natural Resources Defense Council's February 6, 1980 request for a hearing in the matter of a proposed amendment to the special nuclear materials license of Nuclear Fuel Services at Erwin, Tennessee. The Commission has been reflecting on whether the public interest would be better served by a legislative type hearing in light of the fact that sensitive issues and basic regulatory policy questions involving the conduct of military functions may be bound up in the adjudication of this matter.

Because there have previously been no NRC hearings involving the conduct of military functions, the Commission has not specifically addressed such hearings in its rules. However, the Administrative Procedure Act (APA) provides for just such an exception as the Commission proposes. 5 U.S.C. 554 entitled "Adjudications" provides in relevant part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—. . . . (4) the conduct of military or foreign affairs functions.

In the Commission's view the § 554(a)(4) exception is currently applicable to NRC adjudications pursuant to Section 181 of the Atomic Energy Act of 1954 as amended, which makes the APA applicable to all agency action, but for purposes of clarification the Commission has decided to incorporate the exception in its rules. That will have the effect of clarifying that adjudications involving military functions may be exempted under the Commission's rules from the formal adjudicatory procedural requirements which are applicable by rule to other adjudications conducted by the NRC. Should the Commission decide on a legislative type hearing in the NFS Erwin proceeding, there will then be no question about the appropriateness of such hearings under its rules.

The Commission has decided to incorporate an exemption for the "conduct of foreign affairs functions" in order to conform its rule more exactly to the APA exemption, and to clarify that it has available the same measure of flexibility in fashioning procedures where military or foreign affairs functions are involved.

The military and foreign affairs exception will serve the same purposes in our rules as it does in the APA. It will ensure that delays often associated with the adjudicatory process will not encumber the military or foreign affairs functions of the United States. It will also serve better to protect the highly sensitive information associated with both military and foreign affairs functions. Finally, it will enable the Commission to reserve to itself consideration of military and foreign policy issues which only it can resolve and to approach such matters in an informal procedural framework best suited to consideration of these issues. The alternative of the Commission itself presiding over the conduct of a formal evidentiary proceeding is impracticable because of the demands on the Commissioners' time this would entail, and is inappropriate because formal adjudicatory proceedings are not the most suitable means for resolution of policy issues.

This rule is promulgated effective immediately. The requirements of Section 553 of the APA do not apply by the terms of that section (*see* § 553(a)(1)) where, as here, a military or foreign affairs function of the United States is involved). Additionally, general notice of proposed rulemaking is not required because the amendments by their nature concern rules of agency procedure or practice, and because the amendments merely interpret the present rules of practice in 10 CFR part 2 in light of Section 181 of the Atomic Energy Act.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Sections 552, 553, and 554 of Title 5 of the United States Code, notice is hereby given that the following amendment to Title 10, Chapter 1, Code of Federal Regulations, part 2 is published as a document subject to codification.

10 CFR part 2 subpart G is therefore amended effective immediately by adding after § 2.700 a new § 2.700a reading as follows:

§ 2.700a Exceptions.

Consistent with due process requirements the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

(Sec. 161p, Pub. L. 83–703, 68 Stat. 948 (42 U.S.C. 2201p); 5 U.S.C. 554, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384)

Note.—Commissioners Gilinsky and Bradford dissent from this order. Their separate views are attached.

FOR FURTHER INFORMATION CONTACT: Marjorie S. Nordlinger, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; phone 202–634–1465.

Dated at Washington, D.C. this 26th day of June, 1980.

Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission

Commissioner Gilinsky's Dissent—SECY–A–80–41A and SECY–A–80–82A

I do not believe that the provisions of the Administrative Procedures Act permit the Commission to amend its adjudicatory regulations in a manner which affects the substantive rights of the parties without providing notice and an opportunity for comment.

It is worth recalling what this case is about. The NFS Erwin facility was unable to meet the NRC requirements regarding material accounting of potential bomb material. There is little question that if this had been a commercial facility, its license would have been revoked. This was the course of action which the NRC staff recommended. Because the operations of this facility are dictated ultimately by the needs of the Navy, irrespective of whether or not the facility meets NRC requirements, the NRC staff suggested that responsiblity for its oversight be transferred to the Assistant Secretary for Defense Programs, Department of Energy. I agreed; the Commission decided on another course. It relaxed the applicable material accounting requirements to a level the facility is apparently able to meet, and thus continued nominal oversight of this facility.

The lengths to which the Commission is now prepared to go to prevent public examination of this decision confirms my belief that my original view was correct. Since authority over the operation of the facility rests, as a practical matter, with the Department of Energy, responsibility for keeping track of the material should also rest with that Department.

Dissent of Commissioner Bradford

Today's decisions in this matter are dishonorable and disgraceful. They leave one wondering just where the Commission would stop in its efforts to avoid public scrutiny. In order to rush them out while a majority could still be had for such clumsy squirming, the Commission has had to trample its own rules of procedure.[1] A major side effect of the

[1] The agency's rules provide for an automatic five-day extension of time upon the request of any Commissioner before a vote on any item. They also provide that a majority of the Commission may change the rules at will. The decision to disregard agency legal advice was agreed to by three Commissioners on June 23. An extension having been requested on June 24, the Commission for the first time in its history voted to instruct the

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Commission's decision is to confirm the concern expressed by Commissioner Gilinsky when the Nuclear Regulatory Commission decided to retain jurisdiction over the Erwin facility in December 1979. It is now clear that that decision did not mean, as I then thought in joining the majority, that serious regulation would continue at Erwin. Instead, the Commission was seeking to extend whatever credibility it possessed to cover the facility's inability to keep adequate track of special nuclear material while avoiding any substantive or procedural regulatory action that might inconvenience or embarrass the facility operators or the Department of Energy.

There are three decisions involved here. The basic one is the Commission decision to renege on its earlier offer of a full adjudicatory hearing on the Erwin facility to the Natural Resources Defense Council. The hearing offered in January 1980 was clearly adjudicatory, with discovery and cross-examination, for the Commission rules at that time provided for no other format in a case like this.[2] It is this difficulty in the rules that has led the majority to its second decision, namely the promulgation of a rule stating that "consistent with due process requirements, the Commission may provide alternative procedures in adjudication to the extent that there is involved the conduct of military or foreign affairs functions." The third decision, made in the face of irreconcilable advice from every respectable legal office in the agency,[3] was to make this rule immediately effective through yet a second reliance on a military functions exception in the Administrative Procedure Act. It is dubious enough to have stated that the regulation of the Erwin facility involves a clear military function, for neither regulation nor the loss of special nuclear material are within the functions normally performed by the military and none of the people involved are employees of the military. However, the dubiousness of this action pales beside the absolutely preposterous claim that the promulgation of a Nuclear Regulatory Commission rule regarding military functions itself involves the conduct of military affairs.[4] Even the Department of Defense, which might attempt such a claim regarding its rules, chooses instead to offer notice and comment. Throughout the entire span of the Federal Government, I venture with some confidence to say that only the three would-be colonels who are voting for today's action have ever tried such a deception as to what might be a military function.

By making this rule change immediately effective, the Commission has violated the Administrative Procedure Act.[5] The Commission states three bases for its action: 1) the rule involves a military function; 2) the rule is interpretative; and 3) it is a rule of agency procedure. Each reason is far from the truth. As already noted, there is no military function in the promulgating of a change in the Commission's rules of practice or in eliminating public comment on the change. In addition, it is clear from the legislative history of the Administrative Procedure Act that this exception was only meant to apply "to the extent" a military function is "clearly and directly" or "directly involved."[6] It is also clear, as already noted, that this is not an interpretative rule, for it creates two new types of hearing categories that are not currently provided for in the NRC's regulations. Finally, it is clear that this is not a truly procedural rule, for it is no mechanistic prescription of the form of agency practice. This Commission has previously recognized that the rights of parties to adjudicatory hearings, including the rights to cross-examination are substantial.[7] Furthermore, new procedural rules cannot be applied to pending proceedings if a party will be injured or prejudiced thereby.[8]

Lastly, there is the question of whether an adjudicatory hearing is in order here. The NRDC petition makes a number of factual allegations regarding the sufficiency of NRC security and accounting procedures at Erwin, a facility shut down last year precisely because it had lost track of significant quantities of special nuclear material. Judgments about the adequacy of the revised NRC procedures are not broad policy decisions. They cannot be made without detailed factual findings of precisely the sort best aided by discovery and cross-examination.[9]

Needless to say, classified information can be protected as necessary in any proceeding.[10] The presiding officer(s) can avoid any dilatory tactics or abuses of procedural rights. The facility would continue to operate during the proceeding, so that Navy's fuel supply is not in jeopardy. General statements to the contrary appearing at pp. 3–4 of the Supplementary Information section of the rule are deliberately phrased to mislead and are of absolutely no applicability to this proceeding. The only thing being protected against here is the potential embarrassment to this agency or to the Department of Energy that might flow from effective probing of particular facts in this case. That the NRC would go to such dishonorable lengths for so unworthy a purpose is, as I said at the outset, a disgrace.

[FR Doc. 80-20151 Filed 7-2-80; 8:45 am]

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Secretary not to grant it. This was done despite the fact that decisions on other matters of major importance have been forthcoming throughout the week and that both June 25 and June 26 were entirely taken up with Commission meetings on other matters.

[2] Contrary to the Commission claim in the supplementary information section that the proposed rule clarifies existing authority, the General Counsel advised the Agency, "Current NRC rules require formal hearings in all cases of agency adjudication, and the offer of a hearing in this case was no doubt construed—quite reasonably—as an offer of a formal hearing." (General Counsel's memorandum of May 16, 1980, page 2.) In fact, there is no ambiguity here to clarify. NRC has in past not made use of the military or foreign affairs exceptions provided in the APA in the context of Section 189 even when this argument might have been made. The regulations and many years of practice make clear that a party requesting a hearing in a license amendment matter is entitled to an on-the-record adjudicatory hearing. If the Commission entertained doubt on this point, it would not be risking court reversal by promulgating this rule on an immediately effective basis.

The only past indication of a different sort appears in *In the Matter of Edlow International*, 3 NRC 563 (1976). There, the Commission conceded that a hearing of right would have to be "adjudicatory or trial-type," "subject to appropriate modifications made in accordance with the [APA's] 'foreign policy' exception (at p. 570)." The Commission then denied standing and granted a discretionary hearing very like the one offered here, pointing out that, if standing had been found, a more formal hearing would have been in order. Since the Commission did not put its dictum regarding the APA exceptions into practice, it never made clear why it would concede that an adjudicatory hearing was required despite the exceptions while still feeling that the military or foreign affairs exception was available to modify that hearing.

[3] SECY-A-80-41—"NRDC's Request for a Hearing in the Matter of NFS-Erwin" (March 27, 1980).

SECY-A-80-82—"SECY-A-80-41, NRDC's Request for a Hearing in the Matter of NFS-Erwin—Draft Federal Register Notice Proposing a Rule Change" (June 11, 1980).

Memorandum to the Commission from Leonard Bickwit, "SECY-A-80-41—Analysis of the Requirement for an Adjudicatory Hearing and Discussion of Alternatives" (May 16, 1980). Advice to the contrary in this paper was explicitly rescinded in SECY-A-80-82.

Memorandum to the Commission from Leonard Bickwit, Jr., General Counsel, "SECY-A-80-82—Rule Change to Take Advantage of the Military Function Exception—Immediate Effectiveness" (June 16, 1980).

Memorandum to Chairman Ahearne from Howard K. Shapar, Executive Legal Director, "Prior Notice Requirement for Rule Change" (June 19, 1980).

[4] The difference between putting the proposed change out for comment and enacting it immediately is *entirely* that Commissioner Kennedy's term would expire during the comment period, and the present majority has reason to doubt that a new appointee would join their charade. No armies will march; no navies will sail; no planes will fly as a result of this rule being made immediately effective instead of being put out for comment. Not one iota more or less fuel will be fabricated for the Navy. Nothing remotely resembling a military function will occur. All that will happen is that a civilian commissioner's civilian term on this all-civilian agency will not end before he casts his civilian vote for a change in the agency's civilian rules of practice.

[5] 5 U.S.C. 553.

[6] Senate Committee on the Judiciary, Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 199, 257 (1947).

[7] In *Bailly*, ALAB-249, 8 AEC 980 (1974) the inability of a party to cross-examine was held sufficient grounds to reopen the hearing. Furthermore, this agency has recognized that "intervenors may build their cases 'offensively' through cross-examination." *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978).

[8] *Pacific Molasses Company v. FTC*, 356 F.2d, 386 (5th Cir. 1966). See also *American Farm Lines v. Black Ball*, 397 U.S. 532 (1970).

[9] Indeed, it is possible that the "hearing" offered by the Commission (without an effective mechanism for adjudicating contested material facts) does not satisfy NRDC's right to a hearing as provided for in Section 189 of the Atomic Energy Act.

[10] Atomic Energy Act, Section 181; 10 CFR 2.900 *et seq.*

Appendix B

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1864

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION TO REVIEW AN ORDER
OF THE
NUCLEAR REGULATORY COMMISSION

BRIEF FOR PETITIONER

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DATED: DECEMBER 11, 1980

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1864

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION TO REVIEW AN ORDER
OF THE
NUCLEAR REGULATORY COMMISSION

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

* Cases or authorities principally relied upon are marked with asterisk.

STATUTES AND REGULATIONS

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*/ Cases or authorities principally relied upon are marked by an asterisk.

MISCELLANEOUS

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*/ Cases or authorities principally relied upon are marked by an asterisk.

CERTIFICATE REQUIRED BY RULE 8(c)
OF THE GENERAL RULES OF THIS COURT

The undersigned, counsel of record for the petitioners, Natural Resources Defense Council, Inc., certifies that the following parties appeared below:

Petitioners

Natural Resources Defense Council, Inc.

Respondent

United States Nuclear Regulatory Commission

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Lee L. Bishop
Attorney for Natural Resources
Defense Council, Inc.

STATEMENT OF THE ISSUES

1. Whether a rule which exempts "military functions" from the requirement of adjudicatory hearings in existing agency rules is itself a "military function," and thereby exempt from notice and comment pursuant to 5 U.S.C. §553(a)(1).

2. Whether a rule which exempts "military functions" from the requirement of adjudicatory hearings in existing agency rules, thereby abolishing the preexisting right of cross-examination is a rule of "agency procedure and practice," and thereby exempt from notice and comment pursuant to 5 U.S.C. §553(b)(3)(A).

3. Whether a rule which exempts "military functions" from the requirement of adjudicatory hearings in existing agency rules, abolishing the preexisting right of cross-examination, is an "interpretative rule," and thereby exempt from notice and comment pursuant to 5 U.S.C. §553(b)(3)(A).

4. Whether a newly promulgated rule can be applied to an ongoing proceeding, if the effect of the rule is to substantially prejudice the rights of a party in that proceeding by eliminating the preexisting right to cross-examination and discovery.

This case has not previously been before this Court. All proceedings in a related petition for review, NRDC v. NRC, No. 80-1863, (D.C. Cir. filed July 28, 1980), were stayed by order of this Court on September 29, 1980.

REFERENCES TO PARTIES AND RULINGS

Parties

Petitioner is the Natural Resources Defense Council, Inc. (NRDC).

Respondent is the United States Nuclear Regulatory Commission (NRC).

Rulings

The rule at issue was issued by the Commission on June 26, 1980, and officially reported in the Federal Register at 45 Fed. Reg. 45253 (July 3, 1980). It is reproduced at page 178 of the Joint Appendix.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in Appendix A.

STATEMENT OF THE CASE

Nature of the Case

This review proceeding challenges the ability of the NRC to promulgate a rule eliminating the preexisting right to full adjudicatory hearings for certain nuclear licensing cases without notice and comment, as required by 5 U.S.C. §553. The Commission admits that the rule, which exempts cases involving "military or foreign affairs functions" from normal NRC adjudicatory rules, was promulgated in direct response to the Natural Resources Defense Council's (NRDC's) request for hearing to contest the amendment of the license of a commercial

nuclear fuel processing facility operated by Nuclear Fuel Services, Inc., in Erwin, Tennessee. The NFS-Erwin plant processes weapons-grade nuclear material used in making reactor fuel for naval submarines and surface vessels. It is regulated by the NRC, which limits by license conditions the amount of such material which may be "unaccounted for." Due to the repeated failure to meet these license conditions, the cognizant NRC staff recommended to the Commissioners that the license for the facility be revoked. Instead, the Commissioners proposed to amend the license to allow NFS-Erwin to "lose" more nuclear material. NRDC's petition for a hearing of this proposed (but immediately effective) amendment prompted the NRC to adopt, without prior notice or the opportunity for comment, a rule which would prevent a full adjudicatory hearing, thereby protecting the NRC decision from rigorous scrutiny. The Commission based its decision to promulgate the rule without notice and comment on exceptions in the Administrative Procedure Act for "military functions," "interpretative rules," and rules of "agency practice and procedure." However, the record establishes that the NRC's sole purpose in promulgating this rule was to limit NRDC's rights in the hearing on the NFS-Erwin license amendment and that its sole purpose in doing so without notice and comment was the imminent expiration of the term of one of the 3 Commissioners in the majority.

The petitioners demonstrate below that the rule does not fall under any of the claimed exceptions from the requirement for notice and comment prior to promulgation. Further we show

that the rule, even if properly promulgated, cannot be applied to the ongoing Erwin proceeding because it substantially prejudices NRDC's rights in that hearing.

Statement of Facts

1. NRC Regulation of NFS-Erwin

This case involves the regulation by the NRC of a nuclear fuel fabrication facility owned and operated by Nuclear Fuel Services, Inc. a subsidiary of Getty Oil Company, at Erwin, Tennessee (hereafter referred to as "NFS-Erwin"). A.R. IV-13.[1/] This facility manufactures highly enriched uranium fuel sold to another private firm which fabricates fuel for use in naval reactors in submarines and surface vessels. Ibid. Because the facility handles nuclear material capable of being fabricated into bombs, it is subject to NRC-required physical security and material accounting procedures intended to prevent, inter alia, the intentional diversion of weapons-grade uranium to terrorists or foreign governments. 10 CFR Parts 70 and 73. The NRC license for NFS-Erwin contains a condition requiring shutdown, investigation, and inventory of the plant when a specified amounts of nuclear material is "unaccounted for." A.R. IV-35, J.A. 24.

The NFS-Erwin facility has a long history of inadequate accounting and control of nuclear material. A.R. IV-43,

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1/ References to documents in the administrative record will be abbreviated "A.R." Documents reproduced in the Joint Appendix will be identified as "J.A."

Cochran Affidavit ¶12. Most recently, on September 18, 1979, the NRC announced its order commanding NFS-Erwin to cease operations due to its violation of the limits on the amount of weapons-grade nuclear material which may be unaccounted for.[2/] The Director of the NRC's Office of Nuclear Material Safety and Safeguards reported to the Commission on December 14, 1979, that the subsequent inspection and inventory at NFS-Erwin had not succeeded in accounting for the material, nor had it found an explanation for its disappearance.

> . . . [W]e can't rule out a theft or diversion, we can't say that there hasn't been one. The only thing that we can say is that we have no real explanation for the inventory difference. And as the FBI pointed out, this is one additional large inventory difference added to the many differences that we have had at that plant over these past several years." A.R. III-57, J.A. 3, 7.

On the basis of this series of unexplained losses of nuclear material, the Director recommended to the Commission that the license for NFS-Erwin be revoked. Id. at 17.

On January 21, 1980, without public notice or opportunity for hearing, the Commission instead issued an Order relaxing the conditions of the facility's license by (1) deleting the requirement that the plant be shutdown upon discovery of a significant inventory difference, and (2) increasing the amount of nuclear material which could be "lost" by at least 50 per cent. A.R. IV-35, J.A. 24; IV-43, Cochran Affidavit ¶32. The

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2/ NRC News Release, No. 79-167 (September 18, 1979).

Commission also ordered additional physical security and accounting requirements intended to address possible causes for the lost material. The Commission's order authorized the NFS-Erwin facility to resume operation under the new conditions, although the license amendment was characterized as "proposed." A.R. IV-35, J.A. 24.

2. NRDC's Request For A Hearing

Consistent with the requirements of Section 189a of the Atomic Energy Act (AEA),[3/] the January 21 Commission order provided that, within 20 days, "the licensee and any other person whose interest may be affected may request a hearing with regard to this proposed amendment." A.R. IV-35, J.A. 24, 26. The hearing offered was necessarily a formal adjudicatory hearing, including testimony submitted under oath and subject to cross-examination, as it was the only type then provided for by NRC regulations. 10 CFR Part 2 Subpart G.

On February 6, 1980, the Petitioner, Natural Resources Defense Council (NRDC), responded by filing a Request for Hearing. A.R. IV-43, J.A. 24. In brief, NRDC's Request for Hearing stated facts demonstrating that the new license conditions

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3/ In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permits, . . . and in any proceeding for the issuance of modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. 42 U.S.C. §2239(a).

would not adequately protect against diversion of weapons-grade uranium or for undiscovered discharges of radioactive material to the environment. Moreover, NRDC contended that the additional physical security requirements were incapable of resolving the causes of the material losses, since the NRC staff admittedly did not know the causes of the inventory deficiencies.[4/]

NRDC's Request for Hearing contended further that operation of the NFS-Erwin facility presents a continuing risk of diversion of weapons-grade material and/or discharge of radioactive

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4/ "MR. DIRCKS: [Director, NRC Office of Nuclear Material Safety and Standards]

It [the new license conditions] does not, in my view, give us the assurance that material can be accurately accounted for in the facility or controlled.

* * *

"MR. BURNETT: [Director, NRC Division of Safeguards, Office of Nuclear Material Safety and Safeguards]

. . . We have not been able to determine the reason for the accounting loss. Therefore, these license conditions are general, they are broad-based. They are not directed at the specific problem, therefore, it is very hard to guarantee you that this will cover it."

COMMISSIONER KENNEDY:

Is the facility so designed and its process so designed and operated to make possible the application of kinds of accounting controls which would give a high assurance?

"MR. DIRCKS:

In our view, it is not designed in that way."

A.R. III-57, J.A. 3, 8.

material into the environment. Given the patent inadequacy of safeguards measures at the plant and the need to maintain a source of fuel for naval reactors, NRDC maintained that the only reasonable course is for NRC to revoke the NFS-Erwin license, as the NRC Staff recommended, and to have the U.S. Department of Energy build a state-of-the-art facility on a U.S. Government reservation where improved material accounting and enhanced security can be provided. A.R. IV-43, J.A. 29, 39.

NRDC has never requested that the Erwin facility be closed permanently if, and so long as, it is needed as the sole source of fuel for naval reactors. Until a new facility can be built, it may be necessary to operate Erwin as a DOE contractor facility with independent NRC oversight. The present situation, however, provides only the appearance of civilian regulation and compromises NRC's ability to strictly regulate other facilities within its jurisdiction. Ibid.

3. Evolution Of The Challenged Rule

In response to the NRDC petition, the administrative record reveals a series of memoranda between the chief legal officers of the NRC and the Commissioners, in an attempt to establish a legal basis for denying NRDC the full adjudicatory hearing provided for in the regulations. This process was initiated by Commissioner Kennedy in a memorandum to NRC General Counsel Leonard Bickwit dated April 16, 1980, (A.R. IV-64, J.A. 112), in response to a proposed order prepared by the General Counsel on March 27, 1980, which essentially granted NRDC the adjudicatory hearing it requested. A.R. I-13, J.A. 98.

The succession of legal opinions that followed from the General Counsel addressed various approaches to limiting the hearing afforded NRDC to a legislative non-adversarial hearing. On May 16, he advised that the Commission might be able to take advantage of the exception allowed by the Administrative Procedure Act (APA) "to the extent that there is involved . . . the conduct of military . . . functions." 5 U.S.C. §554. A.R. IV-70, J.A. 115. However, due to the NRC's long-established regulations affording adjudicatory hearings for all licensing actions under §189a of the AEA, he recommended "a rules change -- to be applied prospectively -- exempting military affairs functions from the requirements of Subpart G of Part 2 [of 10 C.F.R.]." Id., J.A. 116. The legal analysis attached to the May 16 memo concluded, inter alia, that: 1) "the Commission and its predecessor agency have always construed [Section 189a of] the AEA as requiring 'on the record' hearings . . . in a licensing proceeding" (Id., J.A. 118); 2) while "it is unclear whether licensing of the fabrication of the fuel for the armed forces (Navy) is exempt [as a "military function"] under APA Section 5," the Commission could assert that the exemption applies to the entire NFS-Erwin proceeding "with some but not major litigative risk" (Id., J.A. 120, 121); 3) the offer of a "hearing" in the January 21 Order could be modified by a rules change to exempt military functions (Id., J.A. 122); and 4) subject to the "military function" exemption, the resolution of the

"underlying facts" in the Erwin case required formal adjudicatory procedures, even though policy issues are also involved. (Id., J.A. 123).

On June 11, 1980, the General Counsel elaborated on his May 16 recommendation that 10 CFR Part 2, Subpart G be amended to exempt "military functions" from the requirement for formal hearings.

> In presenting the need for a rule change we stated that it could be made "either with or without prior public comment." However, further analysis leads us to conclude that the rule should go out for public comment before being made effective.
>
> We reach this conclusion by the following reasoning. The statutory exception to the requirement to seek public comment which exists for "rules of agency . . . procedure or practice" is the one most like to be available. However, the courts have held that procedural rules issued without public comment cannot be used to affect substantially the rights of persons subject to agency regulation. National Motor Freight Traffic Ass'n. v. U.S., 268 F. Supp. 90 (D.D.C. 1967), aff'd, 393 U.S. 18 (1967); Pickus v. Parole Board, 507 F.2d 1107 (D.C. Cir. 1974). Thus it has been held that the only procedural rules that are exempt from APA comment requirements are technical regulations regarding the form of agency actions and proceedings and do not include rules which go beyond formality and substantially affect the rights of those subject to agency authority. Pickus v. Parole Board, supra. . . Here, the rule would serve to deprive the parties of rights to an adjudicatory hearing including rights to cross-examination. Such rights are considered to be substantial.*/
>
> */ In Bailly, ALAB-249, 8 AEC 980 (1974) the inability of a party to cross-examine was held sufficient grounds to reopen the hearing. Further, it has been recognized that "intervenors may build their case

> 'defensively' through cross-examination." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B, ALAB-453, 7 NRC 341, 356 (1978). Therefore, the removal of a right to cross-examination is substantial.
>
> A.R. V-3, J.A. 128 (emphasis added).

On June 16, the General Counsel reaffirmed his opinion that the contemplated rules change could not properly be termed "procedural," and thereby avoid the requirements of the Administrative Procedure Act. A.R. I-16, J.A. 136. In this memorandum, a novel notion surfaced for the first time -- the idea that NRC might use the "military functions" exemption in 5 U.S.C. §553(a)(1) to justify promulgation of the new rule without prior notice or opportunity for comment:

> On reflection we wish to advise that the APA's exception for "military functions" (Section 553(a)(1) might be applicable and might provide a more legally defensible exception to the requirements for notice and comment on the rule change than does the procedural rule exception. Ibid.

He based his conclusion on the following reasoning:

> The argument for applying the exception is that rules which address NRC procedures for adjudications involving the conduct of military and foreign affairs of the United States must, in the language of the statute, "involve" those functions.
>
> It could be argued to the contrary that the APA legislative history indicates that the military function exception applies only "to the extent" a military function is "clearly and directly" or "directly involved," and that this rulemaking does not itself directly involve a military function but rather involves directly only the Commission's rules for the conduct of hearings.

> We have been unable to find any case law to further illumine this point. While commentators have urged narrow construction of the "military and foreign affairs" exception, it has been generally acknowledged that a narrow construction may not be required as a matter of law and, because of the vagueness of the term "military function," the exception is difficult to apply, especially in marginal cases. Id., J.A. 137 (footnote omitted).

Nevertheless, the General Counsel was not sanguine regarding the NRC's ability to sustain this interpretation on judicial review:

> Use of the military function exception for rules to enable the NRC to take immediate advantage of the military function exception for licensing may strike the court as a pyramiding of questionable exceptions that carries insufficient weight when compared with the perceived advantages of public participation and the seeming unfairness of not permitting the petitioner here to comment on a matter of critical concern to it. In short, we cannot predict with any confidence the outcome of litigation on this matter should it occur. Id., J.A. 138 (emphasis added).

Finally, on June 19, Howard K. Shapar, the NRC's Executive I gal Director, submitted a further memorandum to the Chairman on the ability of the NRC to use the "procedural rule" exception of the APA to avoid notice and comment on the proposed rule. A.R. V-13, J.A. 148. He concluded:

> To the extent, therefore, that the Commission might wish to change its procedural rules (i.e., the rules of practice) without notice and comment, I believe that the APA and the pertinent reported cases would permit such a change, notwithstanding a substantial impact on the rights of participants in agency proceedings.*/
>
> */ Two important caveats must be noted: First, any such change must be truly procedural, that is a mechanistic prescription

> of the form of agency practice rather than substantively controlling the outcome of the proceeding, and second, new procedural rules cannot be applied to pending proceedings if a party will be injured or prejudiced thereby. Pacific Molasses Co. v. F.T.C., 356 F.2d 386 (5th Cir. 1966), See also, American Farm Lines v. Black Ball, 397 U.S. 632 (1970). Id., J.A. 149.

4. The Commission's Decision

On June 26, 1980, the Commission promulgated, without notice or opportunity for comment, an immediately effective rule creating an exception to its rules for the conduct of adjudicatory proceedings in cases "involving the conduct of military or foreign affairs functions." A.R. V-14, J.A. 178. Also on June 26, the Commission applied the new rule in granting NRDC's request for a hearing on the proposed amendment to the license for NFS-Erwin, announcing that the hearing would be a legislative-type proceeding conducted before the Commission, with no opportunity for discovery of cross-examination.[5/]

The preamble stated that the rule "has developed from the Commission's consideration of Natural Resources Defense Council's February 6, 1980 request for a hearing" in the NFS-Erwin license amendment order. A.R. V-14, J.A. 178, 179. The preamble explained that the rule was necessary to "clarify" that "adjudications involving military functions may be exempted. . . from the formal adjudicatory procedural require-

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5/ Nuclear Fuel Services, Inc., Order No. CLI-80-27; A.R. I-8, J.A. 174; Notice of Hearing (June 27, 1980). A.R. I-9, J.A. 190. These orders were stayed by this Court on September 29, 1980.

ments which are applicable by rule to other adjudications conducted by the NRC." Id., J.A. 180.

Finally, the Commission stated:

> This rule is promulgated effective immediately. The requirements of Section 553 of the APA do not apply by the terms of that section (see 5 U.S.C. §553(a)(1)) where, as here, a military or foreign affairs function of the United States is involved). Additionally, general notice of proposed rulemaking is not required because the amendments by their nature concern rules of agency procedures or practice, and because the amendments merely interpret the present rules of practice in 10 CFR Part 2 in light of Section 161 of the Atomic Energy Act. Id., J.A. 181.

The Commission's decisions were carried by identical 3-2 votes, with dissents filed by Commissioners Gilinsky and Bradford. Gilinsky stated simply that:

> I do not believe that the provisions of the Administrative Procedures Act permit the Commission to amend its adjudicatory regulations in a manner which affects the substantive rights of the parties without providing notice and an opportunity for comment.

He went on to assert that the series of June 26 decisions were designed to continue "nominal oversight" of NFS-Erwin, although "if this had been a commercial facility, its license would have been revoked," as the "NRC Staff recommended." Id., J.A. 183, Dissent of Commissioner Gilinsky.

Commissioner Bradford declared that "today's decisions in this matter are dishonorable and disgraceful. The leave one wondering just where the Commission would stop in its efforts to avoid public scrutiny." Id., J.A. 184, Dissent of

Commissioner Bradford. He cited the series of legal memoranda described above at pp. 7-13, asserting that the decision to make the rule effective without notice and comment in reliance on the "military function" exception was made "in the face of irreconcilable advice from every respectable legal office in the agency." Id., J.A. 186. He stated:

> It is dubious enough to have stated that the regulation of the Erwin facility involves a clear military function, for neither regulation nor the loss of special nuclear material are within the functions normally performed by the military and none of the people involved are employees of the military. However, the dubiousness of this action pales beside the absolutely preposterous claim that the promulgation of a Nuclear Regulatory Commission rule regarding military functions itself involves the conduct of military affairs.*/ Even the Department of Defense, which might attempt such a claim regarding its rules, chooses instead to offer notice and comment. Throughout the entire span of the Federal Government, I venture with some confidence to say that only the three would-be colonels who are voting for today's action have ever tried such a deception as to what might be a military function.
>
> */ The difference between putting the proposed change out for comment and enacting it immediately is entirely that Commissioner Kennedy's term would expire during the comment period, and the present majority has reason to doubt that a new apppointee would join their charade. No armies will march; no navies will sail; no planes will fly as a result of this rule being made immediately effective instead of being put out for comment. Not one iota more or less fuel will be fabricated for the Navy. Nothing remotely resembling a military function will occur. All that will happen is that a civilian commissioner's civilian term on this all-civilian agency will not end before he casts his civilian vote for a change in the agency's civlian rules of practice. Id., J.A. 186, 187.

Commissioner Bradford then commented on the other bases claimed by the Commission for dispensing with notice and comment.

> It is also clear, as already noted, that this is not an interpretative rule, for it creates two new types of hearing categories that are not currently provided for in the NRC's regulations. Finally, it is clear that this is not a truly procedural rule, for it is no mechanistic prescription of the form of agency practice. This Commission has previously recognized that the rights of parties to adjudicatory hearings, including the rights to cross-examination are substantial. Furthermore, new procedural rules cannot be applied to pending proceedings if a party will be injured or prejudiced thereby. Id., J.A. 188 (footnote omitted).

This petition followed.

SUMMARY OF ARGUMENT

I. The NRC violated §553 of the Administrative Procedure Act by promulgating without public notice and opportunity for comment a rule creating a broadly-stated exemption from existing NRC procedural rules mandating adjudicatory hearings. The exemption created covers proceedings involving "military or foreign affairs functions." In failing to provide notice and comment, the NRC improperly relied on three exceptions to the rulemaking provisions of the Administrative Procedure Act. Specifically:

a) the promulgation of the rule itself does not "directly involve. . . a military function," as defined in 5 U.S.C. §553(a)(1). The promulgation of an amendment to the Commission's rules of practice governing civilian regulation of nuclear facilities is not an activity particularly suited to

or exercised by the military. Moreover, the intended object of the rule -- the nuclear fuel fabrication facility at Erwin, Tennessee -- is itself a privately owned and civilian regulated commercial facility, by definition not performing any function specifically fitted or appropriate for the military. Finally, as even the NFS-Erwin facility will continue to operate during the notice and comment process, that activity will not be affected in any way by adhering to the requirements of the Administrative Procedure Act.

b) the rule is not a "rule of agency practice and procedure," as defined in 5 U.S.C. §553(b)(3)(A). Rather, it would eliminate the rights of parties such as NRDC to cross-examination and discovery for a category of licensing cases which had previously provided for adjudicatory procedures. Such rights are clearly "substantial," and their elimination is not merely "procedural."

c) the rule is not "interpretive." 5 U.S.C. §553(b)(3)(A). Rather than interpreting or clarifying an existing rule or statute, it would implement a statute for the first time, creating a new exception to the NRC's rules for adjudicatory hearings. This rule affects NRDC's substantive rights, and is therefore not merely "interpretive."

II. Even if the rule at issue is held to have been properly promulgated, it cannot be applied to the NFS-Erwin proceeding because it severely prejudices NRDC's rights in an ongoing proceeding by eliminating, inter alia, discovery and cross-examination. The deprivation of these rights would frustrate

NRDC's ability to effectively participate in the challenged license amendment; therefore the rule cannot be applied to this ongoing proceeding.

ARGUMENT

I

PROMULGATION OF THE RULE AT ISSUE WITHOUT NOTICE AND COMMENT IS A VIOLATION OF SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT, AS THE RULE IS NOT A MILITARY FUNCTION, AND IT HAS SUBSTANTIVE, RATHER THAN PROCEDURAL OR INTERPRETIVE EFFECTS

Section 189a of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §2239(a), requires that

> "in any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license. . . the Commission shall grant a hearing upon the request of any person whose interest may be affected. . . ."

The NRC, and its predecessor agency (the Atomic Energy Commission) have always construed this section of the AEA to require adjudicatory hearings. Siegel v. AEC, 130 U.S. App. D.C. 307, 314, 400 F.2d 778, 785 (1968). Indeed, the NRC regulations governing adjudicatory proceedings, which permit, inter alia, for discovery and submission of testimony under oath subject to cross-examination have been applied to §1389a licensing proceedings since the inceptions of those activities in the 1950's. 10 C.F.R. Part 2, Subpart G; A.R. IV-70, J.A. 115, 117.

The rule under review in this proceeding creates two exceptions to this long-held procedure, for licensing activities involving military or foreign affairs functions. A.R. V-14,

J.A. 178. In the preamble accompanying the new rule, the NRC asserts that it need not comply with the notice and comment procedures outlined in §553 of the Administrative Procedure Act (APA) as the rule itself "involves the conduct of military or foreign affairs functions," and also because the rule is merely "an interpretative rule and a rule of agency procedure." Id., J.A. 180, 181.

As we will demonstrate below, the NRC's claim that the promulgation of this rule is a "military function" and therefore exempt from normal notice and comment prior to promulgation is contrary to the plain meaning of §553(a)(1) of the APA and its legislative history, and is unsupported by any judicial interpretations of this section. Moreover, as the rule has the effect of eliminating the pre-existing rights to discovery, cross-examination and a decision based on the record, the rule affects substantive rights and is not merely "procedural" or "interpretative."

A. The Promulgation Of A Rule Interpreting And Applying The "Military Or Foreign Affairs Function" Exception To The NRC's Rules Of Practice Is Not Itself A Military Function.

Section 553(a) of the APA states that its requirements apply to agency rulemaking "except to the extent that there is involved (1) a military or foreign affairs function of the United States. . . ." 5 U.S.C. §553(a). This clause, which is also included in 5 U.S.C. §554(a)(4) governing agency adjudications, was enacted by Congress as part of the orginal

Administrative Procedure Act, enacted in 1946.[6] Unfortunately, the legislative history is not very illuminating. The Senate Report states that the military and foreign affairs functions exceptions "apply only 'to the extent' that the excepted subjects are directly involved."[7] The report does explain that "foreign affairs functions" include "only those 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences." Ibid. The House report mirrors the Senate discussion. Id. at 267.

The Attorney General's Manual on the Administrative Procedure Act[8] notes that rulemaking directly involving a military function may be carried out by other agencies than the Defense Department, citing the Federal Power Commission's provision of emergency electrical facilities during wartime, as authorized by Section 202(c) of the Federal Power Act.[9]

6/ Act of June 11, 1946, Pub. L. No. 79-404, Section 4, 60 Stat. 237.

7/ Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2d Sess. 199 (1946).

8/ United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 26 (1947).

9/ During the continuance of any war in which the United States is engaged. . . the Commission shall have authority, . . . with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. 16 U.S.C. §824a(c).

Both NRDC and the NRC General Counsel (A.R. IV-70, J.A. 115, 119), have been unable to discover any caselaw analyzing this exception from normal APA procedures.[10/] Indeed, the General Counsel notes that the rulemaking exception (in 5 USC §553(a)(1)) has never been claimed by the NRC, and that the adjudicatory exception (5 U.S.C. §444(a)(4)) has been applied in only one case -- "a hearing requested to contest a classification matter." In the Matter of Power Reactor Development Company, 1 AEC 18, 24 (1957). A.R. IV-70, J.A. 115, 116.

Despite this paucity of source material, Professor Arthur Bonfield performed a lengthy analysis of the military and foreign affairs function exemption for the Administrative Conference of the United States.[11/] Bonfield emphasizes the language in the legislative history indicating that the exemption should be applied only to rulemaking that "directly"

10/ See Gayer v. Schlesinger, 172 U.S. App. D.C. 172, 179 n. 13, 490 F.2d 740, 747 n. 13, (1973) amended on other grounds 161 U.S. App. D.C. 216, 494 F.2d 1135 (1974) (employee of Department of Defense held entitled to full adjudicatory procedures before security clearance denied on basis of homosexuality, regardless of DOD rules to the contrary, containing no mention of APA exception); McDonald v. McLucas, 371 F. Supp. 837, 840 (S.D.N.Y. 1973) (challenge to DOD action classifying MIA's as "dead: based on failure to follow APA rulemaking and adjudication procedures dismissed as "the language of the APA itself makes it clear that it does not apply") Yiakoumis v. Hall, 83 F. Supp. 469, 472 (E.D. Va. 1949) ("foreign affairs function" exception of APA held to apply to immigration actions, as they are "an exercise of a sovereign power in international relations.")

11/ Bonfield, Military and Foreign Affairs Function Rulemaking Under the APA, 71 Mich. L. Rev. 221 (1972).

relates to military functions, and then only "to the extent" that such functions are involved. It is Bonfield's interpretation that "rulemaking only indirectly or tangentially related to the exempted functions is not to be treated as within the exemptions, and that close cases should be treated as outside the exemption." Id., at 237. In short, the presumption is against exempting agency actions from the provisions of the Administrative Procedure Act. Moreover, Bonfield notes in support of limiting the scope of the exemptions that Congress refused to exempt the War and Navy Departments in their entirety from the Administrative Procedure Act, but instead exempted only those functions which are military as opposed to "civil and regulatory." Id., at 236, n. 44.

Finally, Professor Bonfield concludes:

> Section 553(a)(1) does not exclude all rules involving the armed forces; it is only rulemaking involving 'military functions' that is excluded. Consequently, only rulemaking involving an activity that is specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, qualifications, or attributes is exempted. Furthermore, to be excluded under subsection (a)(1) the rulemaking in question must "clearly and directly" involve such an activity. Id., at 266 (emphasis in original).

In applying this guidance, it must be remembered that the instant case does not require resolution of the question of whether NRC regulation of NFS-Erwin -- a civilian-owned, operated and regulated facility which sells its product to yet another private firm -- is a military function. Rather, the Court must only decide whether the NRC is correct in asserting that the promulgation of a rule interpreting and

applying the "military function" exemption is itself a military function, and therefore exempt from normal notice and comment procedures. Commissioner Bradford, finds the Commission's claim that the promulgation of this rule is a "military function" to be "absolutely preposterous." A.R. V-14, J.A. 178, 186, Dissent. Providing an insight into the proceedings of the Commission rare for both its candor and indignation, he notes:

> The difference between putting the proposed change out for comment and enacting it immediately is entirely that Commissioner Kennedy's term would expire during the comment period, and the present majority has reason to doubt that a new appointee would join their charade. No armies will march; no navies will sail; no planes will fly as a result of this rule being made immediately effective instead of being put out for comment. Not one iota more or less fuel will be fabricated for the Navy. Nothing remotely resembling a military function will occur. All that will happen is that a civilian commissioner's civilian term on this all-civilian agency will not end before he casts his civilian vote for a change in the agency's civilian rules of practice. Id., J.A. 186, n. 4 (emphasis in original).

The rule at issue here "directly relates" only to the NRC rules of practice and procedure for adjudicatory hearings. No "military function" will be prejudiced, delayed, or affected by affording prior notice and the opportunity to comment on the rule. Indeed, even NFS-Erwin is operating today and will continue to operate completely independently of the promulgation of this rule. Moreover, the quality of NRC's regulation could be substantially improved by proposing this rule for notice and comment; the concerned public could

assist the NRC in developing a rule which more carefully considers the circumstances under which the "military function" exemption should properly be applied to NRC proceedings, if in fact there are legitimate "military functions" regulated by the Commission. This Court must reject the NRC's transparent attempt to unlawfully evade the requirements of the Administrative Procedure Act, and direct it to propose this rule for notice and comment, pursuant to 5 U.S.C. §553(b).

B. The Promulgation Rule Is Not Merely A Procedural Or Interpretative Rule And Therefore Exempt From The Requirement Of Prior Notice And Comment; Rather, The Rule Affects Substantial Rights Of Parties In Licensing Proceedings.

The preamble of the rule at issue in this proceeding declares, in addition to being exempted under the "military functions" exception,

> "notice of proposed rulemaking is not required because the amendments by their nature concern rules of agency procedure or practice, and because the amendments merely interpret the present rules of practice in 10 CFR Part 2 in light of Section 181 of the Atomic Energy Act. A.R. V-14, J.A. 178, 181.

As this Circuit has made clear, the particular label an agency affixes to a rule is not determinative. Rather, "it is the substance of what the [agency] has purported to do and has done which is decisive." Chamber of Commerce v. OSHA, D.C. Cir. 78-2221, July 10, 1980. Slip. op. at 9; quoting Columbia Broadcasting System v. U.S., 316 U.S. 407, 416 (1942). In this case, the NRC has made a radical change in its adjudicatory hearing rules, removing the rights to discovery and to submission of testimony under oath subject to cross-examination for a broad category of licensing cases. The

law is clear that such a change is neither "procedural" nor "interpretative," and therefore requires notice and opportunity for public comment before promulgation.

1. Procedural Exception

Section 553(b)(3)(A) of the APA exempts from the requirement of advance notice of proposed rulemaking those rules which are "rules of agency. . . procedure or practice." As this Circuit has noted:

> A matter "relating to practice or procedure" means technical regulation of the form of agency action and proceedings. This category too, should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority.

Pickus v. United States Board of Parole, 165 U.S. App. D.C. 284, 289, 507 F.2d 1107, 1112 (1974) (emphasis added). The Court stated that the challenged rules "were of a kind calculated to have a substantial effect on ultimate parole decisions," in that they "narrow [the Board's] field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated had Section 4 been followed."

In Reynolds Metal Co. v. Rumsfeld, 564 F.2d 663, 669 (4th Cir. 1977), the court agreed with Pickus that "notice and comment [are] required if the rule makes a substantive impact on the rights and duties of the person subject to regulation." There, the court upheld a procedural rule which "provides an expeditious means of transmitting to the [Equal Employment Opportunity] commission complaints that should have been mailed

to it in the first place." The rule "neither diminishes nor increases the company's rights and duties," and was upheld. Ibid.

There can be no question that the new rule is a major departure from past agency practice. The Commission's Executive Legal Director has detailed the agency's consistent recognition that Sectin 189a of the Atomic Energy Act obligates the NRC to offer adjudicatory hearings for all licensing activities. A.R. V-13, J.A. 148, 150, n. 3. (Memorandum from Howard K. Shapar to Chairman Ahearne, June 19, 1980). He conceded that the proposed rule would have the effect of removing the preexisting right of cross-examination, which he characterized as a "radical change" in agency practice. Id., J.A. 153.

There can also be little doubt that the rule under review goes far beyond the purely "formalistic" procedural rule described in Pickus, supra. The rule removes the preexisting rights to cross-examination and discovery, resulting in a proceeding which is much more likely to produce a decision favorable to the Commission, as it eliminates a party's ability to introduce damaging documents and to adduce contrary testimony of Commission employees. In a formal opinion to the Commissioners, the NRC General Counsel agreed that the right to cross-examination in NRC licensing proceedings was "substantial," and that the Commission therefore could not take advantage of the "procedural" exception. A.R. V-3, J.A. 128, 129. He explained:

> In Bailly, ALAB-249, 8 AEC 980 (1974) the inability of a party to cross-examine was held sufficient grounds to reopen the hearing. Further, it has been recognized that "intervenors may build their case 'defensively' through cross-examination." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B, ALAB-463, 7 NRC 341, 356 (1978). Therefore, the removal of a right to cross-examination is substantial. Id., J.A. 129, n. 1.

The rule under review cannot reasonably be characterized as merely a mechanistic or routine adjustement in agency procedures. On the contrary, it is a drastic change in long-established practice which removes the right to cross-examination which the NRC admits is "substantial." According to the holding in Pickus, supra, this must be proposed for notice and comment prior to promulgation, pursuant to §553 of the APA.

2. Interpretative Rule Exception

Finally, the NRC claims that the challenged rule is merely "interpretive" and thereby exempt from the notice and comment provisions of 5 U.S.C. §553(b)(3)(A). A.R. V-14, J.A. 178, 181. This last rationale also fails.

The law is clear that a rule can only be classified as interpretive if it merely interprets or clarifies a statute or regulation. If it creates precedent or implements a statute, a rule is substantive or "legislative." Gibson Wine Co. v. Snyder, 90 U.S. App. D.C. 135, 137, 194 F.2d 329, 331 (1952).

Here, the effect of the NRC's action is to severely curtail the rights of parties in certain licensing proceedings, by changing longstanding agency practice. A.R. V-13, J.A. 153. (Memorandum from Howard Shapar to Ahearne, June 19, 1980).

In promulgating this rule, the NRC has chosen to implement the "military functions" exception for the first time, carving out a new exception from its adjudicatory procedures which substantially diminishes the ability of parties such as NRDC to develop the factual record necessary to effectively participate in agency decision-making.[12/] In this respect, the NRC's new rule is strikingly similar to the rule at issue in Brown Express, Inc. v. U.S., 607 F.2d 695 (5th Cir. 1979). There, the court prohibited the ICC from reversing without notice and comment a long-established policy of notifying competing carriers of the filing of applications for emergency temporary authority:

> The Commission's Notice of Elimination is not an interpretative rule, for it does not purport to interpret a statute or regulation. . . . [T]he Notice of Elimination is not a mere clarification. It defines no ambiguous term. It gives no officer's opinion about the meaning of the statute or regulations. Rather, it effects a change in the method used by the Commission in granting substantive rights. As such, it is a new rule and cannot be interpretive. Id., at 700, (empahsis added).13/

12/ For an explanation of the manner in which denial of discovery and cross-examination would frustrate NRDC's ability to present a case on the basic factual issues concerning the proposed amendment to the NFS-Erwin license, see petitioner's Memorandum of Points and Authorities in Support of Motion for Stay of NRC Orders of June 26, 1980, Pending Judicial Review, September 9, 1980, pp. 15-18.

13/ See also, Texaco v. FPC, 412 F.2d 740 (3d. Cir. 1969) National Motor Freight Traffic Ass'n. v. U.S., 268 F. Supp. 90 (D.D.C. 1967); Pharmaceutical Manufacturers Ass'n. v. Finch, 307 F. Supp. 858 (D. Del. 1970).

In addition, in Cerro Metal Products v. Marshall, 467 F. Supp. 869, 882, (E.D. Pa. 1979), aff'd. 620 F.2d 964 (3d. Cir. 1980), the court rejected an agency's characterization of a rule as "interpretive" based in large part on the agency's past practice of allowing notice and comment on many other rules which "seemed to impinge in some consequential way on the interests of those regulated and protected by the Act." The list of NRC regulations promulgated after notice and comment attached to the Shapar memorandum, A.R. V-13, J.A. 148, includes many which have far less impact on the rights of parties than does this rule. Perusal of that list strengthens the conclusion that, in its zeal to avoid scrutiny of the merits of its action in the matter of NFS-Erwin, the NRC has arbitrarily turned its back on its own precedent.

A recent decision by this Circuit is also directly relevant in that it explains the vital purposes served by the requirement that notice and comment precede agency rulemaking. In Chamber of Commerce v. O.S.H.A., No. 78-2221 (July 10, 1980), the action under review was the promulgation by the Occupational Safety and Health Administration of a self-styled "interpretive rule and general statement of policy" without notice or the opportunity for comment. The Court declared the rule to be legislative rather than interpretive since its clear intent was to "implement" the underlying statute rather than to "explain it, and vacated the rule. Slop. at 11. The decision of the Court contains language pertinent to the issues here:

> The Assistant Secretary should not treat the procedural obligations under the APA as meaningless ritual. Parties affected by the proposed legislative rule are the obvious beneficiaries of proper procedures. Prior notice and opportunity to comment permit them to voice their objections before the agency takes final action. Congress enacted 5 U.S.C. §553 in part to "'afford adequate safeguards to private interests.'" [Citations omitted] Given the lack of supervision over agency decision-making that can result from judicial deference and Congressional inattention, this protection, as a practical matter, may constitute an affected party's only defense mechanism.
>
> An agency also must not forget, however, that it too has much to gain from the assistance of outside parties. Congress recognized that an agency's "'knowledge is rarely complete, and it must learn the . . . viewpoints of those whom the regulation will affect. . . .]Public] participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves. . .'" [Citations omitted]
>
> * * *
>
> Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administration action. . . . Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation. Public participation in a legislative rule's formulation decreases the likelihood that opponents will attempt to sabotage the rule's implementation and enforcement. [Citations omitted] Chamber of Commerce, supra, Slip op. at 13-14.

As noted above, participation by the interested public, including NRDC, could assist the NRC to consider and develop criteria for the appropriate application of the "military functions" exemption, assuming that there are situations to

which it may legitimately apply to NRC's duties and responsibilities. The agency's invocation of the "interpretive" exception to avoid notice and comment on this rule is not only "highhanded," it is plainly wrong.

II

EVEN IF THE RULE IS HELD TO BE PROPERLY PROMULGATED, IT CANNOT BE APPLIED TO THE PENDING PROCEEDING CONTESTING THE LICENSE AMENDMENT FOR NFS-ERWIN AS THE RULE WOULD SUBSTANTIALLY PREJUDICE NRDC'S RIGHTS BY ELIMINATING THE RIGHT OF CROSS-EXAMINATION

As described supra, p. 5, the NRC proposed to amend the operating license for NFS-Erwin on January 21, 1980. The public notice of the proposed amendment stated that "the licensee and any other person whose interest may be affected may request a hearing with regard to the proposed amendment." A.R. IV-35, J.A. 22, 23.

On February 8, NRDC petitioned the Commission for a hearing on the proposed amendment, as authorized by §189a of the Atomic Energy Act and the proposed amendment itself. At that time, and since the Commission began issuing licenses for nuclear facilities, NRC procedural rules recognized only one class of hearing in licensing proceedings, adjudicatory hearings including the rights of discovery and cross-examination, inter alia. 10 C.F.R. Part 2, Subpart G.

Subsequently, on June 26, 1980, the NRC simultaneously promulgated the immediately effective rule at issue and applied it retroactively to the pending NRDC petition, therey eliminating NRDC's preexisting rights.

The limitation on an agency's ability to apply procedural rules retroactively was stated clearly in Pacific Molasses Co. v. FTC, 356 F.2d 386, 390 no. 10 (5th Cir. 1966): "new procedural rules may be made to apply to pending proceedings. . . if injury or prejudice does not result therefrom." In that case, the court overturned an FTC administrative decision because the law judge applied a new rule to the proceeding, allowing him to ignore his pre-trial order requiring the FTC staff to notify the parties of its documentary evidence and witnesess 15 days before the hearing. The court held the violation to be substantial, as it diminished the effectiveness of cross-examination. Id., at 390-91.

In Sun Oil Co. v. FPC, 256 F.2d 233 (5th Cir. 1958), cert. den. 358 U.S. 872, the Court approved the application of a new procedural rule eliminating the filing of natural gas rate reports by non-producers holding an ownership share of natural gas production facilities. The court found that the new rules did not prejudice Sun, even though its previously filed reports were discarded, because Sun retained the right to intervene in any formal adjudicatory rate proceeeding if it believed the rate filings by other producers were improper. Id., at 240.

In this case, retroactive application of the "military functions" rule will severely prejudice NRDC's preexisting rights to effectively participate in the NFS-Erwin license amendment proceeding. Whereas Pacific Molasses, supra, rejected retroactive application of a rule which merely diminished the

effectiveness of cross-examination, the rule at issue in this case removes that right altogether. Unlike the procedures in Sun Oil, supra, there is no further adjudicatory proceeding at which NRDC can assert its rights if denied in this licensing proceeding.

If the Erwin proceedings go forth according to the plan proposed by the Commission, NRDC will be denied discovery and denied the right to cross-examine the assertions of the opposing parties. In practical effect, the assertions of NFS, the Commission staff, and the Department of Energy will be insulated from effective probing. NRDC has raised, among others, the following factual issues requiring resolution in the NFS-Erwin license amendment proceeding:

1. Do the amended license conditions provide adequate protection against the threat of theft or diversion of weapons-grade material?
2. Do the amended license conditions provide adequate protection against on-site fabrication of a crude atomic bomb?
3. Do they protect against innocent or malevolent undiscovered discharges of radioactive material?
4. Are excessive amounts of radiation being discharged into the environment from the ventilation systems, scrap recovery operations and liquid effluent streams?

5. Does the purpoted "offsetting" of new physical security requirements against loosened material accounting restrictions conform to fundamental safeguards principles which require a high degree of confidence in both types of controls?

Prehearing discovery and the submission of testimony under oath subject to cross-examination are clearly required in order to build a useful and reliable record on these issues. For example, NRDC must be permitted material in the hands of NRC, NFS, and other parties to the proceeding, documenting the history of NFS's operations and the effectiveness or lack thereof of current and past security and accounting measures. In addition, we must be allowed to question under oath members of the NRC Staff on the basis for their recommendation that the NFS license be revoked. This is particularly crucial since the NRC Staff, pursuant to the express direction of the Commissioners now sitting in judgment in the administrative proceeding, will be taking the opposite position at the hearing. Under these circumstances, it is apparent that NRDC's rights cannot be protected by the Commission's undertaking to pose such questions submitted by the parties as it believes appropriate.

As described in Part I.B.1. of this brief, the NRC General Counsel himself considered the deprivation of cross-examination to constitute the loss of a "substantial right." A.R. V-3, J.A. 128, 129. For this reason, he also advised the Commission not to make the rule effective immediately, but to apply it after allowance

for notice and comment. A.R. V-3, J.A. 128. See also General Counsel memorandum of May 16, 1980, A.R. IV-70, J.A. 115, 116. ("We recommend a rules change -- to be applied prospectively"). The General Counsel's legal opinion was apparently overridden by misguided notions of expediency. Nevertheless, according to the principle enunciated in Pacific Molasses, supra, the NRC may not apply this rule to the proceedings on the proposed amendment to the NFS-Erwin license.

CONCLUSION

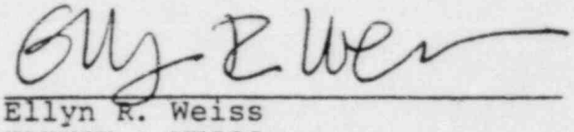
As Commissioner Gilinsky stated in his dissent, "it is worth recalling what this case is about." A.R. V-14, J.A. 183. The entire record in this case -- from the failure of NFS and the NRC to adequately control the weapons-grade nuclear material used in the Erwin plant to the promulgation of an immediately effective rule which removed the preexisting right to adjudicatory hearings -- evidence an intent by the NRC to shield itself from disclosure of the nature and extent of an embarrassing and potentially dangerous regulatory failure.

The agency has gone to extraordinary and unprecedented lengths in this effort at insulation from scrutiny. While NRDC's rights are those most obviously affected, it is not hyperbole to suggest that the public interest is also at risk. The record could not be more clear that the sole motivation for promulgation of this rule was to limit NRDC's participation in the NFS-Erwin proceeding and, moreover, that the sole motivation for failing to provide notice and opportunity for comment was the majority's recognition that its majority status would disappear before the expiration of a comment period with the end of one of the Commissioner's terms. In its stampede to action, the Commission ignored even the advice of its own responsible legal officers. This court should not countenance the callous and transparent efforts of the NRC to justify frustrating the rights of the public to participate in

decisions with potentially grave effects on its welfare and safety.

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL, INC.

BY: 

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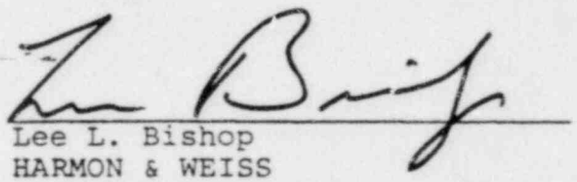

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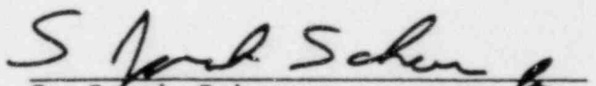

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APPENDIX A

PERTINENT STATUTES AND REGULATIONS

Statutes

1. Section 3 of the Administrative Procedure Act, 5 U.S.C. §553 (1966).

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

2. Section 4 of the Administrative Procedure Act, 5 U.S.C. §554 (1966)

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

3. Section 189a of the Atomic Energy Act, 42 U.S.C. §2239(a) (1954; as amended, 1957, 1962)

§ 2239. Hearings and judicial review

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an

operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

Aug. 1, 1946, c. 724, § 189, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 955, and amended Sept. 2, 1957, Pub.L. 85-256, § 7, 71 Stat. 579; Aug. 29, 1962, Pub.L. 87-615, § 2, 76 Stat. 409.

Regulations

1. NRC Rules of Practice for Domestic Licensing Proceedings 10 C.F.R. 2.700, 2.700a

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3).

§ 2.700a Exceptions.

Consistent with due process requirements the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

CERTIFICATE OF SERVICE

I hereby certify that copies of Petitioner's "Brief," have been hand-delivered this 11th day of December, 1980, to the following:

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