Before the UNITED STATES
NUCLEAR REGULATORY COMMISSION Washington, D.C. 20555

In the Matter of

UNITED STATES DEPARTMENT OF ENERGY

PROJECT MANAGEMENT CORPORATION

TENNESSEE VALLEY AUTHORITY

(Clinch River Breeder Reactor Plant)

MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE BIERRA CLUB, IN SUPPORT OF THEIR MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE

Intervenors, Natural Resources Defense Council,
Inc. and the Sierra Club (the "Intervenors"), submit this
memorandum in support of their motion seeking the recusal of
Commissioner Asselstine from any reconsideration of the Commission's March 16 decision on Applicant's Section 50.12 request (CLI-84-4) (the "Order"). Intervenors believe that the
process leading to Applicants' request for reconsideration
and surrounding Commissioner Asselstine's nomination has
created an appearance of bias, partiality and loss of independence. Consequently, under the Commission's regulations,
it is inappropriate for Commissioner Asselstine to sit on
this matter.

should stress that they are not suggesting that Mr.

Asselstine is personally biased or that he has actually prejudged reconsideration. Rather, the issue here is one of appearance. The effect of process leading up to reconsideration of the Order has been to create an impression that the reconsideration decision is a foregone conclusion, based on political philosophy rather than independent jugment of the facts and law. And, because of the importance of maintaining public confidence in the integrity and impartiality of the Commission's decision making process, the appearance of bias, partiality or loss of independence is as important a factor under the Commission's Code of Conduct as actual bias, partiality or loss of independence.

In essence, there have been four elements critical in creating the impression of bias, partiality or loss of independence: (1) the earlier statements of the Chairman with respect to reconsideration; (2) the apparent efforts of the Administration to find someone "to vote their way"; (3) the mention of the reconsideration issue by Administration officials to Mr. Asselstine prior to the confirmation process; and (4) the very speed with which the reconsideration process has proceeded since Mr. Asselstine's confirmation. Each is discussed briefly below.

First, even before the Commission voted on the Section 50.12 request in March, the Chairman, sensing the votes were not going his way, publicly noted his interest in reconsidering the Order when the "composition" of the Commission changed. Commissioner Bradford, who voted against the Applicants, was leaving. A new Commissioner, to be appointed by the Administration, would be replacing him. And, the Chairman seemed to assume, more or less implicitly, that a new Commissioner might vote a different way. Thus, at the March 1 Commission meeting, the Chairman, after noting that denial of the exemption "would be a very sad mistake," Transcript of March 1 Meeting at 48, stated that he'd "like to keep the options open for a new Commission or a Commission that has a different membership," id. In fact, a vote was put off several days until Commission counsel could provide legal advice with respect to how to go about reconsideration and, on March 5, counsel advised the Commission that the Chairman could vote with the minority and still move to reconsider later, and, further, that reconsideration, on the basis of the existing record, might take place within 60 days (the period for seeking judicial review of the Order). Transcript of March 5 Meeting at 1-3. The discussions on March 1 and March 5 thus plainly set the stage for reconsideration of the Order in what would be expected to be a more favorable climate for Applicants.

Second, the Chairman's interest in reconsideration seems not to have been lost upon the Applicants. They appear, as far as press reports indicate, to have embarked upon a course designed to get a new (and presumably favorably disposed) Commissioner on board within 60 days. Thus, for example, Judith Miller of the New York Times reported on March 6, "There were indications today that the Administration would act swiftly to provide Mr. Palladino with a Republican-dominated commission so that he could reconsider the exemption." N.Y. Times, March 6, 1982. And, at every stage of the way, there has been an expectation that somehow, if the Administration's nominee could be confirmed and sworn in by May 15, reconsideration (and presumably a switched vote) would be the result. See, e.g., Environmental Energy Study Conference Weekly Bulletin, May 3, 1982 at C14.

Third, although Commissioner Asselstine has stated that no promises were sought or given in connection with his nomination, he has noted in a response, dated May 10, 1982, to questions from Senator Stafford, Chairman of the Senate Committee on Environment and Public Works, "I was told by one individual [left blank] that the Administration wished to fill the existing vacancy on the Commission as soon as possible, and that one factor was the desire to resolve the DOE exemption request." However brief this reference, it clearly

Lut Commissioner Asselstine on explicit notice of the Administration's interest in obtaining reconsideration in connection with his nomination.

Fourth, and finally, the haste with which the Applicants and the Commission itself appear to be pursuing reconsideration adds to the entire atmosphere of prejudgment. Commissioner Asselstine was confirmed Thursday, May 13. On Friday, May 14, Applicants filed a request for reconsideration. Without even providing Intervenors with a chance to respond, a Commission meeting with respect to that request was apparently scheduled for the afternoon of Monday, May 17, one working day later. And, we understand that Commissioner Asselstine may be sworn in just in time for that meeting. This sequence of events creates the impression of a rapid and unreflective effort to reverse the Commission's prior Section 50.12 decision.

While no single one of the elements just described might be enough, standing alone, to require recusal of Commissioner Asselstine, all the elements taken together inevitably create the impression that the process by which the reconsideration issue reaches the Commission has been designed to achieve a preconceived result. And, it is precisely this impression which the Commission's Code of Conduct is in-

tended to protect against. More particularly, 10 CFR \$0.735-49a provides:

"An employee shall avoid any action, whether or not specifically prohibited by this Part 0, which might result in, or create the appearance of:

(d) Losing complete independence or impartiality;

- (e) Making a Government decision outside of offical channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government."

Under this regulation, quite apart from any actual bias, partiality or loss of independence, recusal of Commissioner

Asselstine is not only appropriate, it is compelled. Only in this way will the appearance of integrity of the Commission's decision making process be fully maintained.

In sum, for all the reasons set forth above, Intervenors submit that Commissioner Asselstine should decline to deal with any matters relating to reconsideration of Applicants' Section 50.12 request.

Respectfully submitted,

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Dated: Washington, D.C. May 17, 1982

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE and MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB, IN SUPPORT OF THEIR MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE were delivered by hand this 17th day of May, 1982 to:

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