

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

_____)
In the Matter of)
) Docket No. 50-271-OLA-4
VERMONT YANKEE NUCLEAR) (Construction Period
POWER CORPORATION) Recapture)
)
(Vermont Yankee Nuclear)
Power Station))
_____)

AFFIDAVIT OF JAMES B. SINCLAIR

James B. Sinclair, being first duly sworn, deposes and says as follows:

1. I am the Director of External Affairs of Vermont Yankee Nuclear Power Corporation. Among my other responsibilities is the function of serving as VYNPC's interface with the Institute of Nuclear Power Operations ("INPO"). I am familiar with the documents that are the subject of the "Objection to Document Production and Request for Protective Order (INPO Documents)" in support of which this affidavit is made, and I am familiar with the INPO programs as a result of which these documents were produced. I am also familiar with the "Memorandum of Agreement Between the Institute of Nuclear Power Operations and the U.S. Nuclear Regulatory Commission" dated October 20, 1988.

2. INPO is a private non-profit consortium of electric utility companies operating nuclear power plants in the United States. It produces, and circulates to its membership, reports that present the results of its own inquiries into events and experiences of potential safety significance occurring at its members' power plants, either on a plant-specific basis or on an industry-wide (topical) basis. INPO also furnishes copies of its reports to the NRC. Reports are furnished to NRC and to the INPO members on the express condition that they not be made public without INPO's consent. Vermont Yankee has been informed that INPO does not consent to the production to the State of Vermont of any of the documents covered by this document request (except No. 11). Indeed, I am informed that the State of Vermont

earlier requested the same documents from INPO directly and was told that they were not available to it.

3. Each of the documents in question is the property of INPO and is copyrighted by INPO. In addition, each of the documents (with the exception of No. 11) is stamped by INPO as either "Limited Distribution" or "Restricted Distribution." "Limited Distribution" means:

"LIMITED DISTRIBUTION: Copyright 1988 by Institute of Nuclear Power Operations. All rights reserved. Not for sale. Unauthorized reproduction is a violation of applicable law. Reproduction of not more than ten copies by each recipient for its internal use or use by its contractors in the normal course of business is permitted. This document should not be otherwise transferred or delivered to any third party, and its contents should not be made public, without the prior agreement of INPO."

"Restricted Distribution" means:

"RESTRICTED DISTRIBUTION: Copyright 1988 by Institute of Nuclear Power Operations. All rights reserved. Not for sale. Reproduction of this report without prior written consent of INPO is expressly prohibited. Unauthorized reproduction is a violation of applicable law. The persons and organizations that are furnished copies of this report should not deliver or transfer this report to any third person, or make this report or its contents public, without the prior agreement of INPO and, if applicable, the member of INPO for whom the report was written."

To my knowledge, Vermont Yankee has never transgressed the restrictions imposed on it by INPO by these restrictions.

4. As noted above, INPO makes copies of its reports available to NRC in order to assist NRC in the performance by NRC of its statutory responsibilities. INPO and NRC have entered into a "Memorandum of Agreement Between the Institute of Nuclear Power Operations and the U.S. Nuclear Regulatory Commission" dated October 20, 1988, a copy of which is attached to this affidavit. In relevant part, this agreement provides as follows:

"The appendices to this agreement provide for NRC access to selected INPO proprietary documents and information. Such documents and information provided to the NRC will be appropriately identified as Limited or Restricted Distribution. Consistent with previous legal decisions sanctioning the exchange of proprietary information between INPO and NRC and in the interest of improving nuclear plant safety, NRC will control distribution of INPO proprietary documents and information within the agency and will exert best efforts to protect it from unauthorized disclosure. Exceptions to this

policy for control of INPO proprietary documents and information will be addressed by the parties to this agreement on a case-by-case basis."

5. I am aware that, in addition to its undertakings in the Memorandum of Agreement, the NRC has considered whether INPO reports should be made publicly available, and concluded that they should not, in connection with litigation known as the *Critical Mass* case. The position of the NRC on this issue is described by the Court in that litigation thus:

"NRC and INPO are nevertheless fulling in accord in one respect: the limited confidentiality the INPO reports presently enjoy, i.e., their general unavailability to the public at large, is indispensable to the quality of the information they contain. A host of declarants and affiants from both NRC and INPO (all of whom are highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office) ardently attest to the importance of that circumstance as assuring maximum candor on the part of INPO's sources for the substance of its reports."

"NRC and INPO contend that the true value of the reports to the industry (and to NRC) lies not in the factual information they impart but, rather, in the insight they afford as to 'root causes' of the events and experiences which are frequently found to involve human error. The INPO personnel who compile the reports endeavor to get members' officials and plant personnel having knowledge of such events and experience to engage in subjective self-critical or colleague-critical 'rumination' about them. Were the reports to become public, candor would suffer, and hence, diminish the value of the reporting process itself to INPO, to NRC, and ultimately to the public."

Critical Mass Energy Project v. NRC, 731 F. Supp. 554, 556 & n.6 (D.D.C., 1990).

6. The document requested in Item 11 is classified by INPO as publicly available. It is not within the scope of this objection and request for a protective order.

7. The NRC and INPO policy on disclosure, and the underlying reasons that support it, apply equally to each of the documents covered by this document request (other than No. 11).

8. There is an additional similar reason why these documents should not be produced. Each of these documents attempts to identify what is known as "good practices" for the operation of a nuclear power plant, based on the aggregate of members' experience and judgment. The function of these "good practices" observations is to assist the members, and ultimately the

Bob Gad

NRC, in achieving what is known as a "rising standard of excellence," which means continually improving operator performance above the minimum required for licensing and by enforcement. These "good practices" observations are susceptible of two kinds of misuse. First, they may not be applicable to any given plant or circumstance. Second, they are something that some might attempt to convert into licensing or enforcement minimum performance, thus defeating their purpose. INPO is convinced, as am I, that the public disclosure of these "good practices" observations will ultimately and necessarily lead to the abandonment by INPO and its members of the effort to produce them.

James B Sinclair
James B. Sinclair

State of Vermont

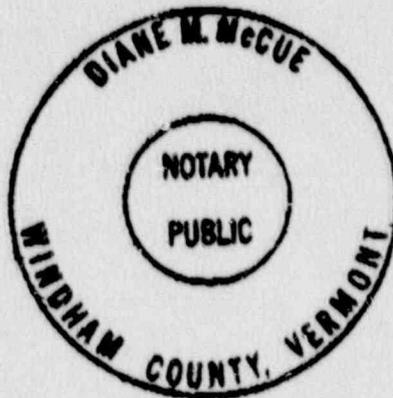
County of Windham

Then appeared James B. Sinclair, before and personally known to me, who, being first duly sworn, declared the foregoing statements to be true, this 15th day of June, 1990.

Diane M. McGue

Notary Public

My Commission expires: 2/91



**MEMORANDUM OF AGREEMENT
BETWEEN
THE INSTITUTE OF NUCLEAR POWER OPERATIONS
AND
THE U.S. NUCLEAR REGULATORY COMMISSION**

This memorandum between the U.S. Nuclear Regulatory Commission (NRC) and the Institute of Nuclear Power Operations (INPO) reflects the desire for a continuing and cooperative relationship in the exchange of experience, information, and data related to the safety of nuclear power plants.

The NRC has statutory responsibility for licensing and regulating nuclear facilities and materials and for conducting research in support of the licensing and regulatory process, as mandated by the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and the Nuclear Nonproliferation Act of 1978; and in accordance with the National Environmental Policy Act of 1969, as amended, and other applicable statutes. NRC's responsibilities include protecting public health and safety, protecting the environment, protecting and safeguarding materials and plants in the interest of national security, and assuring conformity with antitrust laws. INPO is an organization sponsored by the nuclear utility industry whose mission is to promote the highest levels of safety and reliability in the operation of nuclear electric generating plants. As such, NRC and INPO undertake mutual and complementary activities, as defined in appendices to this Agreement. These appendices will help ensure that the goals of both organizations are achieved in the most efficient and effective manner without diminishing or interfering with the responsibilities and authorities of the NRC and the goals of INPO.

This Memorandum is not intended to be an enforceable agreement or contract on either party, notwithstanding the occasional use of the term "agree" or the use of mandatory language such as "shall" or "will" in either the Memorandum or its appendices. In particular, insofar as this Memorandum or its appendices indicate that the Commission will take or refrain from taking a particular action in discharge of its regulatory responsibilities, such an indication is intended only to reflect the Commission's current policy intentions in this regard. Since this Memorandum is not legally binding, the Commission may depart from its terms whenever it deems it necessary or appropriate to do so in the discharge of its regulatory responsibilities, except that in the interests of cooperation the Commission will, if appropriate and practical, advise INPO of any intention to depart from the terms of this Memorandum prior to doing so.

It is intended that this Memorandum of Agreement and its companion appendices complement one another. Appendices are utilized to delineate detailed and specific areas for cooperative agreements which exist between the parties of this Agreement and which may be amended from time to time. The appendices are not interpreted as restrictive to only those areas specified in the document, but serve as keystones of the Agreement for the exchange of information to support the common goals of both organizations.

8811300207
15pp.

Memorandum of Agreement
Between INPO/NRC
Page Two

INPO and the NRC agree to consult with each other with regard to the availability of technical information which would be useful in areas of mutual interest; and to promote and encourage a free flow of such information. In this regard, INPO will provide plant specific information on a case-by-case basis consistent with the other provisions of this Agreement. Both parties recognize the need for excluding from this Agreement fragmentary information related to work in progress and/or which has been received on a privileged basis. However, as information is verified and found to be necessary or important to findings upon which significant safety-related conclusions and recommendations are based, the party holding such information will take appropriate and timely steps to remove it from the fragmentary, privileged or otherwise restricted status. However, the NRC cannot provide information to INPO that is required by law to be withheld. Each party recognizes the need, on some occasions, to be able to accept and protect privileged information where such information could not be made available otherwise. It is recognized that the parties to this Agreement may not be fully aware of the extent of each other's knowledge and thus, this Agreement requires only the parties' best efforts and a reasonable degree of care in assuring that significant safety-related information is provided in a timely manner to the other party.

The parties to the Agreement will meet periodically to exchange information and keep each other apprised of the major activities underway and planned in each area of agreement. The meetings are an effort to avoid unnecessary and unintentional duplication of activities, while providing a means to identify those areas where independent activities by another organization may be warranted.

Coordination meetings are for information exchange only. Meetings are not to be construed as requests or opportunities for (or used by the NRC for obtaining) the advice or recommendations of INPO or its personnel on policy or regulatory issues within the scope of the NRC's responsibilities. INPO advice or recommendations to the Commission on regulatory or policy matters, if any, are to be made through established procedures of the Commission and will be considered by the Commission in the same manner as other offers of advice or recommendations made through established Commission procedures. Minutes of all coordination meetings will be placed in the NRC public document room. These need not be verbatim transcripts of coordination meetings, but should include a list of the meeting participants and agenda items discussed at meetings, with brief summaries of the discussions held by meeting participants.

In addition to meetings, it is expected frequent, informal communications will exist among the parties that will be limited to exchanging information and providing updates on the status of activities in progress or planned. The appendices to this agreement provide for NRC access to selected INPO proprietary documents and information. Such documents and information provided to the NRC will be appropriately identified as Limited or Restricted Distribution. Consistent with previous legal decisions sanctioning the exchange of proprietary information between INPO and NRC and in the interest of improving nuclear plant safety, NRC will control distribution of INPO

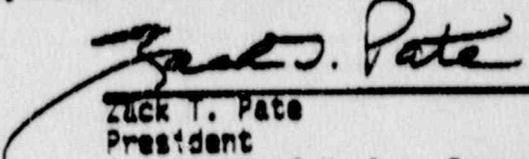
Memorandum of Agreement
Between INPO/NRC
Page Three

proprietary documents and information within the agency and will exert best efforts to protect it from unauthorized disclosure. Exceptions to this policy for control of INPO proprietary documents and information will be addressed by the parties to this agreement on a case-by-case basis.

This Agreement supersedes the previous Agreement dated December 18, 1985.



Victor Stallo, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission



Zack T. Pate
President
Institute of Nuclear Power Operations

Effective Date: October 20, 1988

APPENDIX NUMBER ONE

COORDINATION PLAN FOR NRC/INPO EXCHANGE OF OPERATIONAL EXPERIENCE DATA

1. BACKGROUND

The purpose of this plan is to coordinate selected NRC and INPO activities related to the collection and feedback of operational experience, information and data related to the safety and reliability of nuclear power plants. There are several underlying assumptions, including the following:

- a. NRC as the government entity has statutory responsibilities and authorities which are paramount. Nothing in this plan dilutes that responsibility and authority to take action in accordance with applicable statutes.
- b. Recognizing the ability of INPO to contribute to safe and reliable operation with a resulting benefit to public health and safety, the following statements apply:
 - (1) NRC and INPO share the common objectives that reporting of operational experience information and data be efficient and that duplicative or inconsistent reporting be minimized.
 - (2) NRC and INPO agree that the validity of analysis results may depend upon the completeness and quality of input information.
 - (3) NRC and INPO agree that the effectiveness of operational data feedback is dependent upon a proper understanding of the significant lessons learned from industry operating experience.

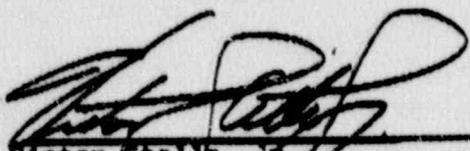
2. OVERALL COORDINATION

- a. NRC and INPO will regularly exchange, on a timely basis, the results of completed and formally documented generic analysis and event evaluation of operational data.
- b. INPO will provide the NRC with timely listings of the significant events that have been identified by the SEE-IN screening process as significant events for analysis. Similarly, the NRC will provide INPO in a timely manner with the results of its significant event screening procedure that identifies events for engineering evaluation or a case study and for Information Notices or Bulletins.
- c. Information and data obtained by the NRC from foreign sources, that do not include restrictions on further distribution, will be entered into a computerized data bank and will be made available for INPO analysis activities. Foreign information and data obtained by INPO that does not include restrictions on further dissemination will

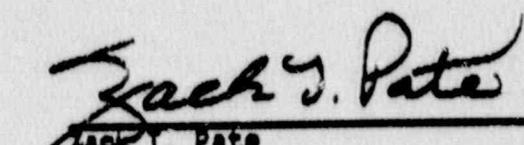
Appendix Number One
Coordination Plan for NRC/INPO
Exchange of Operational Experience Data
Page Two

similarly be entered into an INPO data base and will be made available for NRC analysis activities.

- d. INPO will provide the NRC access to and use of the Nuclear Plant Reliability Data System (NPRDS) operated and maintained by INPO. Additional agreements regarding NPRDS access and usage are contained in a contract between NRC and INPO that is separate from this agreement.
- e. NRC and INPO intend to have periodic informal technical discussions on generic or event-related studies in progress that are of mutual interest.
- f. Prior to issuing to the industry an Information Notice or other completed and formally documented analysis on a specific event at a nuclear power plant, the NRC agrees to make reasonable efforts to review available INPO SEE-IN products to determine if the Information Notice or other analysis is needed and, if so, that it is technically accurate. Similarly, INPO agrees to make reasonable efforts to review available NRC Information Notices or other completed analysis to determine if an INPO SEE-IN product is needed and, if so, that it is technically accurate. Unless a compelling safety concern dictates otherwise, the party identifying technical inaccuracies, if any, will give the other party reasonable advance notification of the inaccuracies and seek resolution before formally issuing the information to the industry.



Victor Stello, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission



Jack T. Pate
President
Institute of Nuclear Power Operator

Effective Date: October 20, 1986

APPENDIX NUMBER TWO
COORDINATION PLAN
FOR
NRC/INPO APPRAISAL AND EVALUATION
ACTIVITIES

1. BACKGROUND

The purpose of this plan is to coordinate selected NRC and INPO utility appraisal and evaluation activities. It is also intended to provide a mechanism and a basis for NRC to recognize INPO efforts in this area.

There are several underlying assumptions, including the following:

- o INPO recognizes NRC's regulatory responsibilities and authority.
- o NRC recognizes INPO's efforts to promote excellence in nuclear plant operations.
- o NRC desires to recognize INPO evaluation activities to the extent that these activities are effective in helping meet NRC's responsibilities as well as lessen the burden imposed on the industry by duplicative appraisal activities.
- o NRC requires access to selected INPO documents and information as well as the opportunity to observe selected INPO activities in order to be able to give credit for INPO activities and to thereby avoid unnecessary duplication.

2. INPO ACTIVITIES

This section outlines current and planned INPO evaluation activities.

- a. INPO will conduct evaluations of operating nuclear plants on a periodic basis. The interval between plant evaluations will average about 16 months.
- b. INPO will conduct evaluations or assistance visits related to corporate support of nuclear stations. This phase of INPO activities will usually be conducted coincident with (in close time proximity to) an evaluation of the utility's plants.
- c. INPO will prepare a written report for each evaluation. These reports will include appropriate utility responses in each area identified by INPO as needing improvement.

- d. Each succeeding evaluation will include follow-up on the responses developed during the preceding evaluation.
- e. INPO will conduct appropriate visits to Near Term Operating License plants and their corporate organizations to assist in their preparation for operation.

3. NRC REVIEW OF INPO ACTIVITIES

- a. INPO expects its member utilities to make operating plant evaluation reports available to the NRC for review or reading. Further, INPO will make final evaluation reports available to the NRC for review or reading by appropriate NRC management personnel at the INPO offices in Atlanta.
- b. Current copies of, and any changes to, INPO evaluation criteria will be provided to NRC.
- c. NRC may, on request, have a representative observe an INPO evaluation. INPO will obtain the necessary concurrence from the host utility. While specifying a maximum number to be observed is not considered necessary by either party, it is anticipated that an NRC representative may observe INPO evaluations several times annually. Where NRC Regional personnel participate as observers, they would not normally accompany an INPO team on an evaluation in their own Region.
- d. INPO will brief personnel of the NRC Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation (NRR) periodically on all aspects of INPO's evaluation and assistance program.
- e. NRC review of INPO evaluation activities will be coordinated by the NRC Office of the Executive Director for Operations. Since INPO has its own system for obtaining member corrective action, NRC's role in pursuing correction of INPO evaluation findings will primarily involve only those potentially significant safety problems for which NRC has no other reasonable alternative in meeting its legislated responsibilities. Any other NRC follow-up enforcement action would be in accordance with paragraph 4.c. below.

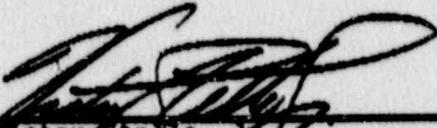
4. NRC RECOGNITION OF THE INPO EVALUATION PROGRAM

- a. Subject to the continued development and success of the INPO program as outlined above and NRC's ability to effectively review the program, NRC intends to recognize INPO evaluations and, in those

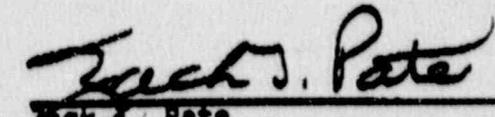
Appendix Number Two
Coordination Plan for NRC/INPO
Appraisal and Evaluation Activities
Page Three

areas deemed appropriate, to minimize NRC-sponsored evaluations or appraisals that duplicate INPO evaluations.

- b. NRC and INPO will coordinate NRC inspections (involving two or more inspectors) and INPO evaluations to minimize the impact on the utility involved. Where feasible, NRC and INPO will coordinate event related or other emergent on-site activities such as NRC augmented inspection teams (AITs), incident investigation teams (IITs), diagnostic evaluation teams (DETs) and INPO event investigations, although each party recognizes that it may not be possible to coordinate all of these efforts.
- c. The NRC will apply the established Commission enforcement policy for licensee identified non-compliances to those non-compliances identified by utilities as a result of INPO evaluations.



Victor Stallo, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission



Jack T. Pate
President
Institute of Nuclear Power Operation

Effective Date: October 20, 1988

APPENDIX NUMBER THREE
COORDINATION PLAN
FOR
NRC/INPO TRAINING-RELATED ACTIVITIES

1. BACKGROUND

The purpose of this plan is to coordinate selected NRC and INPO activities related to nuclear power industry training. It is also intended to provide a mechanism and a basis for information sharing and NRC recognition of INPO efforts in this area.

There are several underlying assumptions:

- o INPO recognizes NRC's regulatory responsibility and authority.
- o NRC and INPO share the goal of improving and maintaining the quality of nuclear utility training.
- o NRC recognizes the industry's initiative and commitment to INPO programs that promote high quality training through development of integrated training and qualification systems, including accreditation of key training programs.
- o NRC recognizes INPO accreditation and associated training evaluation activities (see also Appendix 2, "Coordination Plan for NRC/INPO Appraisal and Evaluation Activities") as an acceptable means of self-improvement in training. Such recognition encourages industry initiative and reduces duplicate program review and appraisal activities.
- o INPO recognizes that the NRC requires access to selected INPO documents and information, as well as the opportunity to observe selected INPO activities related to training and accreditation, in order to ensure that the NRC meets its obligations to the public and the Congress.
- o Coordination of NRC and INPO training-related activities and sharing of information will increase overall effectiveness as well as lessen the burden imposed on the industry by duplication of activities.

2. OVERALL COORDINATION

In order to promote overall coordination of NRC and INPO training-related activities, the following actions will be taken:

- a. NRC/INPO Coordination meetings will be held periodically with representatives from NRC's Division of Licensee Performance and Quality Evaluation (NRL) and INPO's Training and Education Group. At these meetings, information on ongoing projects and plans will be exchanged. Written reports of progress and results may be exchanged.
- b. INPO will provide the NRC with access to selected INPO documents and information, and will provide updated copies of the INPO training guidelines and Training System Development Manual. INPO will also provide the NRC, on a case-by-case basis, with access to the job and task analysis data stored in the INPO computer data base.
- c. Coordination regarding accreditation of training programs is covered by Attachment 1.


Peter Stallo, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission


Jack T. Pate
President
Institute of Nuclear Power Operation

Effective Date: October 20, 1988

ACCREDITATION OF TRAINING PROGRAMS

I. BACKGROUND

The purpose of this plan is to provide for coordination of selected NRC and INPO activities related to the accreditation of performance-based training programs. This plan also provides for continued industry initiative with NRC monitoring in this area and serves as a basis for NRC recognition of INPO's efforts. This coordination plan is consistent with the Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel. In carrying out this plan INPO recognizes NRC's responsibility and authority.

II. INPO ACTIVITIES

This section outlines current and planned INPO activities related to the accreditation of performance-based programs for the training and qualification of nuclear power plant personnel. The INPO point of coordination for the implementation of this plan is the Group Vice President, Training and Education.

- a. INPO will continue to manage the accreditation of utility training programs including:
 - o self-evaluations by member utilities, with assistance from the INPO staff;
 - o on-site reviews of training and qualification programs by teams of INPO and utility personnel;
 - o preparation of a report for each accreditation team visit;
 - o follow-up on recommendations developed during the accreditation process;
 - o awarding, deferring or placing on probation of accreditation by the National Nuclear Accrediting Board; and
 - o reviewing accreditation of utility training programs approximately every four years (accreditation will be renewed, continued in a probationary status, or withdrawn).
- b. INPO will continue to conduct periodic performance-oriented evaluations of training and qualification programs as part of its operating plant evaluations and as follow-up to accreditation.

- c. INPO will provide updated copies of the accreditation procedures and criteria document as it is revised. This document will be made publicly available.
- d. INPO will review and consider NRC recommendations regarding INPO-managed training-related programs, documents, and criteria.
- e. INPO will provide periodic detailed briefings on accreditation to appropriate NRC management personnel, including review of the activities described in 2.a above and documentation of industrywide accreditation status.
- f. INPO intends to brief the Commission periodically on program status.

3. NRC ACTIVITIES

This section outlines the NRC's continuing efforts to monitor INPO activities as part of NRC's assessment of the effectiveness of industry's training and qualification program improvements; The NRC point of coordination for implementation of this plan is the Director, Division of Licensee Performance and Quality Evaluation, NRR.

- a. NRC will not issue documents that duplicate INPO training documents and will not refer to INPO documents as a means of satisfying NRC requirements so as to avoid "codifying" or the appearance of "codifying" INPO documents.
- b. NRC will assess the effectiveness of industry's training and qualification program improvements as follows:
 - o conduct operator licensing exams;
 - o conduct operator requalification exams, consistent with Commission policy and 10 CFR Part 55;
 - o conduct reviews of a sample of utility training programs to ensure use of performance-based training principles;
 - o monitor plant and industry trends and events involving personnel errors;
 - o continue evaluation of industrywide training and qualification program effectiveness; and
 - o conduct performance-oriented training inspections to assess the level of knowledge and qualifications of plant personnel.

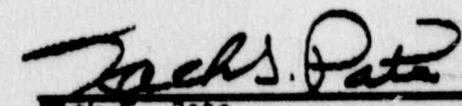
- c. NRC will monitor INPO activities in training and accreditation as follows:
 - o receive periodic briefings and/or reports from INPO and review a sample of applicable INPO documents;
 - o nominate individuals who are not on the NRC staff to serve as members of the National Nuclear Accrediting Board with full voting privileges;
 - o have an NRC staff member attend and observe selected National Nuclear Accrediting Board meetings with the INPO staff and/or the utility representatives;
 - o on request and with concurrence of the utility, have NRC employees observe INPO accreditation team site visits for the purpose of monitoring the effectiveness of the accreditation process. Since accreditation teams are relatively small in size, it is anticipated the NRC would typically send only one observer on any visit. However, in certain circumstances, it may be appropriate to send more than one. INPO will obtain the necessary concurrence from the host utility. While specifying a maximum number to be observed is not considered necessary by either party, it is anticipated that NRC employees would observe approximately 20 percent of INPO accreditation team visits; and
 - o accompany INPO on selected operating plant evaluations (see Appendix 2).
- d. NRC will continue to provide INPO copies of NRC's performance-oriented inspection program, including applicable inspection guidelines.
- e. NRC will coordinate any team inspections with INPO accreditation team visits and evaluations so as to minimize the impact on the utility involved. On request and with concurrence of the utility, an INPO employee may occasionally observe an NRC inspection in this area.
- f. Since INPO has its own system for obtaining member corrective action, NRC's role in pursuing corrective action of INPO-identified training and qualification recommendations will involve only significant safety problems for which NRC has no other reasonable alternative in meeting its legislated responsibilities. The NRC intends to exercise discretion in enforcement matters related to training as described in the Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel.

APPENDIX NUMBER FOUR
COORDINATION PLAN
FOR
INPO/INDUSTRY PARTICIPATION IN
NRC INCIDENT INVESTIGATION TEAMS

1. The purpose of this plan is to establish guidance for INPO or other industry representatives involvement with NRC Incident Investigation Teams (IITs). It is also intended to minimize duplication of event investigation efforts to reduce the impact on the affected utility and to promote dissemination of accurate operating experience information to the industry.
2. NRC and INPO recognize the importance of NRC's incident investigation activities in identifying significant operational experience information. Participation by industry representatives on an IIT should result in a more complete and thorough understanding of the factors contributing to the incident and actions needed to prevent recurrence. In carrying out this plan, INPO recognizes NRC's responsibility and authority.
3. In view of these considerations, INPO and NRC agree on the following:
 - a. INPO or other industry representatives' participation on an IIT will be coordinated between the Director of the Office for Analysis and Evaluation of Operational Data (AEOD) for the NRC and the Vice President for Government Relations, INPO. A request for participation by an industry representative can be initiated by either party to this agreement.
 - b. NRC will provide INPO with a reasonable number of copies of the current Incident Investigation Manual and any other procedures which apply to the operation of an IIT.
 - c. NRC will notify INPO promptly when an IIT is being activated and provide all necessary information to enable INPO to facilitate industry participation.
 - d. INPO will serve as the central point of contact for coordination of all issues and procedures regarding industry participation on IITs.
 - e. INPO will recommend industry participants to the NRC.

- f. INPO will request each industry nominee to sign a statement regarding proprietary information, conflicts of interest, and waiver of compensation. In addition, each industry nominee will be requested to comply with the procedures established for the operation of IITs, which include procedures for handling differences in professional opinion and the release of investigation information. This signed statement will be provided to the NRC as part of the nomination process.
- g. INPO will provide assistance in coordinating with the affected utility to obtain site access for the industry representative(s).
- h. INPO will work with the affected utility and the IIT so that the Significant Event Report (SER), if any, being prepared by INPO on the event under investigation by an IIT is factually correct. To this end, INPO will request that the affected utility coordinate a review of the draft SER with the IIT and provide comments to INPO.


Victor Stallo, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission


Jack S. Pate
President
Institute of Nuclear Power Operations

Effective Date: October 20, 1988

EXHIBIT A—Continued

have discussed this matter fully and believe that the decision that I am now making is in my best interests. The reason for this decision is that I am satisfied that none of the information that Mr. Rochon has about my case has been or will be revealed to Mr. Kohlman or used in the defense of anyone else.

/s/ Harry S. Jr.
H.S., Jr., Respondent in
89-310M-01

Date: February 26, 1990

/s/ Katherine M. Washington
Youth Treatment Coordinator
Oak Hill Youth Center

ORDER

In accordance with the Court's Opinion of even date herewith, it is, this 1st day of March, 1990,

ORDERED that Constance Perry's Motion for Reconsideration of the Court's February 26, 1990 oral Order disqualifying her defense counsel Mark Rochon and Raynice Thompson's motion to disqualify Gary Kohlman shall be, and hereby are, DENIED; and it is

FURTHER ORDERED that Mark Rochon's appearance on behalf of Constance Perry shall be, and hereby is, stricken; and it is

FURTHER ORDERED that Mark Rochon shall not discuss with Constance Perry's lead defense counsel Gary Kohlman any information that Mark Rochon obtained directly or indirectly from H.S., Jr. while representing him at the Public Defender Service; and it is

FURTHER ORDERED that Mr. Kohlman shall continue to represent Ms. Perry without interruption.



CRITICAL MASS ENERGY
PROJECT, Plaintiff,

NUCLEAR REGULATORY
COMMISSION, Defendant,

Institute of Nuclear Power Operations,
Defendant-Intervenor,

Civ. A. No. 84-1948

United States District Court,
District of Columbia,

March 2, 1990.

Nonprofit consumer organization brought suit under the Freedom of Information Act (FOIA) seeking copy of various reports prepared by utility industry consortium and voluntarily transmitted to the Nuclear Regulatory Commission (NRC) regarding consortium's investigation into safety-related events or experiences at its members' nuclear power plants. The United States District Court for the District of Columbia, 644 F.Supp. 844, granted NRC's motion for summary judgment holding reports exempt from disclosure, and plaintiff appealed. The Court of Appeals, 830 F.2d 278, remanded for additional documentation. On remand, the District Court, Jackson, J., held that reports were exempt from disclosure under the "trade secret" or "commercial information" exemption to the FOIA.

Motion granted.

Records 8-59

Reports voluntarily provided on promise of confidentiality to Nuclear Regulatory Commission (NRC), regarding results of provider organization's investigation into safety-related events or experiences at its member utilities' nuclear power plants, were exempt from disclosure under the "trade secret" or "commercial information" exemption to the Freedom of Information Act (FOIA), given evidence that disclosure of reports would be likely to impair NRC's ability to obtain such candid and detailed

552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

S ENERGY
plaintiff.

REGULATORY
Defendant.

Power Operations,
relevant.

1-1943

District Court,
Columbia.

1990.

er organization
Freedom of Infor-
g copy of various
industry consor-
mitted to the Nu-
ssion (NRC) re-
investigation into
periences at its
plants. The Unit-
or the District of
4, granted NRC's
gment holding re-
sure, and plaintiff
Appeals, 830 F.2d
ional documenta-
District Court, Jack-
were exempt from
rade secret" or
exemption to the

rovided on prom-
nuclear Regulatory
rding results of
investigation into
periences at its
r power plants,
losure under the
ocial information"
n of Information
e that disclosure
to impair NRC's
ddid and detailed

disclosures in future. 5 U.S.C.A.
§ 552(b)(4).

Glitzenstein, David V. Ideck, Alan B.
son, Public Citizen Litigation Group,
Washington, D.C., for plaintiff.

Catherine Lanctot, Susan K. Rudy, Eliza-
A. Pugh, Dept. of Justice, Civ. Div.,
Washington, D.C. (Carolyn F. Evans, Of-
fice of Gen. Counsel, of counsel), for defend-
ant.

MEMORANDUM AND ORDER

JACKSON, District Judge.

This FOIA case is once more before the
Court on cross-motions for summary judg-
ment following remand from the court of
appeals.¹ The plaintiff, a consumer orga-
nization, is requesting copies of certain re-
ports presently furnished voluntarily to de-
fendant Nuclear Regulatory Commission
("NRC") by a former stranger to this liti-
gation, the Institute of Nuclear Power Op-
erations ("INPO"). INPO has, since re-
mand, intervened as a co-defendant. Al-
though this case bids fair to rival the saga
of *Washington Post Co. v. U.S. Depart-
ment of Health and Human Services*,² the
Court will once again grant defendants'
motion and dismiss the complaint.

I.

INPO is a private non-profit consortium
of electric utility companies operating nu-
clear power plants in the United States. It
produces, and circulates to its membership,
the reports at issue which present the re-
sults of its own inquiries into significant

¹ *Critical Mass Energy Project v. Nuclear Regula-
tory Comm'n*, 644 F.Supp. 344 (D.D.C.1986), re-
versed and remanded, 830 F.2d 278 (D.C.Cir.
1987).

² Civ. No. 80-1681, Mem. Op. (D.D.C. Dec. 4,
1980); reversed and remanded, 690 F.2d 252
(D.C.Cir.1982); on remand, 603 F.Supp. 235
(D.D.C.1985); reversed and remanded, 795 F.2d
305 (D.C.Cir.1986); on remand, Mem.Op. (D.D.C.
Nov. 20, 1987), reversed and remanded, 865 F.2d
320 (D.C.Cir.1989).

³ Ironically, had the same reports been pre-
pared directly by NRC's own investigators, using

safety-related events or experiences occur-
ring at its members' nuclear power plants.
INPO also furnishes copies of its reports to
the NRC, upon the express condition, how-
ever, that NRC not make them public with-
out INPO's consent, and INPO does not
consent to plaintiff's request here. NRC
has, thus, invoked FOIA's Exemption 4, 5
U.S.C. §§ 552(b)(4), to justify its refusal to
comply with that request.³

The court of appeals found the INPO
reports to possess all the characteristics of
documents entitled to Exemption 4 status
save one, and remanded for this Court's
"actual determination as to whether their
disclosure pursuant to FOIA request would
compromise a governmental interest
sought to be served by the Exemption 4,
either by impairing NRC's ability to obtain
the reports in the future (specifically, infor-
mation of the same quality they presently
impart), or by diminishing NRC's own regu-
latory efficiency or effectiveness. *Crit-
ical Mass Energy Project*, 830 F.2d at 287:

II.

The determination mandated by the court
of appeals requires "balanc[ing] the individ-
ual-litigant's [i.e., the requestor's] need for
information against the government's need
to obtain the information in the future,"
Washington Post Co., 690 F.2d at 258, and
"the extent to which the government's abil-
ity to obtain [the] information would be
impaired... against the public interest in
disclosure." *Id.* at 269 (emphasis in origi-
nal).⁴ It also necessitates a prediction of
sorts as to the nature of the INPO/NRC
relationship without the protection of a

INPO's sources and techniques, they would like-
ly be immune from disclosure under FOIA's
Exemption 5. See *United States v. Weber Air-
craft Corp.*, 465 U.S. 792, 104 S.Ct. 1488, 79
L.Ed.2d 814 (1984); *Badlovser v. U.S. Dep't of the
Air Force*, 829 F.2d 182 (D.C.Cir.1987).

⁴ The Court assumes that the "balancing" to be
undertaken in Exemption 4 cases is an excep-
tion to, or at least a qualification of, the no-bal-
ancing rule generally observed in other FOIA
contexts. See *Soucie v. David*, 448 F.2d 1067,
1076-77 (D.C.Cir.1971).

FOIA exemption for INPO reports in NRC's possession.

Yet despite the bulk of the record before the Court, it is largely unrevealing as to how the defendants would react to a decision rendering the INPO reports disclosable under FOIA, other than INPO's unequivocal confirmation of the fact that one certain consequence will be the cessation of its practice of sharing them with NRC voluntarily.⁵ Thenceforth NRC would have to resort to compulsion to get the reports, and, INPO declares, it would resist vigorously (and it represents that it is informed its individual members will resist as well).

NRC and INPO are nevertheless fully in accord in one respect: the limited confidentiality the INPO reports presently enjoy, i.e., their general unavailability to the public at large, is indispensable to the quality of the information they contain. A host of declarants and affiants from both NRC and INPO (all of whom are highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office) ardently attest to the importance of that circumstance as assuring maximum candor on the part of INPO's sources for the substance of its reports.⁶

The Court also perceives the position taken by NRC in this dispute as being more than perfunctory lip service to its commitment to INPO not to divulge the reports. From the NRC declarations alone it is apparent that NRC is convinced that it will experience a genuine loss of valuable regulatory intelligence, one way or another, if the INPO reporting process is made subject to general public scrutiny. NRC believes that it is now deriving from the INPO reports, and contemporaneously with

5. INPO disclaims, for the present, any intention to stop preparing the reports altogether.

6. NRC and INPO contend that the true value of the reports to the industry (and to NRC) lies not in the factual information they impart but, rather, in the insight they afford as to "root causes" of the events and experiences which are frequently found to involve human error. The INPO personnel who compile the reports endeavor to get members' officials and plant per-

the industry itself, the most insightful thinking of the best informed people within the industry on matters of safety, a commodity otherwise unavailable to it except through the good offices of an unofficial, industry-friendly organization such as INPO.

For its part plaintiff suggests no particularized need of its own for the reports. It is thus remitted to the general public interest in disclosure for disclosure's sake, to support its request. To be sure, the public has an interest of significantly greater moment than idle curiosity in information bearing upon the safety of nuclear power plants. But so does NRC, and so do INPO and its members, and of a much more immediate and direct nature, in addition to their abhor of the general public interest.

Plaintiff also offers no affirmative evidence of its own to contradict defendants' declarants and affiants as to the importance of the information to the NRC, as to the extent to which NRC's ability to obtain it might be impaired were the INPO reports to be made public, or as to whether the NRC would be otherwise diminished in efficiency or effectiveness thereby. Plaintiff's case consists entirely of common sense inferences it asks the Court to draw from seeming concessions made by NRC to several of its discovery initiatives. The gist of those inferences is that the assertions of the NRC and INPO declarants and affiants are not to be credited, or at least not taken at face value.

For example, plaintiff argues, INPO members are already required to submit "licensee event reports" to NRC which are routinely made available to the public, although often containing revelations of hu-

sonnel having knowledge of such events and experiences to engage in subjective self-critical or colleague-critical "rumination" about them. Were the reports to become public, candor would suffer, and, hence, diminish the value of the reporting process itself, to INPO, to NRC, and ultimately to the public. See, e.g., the affidavits of T.J. Sullivan (INPO) of August 26, 1988, and Edward E. Jordan (NRC) of October 28, 1988.

most insightful
d people within
safety, a com-
e to it except
an unofficial,
on such as

sts no particu-
ne reports. It
al public inter-
ure's sake to
re, the public
y greater mo-
information
uclear power
so do INPO
much more
in addition to
blic interest.

ormative evi-
t defendants'
o the impor-
e NRC, as to
ility to obtain
he INPO re-
s to whether
diminished in
reby. Plain-
of common
ourt to draw
le by NRC to
atives. The
at the asser-
eclarants and
l, or at least

gues, INPO
d to submit
RC which are
he public, al-
ations of hu-

ch events and
ive self-critical
about them.
public, candor
sh the value of
NPO, to NRC,
e, e.g., the affi-
of August 26,
RC) of October

error, yet are conceded by defendants
truthful as far as they go.⁷ More-
plaintiff suggests, candor on the part
sources interviewed by INPO is more
to be inhibited by fear of summary
discipline or reprisal by an employer (or
NRC) than by apprehension of eventual
public exposure for confessions of job-relat-
mistakes. Yet nothing about the cur-
rent reporting process protects an INPO
source's anonymity from any of the multi-
ple intra-industry recipients of the reports,
including the source's own employer.⁸ Fi-
nally, plaintiff observes, NRC wields the
ship hand: not only does it have subpoena
and near-plenary regulatory powers should
it choose to use them to get the INPO
reports, NRC can also effectively hold the
licenses of INPO members hostage until it
gets what it wants, in terms of candor,
from anyone in the industry.

(S.S.)

III

The Court finds the effect of the defen-

dants' multiple declarations and affidavits,

when aggregate, to exceed the sum of

their parts, and to carry defendants' bur-

den of establishing entitlement to the ex-

emption they claim for the INPO reports.

Taken together they evince a symbiosis in

the relationship between NRC and INPO

which the Court foresees as being damaged

were the INPO reports in NRC's posses-

sion to be subject to FOIA disclosure.

Whether or not the reporting process

would truly experience a loss of candor—

an issue neither more declarations nor a

parade of witnesses could definitively re-

solve in advance of the event—both NRC

and INPO share the conviction that it

would. The consequence would be that the

7. The relationship between the "licensee event

reports" and the INPO reports at issue, for de-

fendants' purposes, is illustrated by T.J. Sulli-

van's affidavit of February 20, 1990, and the

declaration of Jack E. Rosenthal (NRC) of Feb-

ruary 21, 1990, filed *in camera* post-hearing

under seal at the Court's request. In certain

respects that relationship resembles that of hos-

pital records of patient care to peer review com-

mittee proceedings of particular cases. See

8. Among other representations made by NRC or

INPO for the first time at oral argument, which

had nowhere found direct expression in their

written submissions earlier, is one to the effect

that INPO reports never beget discipline for

sources from either an employer or NRC. It is

now confirmed by the T.J. Sullivan affidavit of

February 20, 1990.

information now freely shared by INPO
with NRC would be withheld until it was
demanded under some form of compulsion.
The demand would have to be enforced,
which would likely precipitate both acrimo-
ny and some form of litigation with attend-
ant expense and delay.

NRC and INPO would then no longer be
collaborators in a quest for optimum indus-
try safety, putting aside their other regula-
tory differences. If not outright antago-
nists, they would at best be wary allies,
working independently of one another, du-
plicating one another's efforts, and mis-
trustful of one another's initiatives or over-
tures. That deterioration of the relation-
ship, in this Court's opinion, represents a
sufficient showing that NRC's efficiency
and effectiveness would be impaired were
it not permitted to honor its commitment to
INPO to keep the INPO reports in confi-
dence, and it is, therefore, this 2nd day of
March, 1990,

ORDERED, that defendants' motion for
summary judgment is again granted; and
it is

FURTHER ORDERED, that the com-
plaint is, once more, dismissed with preju-
dice.



Brodies v. Doctors Hospital, Inc., 50 F.R.D. 249
(D.D.C.1970), *aff'd*, 479 F.2d 920 (D.C.Cir.1973).

8. Among other representations made by NRC or
INPO for the first time at oral argument, which
had nowhere found direct expression in their
written submissions earlier, is one to the effect
that INPO reports never beget discipline for
sources from either an employer or NRC. It is
now confirmed by the T.J. Sullivan affidavit of
February 20, 1990.

DOCKETED
USNRC

'90 JUN 18 P4:32

VYN-143
ASLAB - MAIL
RKGMAIL.VY

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Certificate of Service

I, R. K. Gad III, hereby certify that on June 15, 1990, I made service of the within response to document production request and separate objection and request for protective order, by mailing copies thereof, first class mail, postage prepaid, as follows:

Robert M. Lazo, Esquire
Chairman
Atomic Safety and Licensing Board
U.S.N.R.C.
Washington, D.C. 20555

Jerry Harbour
Administrative Judge
Atomic Safety and Licensing Board
U.S.N.R.C.
Washington, D.C. 20555

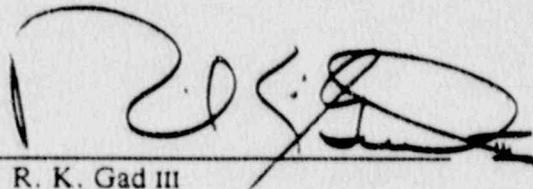
Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S.N.R.C.
Washington, D.C. 20555

Adjudicatory File
Atomic Safety and Licensing Board
Panel
U.S.N.R.C.
Washington, D.C. 20555

Anthony Z. Roisman, Esquire
Cohen, Milstein & Hausfeld
Suite 600
1401 New York Avenue, N.W.
Washington, D.C. 20005

Ann P. Hodgdon, Esquire
Patricia A. Jehle, Esquire
U.S.N.R.C.
Washington, D.C. 20555

Kurt Janson, Esquire
Vermont Department of Public Service
120 State Street
Montpelier, Vermont 05602



R. K. Gad III