POLICY ISSUE
(Notation Vote)

DECEMBER 23, 1993 SECY-93-355

FOR: The Commissioners

FROM: William C. Parler
General Counsel

SUBJECT: REVIEW OF THE REGULATIONS AND PRACTICE GOVERNING CITIZEN PETITIONS UNDER 10 CFR 2.206

PURPOSE:

To provide the staff evaluation of various alternatives for improving the 10 CFR 2.206 process for Commission review.

SUMMARY:

In a January 26, 1993 Staff Requirements Memorandum, the Commission approved the initiation of a review of the Commission's regulations and practice governing the submission of citizen petitions under 10 CFR 2.206. This provision is the primary method for a member of the public to request Commission review of a potential safety problem with an NRC-licensed facility, outside of a licensing or a rulemaking proceeding. The purpose of the review is to ensure that the 2.206 process is as effective, understandable, and as credible as possible. As the first step, the Office of General Counsel held a workshop on July 28, 1993 where knowledgeable representatives of a broad spectrum of interests -- citizen groups, industry, state and federal government, and the NRC staff -- shared their views on the nature and effectiveness of the 2.206 process. We summarized the results of the workshop in SECY-93-258 and in a Commission briefing on September 20, 1993. After further evaluation of the workshop discussion and the written comments submitted on potential improvements to the 2.206 process, we have developed a number of recommendations. These include minor revisions to existing staff procedures in order to improve communication with the petitioner, providing for informal public hearings, and the development of a Commission Manual Chapter and a public information brochure on the 2.206 process.

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SECY NOTE: TO BE MADE PUBLICLY AVAILABLE WHEN THE FINAL SRM IS MADE AVAILABLE.

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BACKGROUND:

The Commission initiated a review of the 2.206 process for a number of reasons. As the primary method for a member of the public to request Commission review of a potential safety problem with an NRC-licensed facility, it is important that the 2.206 process be as effective, understandable, and as credible as possible. Furthermore, there has not been a general re-evaluation of the 2.206 process since this provision was added to the Commission's regulations in 1974. In addition, over the last several years, substantial concerns have been expressed by several citizens groups about the effectiveness and credibility of the process.

The first step in the evaluation of the 2.206 process was the convening of a workshop on July 28, 1993 where representatives of a broad spectrum of interests and the NRC staff shared their views and concerns on the nature and effectiveness of the 2.206 process. The purpose of the workshop was to generate not only productive suggestions for improvement of the 2.206 process, but also to promote a better understanding of the 2.206 process. We submitted a summary of the workshop to the Commission in SECY-93-258 and briefed the Commission on the workshop discussion on September 20, 1993. In the Federal Register Notice announcing the workshop, the Commission also requested public comment on the issues discussed in the NRC staff background paper on the 2.206 process (Attachment A). The comment period closed on August 28, 1993 and several comment letters were submitted from state government, citizens groups, and industry (Attachment B). The workshop discussions and the written comments have formed the basis for our evaluation of the 2.206 process. In addition, we have also addressed the various directives in the Commission's September 29, 1993 Staff Requirements Memorandum (SRM) including criteria to address future reviews, informal meetings with petitioners and other parties, and how the safety issues raised in a petition may be addressed first and then followed by a determination as to whether further action is necessary. In response to Commission requests in the SRM, attached are the Office of Nuclear Reactor Regulation (NRR) procedures for addressing 2.206 petitions (Attachment C), and data on past 2.206 petitions (Attachment D).

The Current Rule

Section 2.206 has been part of the Commission's regulatory framework since the Commission was established in 1975. The section permits any person to file a petition to request that the Commission institute a proceeding to modify, suspend, or revoke a license, or for such action as may be proper. The NRC's normal practice is to treat any request for action against a licensee as a 2.206 petition, provided that a sufficiently specific basis for the request is identified.

The current regulation mandates what is essentially a staff decision on section 2.206 petitions. Public hearings are not required on such petitions, and petitioners do not have any right to participate in the process that leads to the determination whether to grant the petition. In fact, once the petition is filed, there is no requirement in the rule itself for the NRC to have any contact with the petitioner, except to advise whether the petition has been granted or denied.

In reviewing the issues raised in a 2.206 petition, the staff generally relies on its own resources to gather and review information, including, when appropriate, the initiation of engineering reviews by headquarters staff or inspections or investigations by inspectors or investigators operating out of one of NRC regional offices. It may also rely on studies prepared by NRC consultants and, when appropriate, may seek the comment of other Federal agencies, such as the Federal Emergency Management Agency. The licensee usually voluntarily responds to the issues raised by the petition, and the staff may meet with licensee representatives to discuss the issues raised by the petition.[1]

In about 10 percent of all petitions filed in the past with the NRC, regulatory action was taken which, in effect, granted the relief requested in whole or in part. In many instances where the petition was denied, the action requested was already taken before the Director's Decision was issued, effectively making the petition moot. The staff may, in some cases, issue a notice of violation or a civil penalty, rather than acting directly on the license. When a petition is granted, the Director issues an order to the licensee, pursuant to 10 C.F.R. 2.202, or takes other appropriate action.

The bases for the staff's determination on a 2.206 petition are set forth in a formal Director's Decision signed by the Director of the appropriate program office. Decisions are published with reported agency adjudicatory decisions in the NRC issuances. There is no requirement for independent review of the decision within the agency before it is issued, and the petitioner does not have the right to appeal the decision to the Commission, though the Commission has the discretion to review the decision if it so desires.

Perspectives on the 2.206 Process: Petitioner's Interests

Many of the commenters in the petitioners category stated that public participation in regard to nuclear reactors basically stops once the plant is licensed. They noted that no hearing rights are

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[1]The staff does have the discretion to require the licensee to submit additional information under oath or affirmation.

afforded to the public after the plant is licensed and the 2.206 process is the only mechanism available for citizens to initiate a proceeding in regard to an operating plant. However, there is no right to a hearing on a 2.206 petition and discretionary hearing opportunities under 2.206 are extremely rare. In addition, the vast majority of 2.206 petitions are denied; petitioners may not request Commission review of a Staff denial of a 2.206 petition; and judicial review of staff denials is not available. Many commenters noted the incongruity of citizen-initiated participation rights effectively stopping at the time of plant operation because this is precisely when a reactor becomes hazardous.

According to one commenter, the importance of 2.206 as an effective method of public participation in regard to licensed facilities is particularly significant in light of several regulatory trends, including the assumption that the current licensing basis for an operating plant is adequate for purposes of the license renewal rule in 10 CFR Part 54; the trend toward moving items from the plant technical specifications to internal plant documents where they can be changed at will by the licensee under 10 CFR 50.59, and the recent revisions to 10 CFR Part 72 which allow onsite storage of spent fuel in dry storage casks approved under a general license. The 2.206 process becomes the only mechanism for addressing these types of issues. Another commenter noted that in addition to serving as the primary method for the public to raise safety issues at licensed facilities, 2.206 serves an important function as a mechanism for the NRC to learn of potential safety problems.

Many commenters noted that the NRC's record of processing 2.206 petitions has led to a perception by the public that the NRC is unresponsive to such petitions. As one commenter noted, this perception results not merely from the fact these petitions are regularly denied, but also from the method in which petitions are processed prior to their denial. The commenters cited a number of examples of how the existing process promotes the perception that the NRC is unresponsive to 2.206 petitions. For example, according to the commenters, in many instances the only communication that the petitioner receives from NRC is a letter acknowledging the petition and sometime later a decision by the Director denying the petition. In the meantime, there are often extensive communications between the NRC staff and the licensee on the issues raised in the petition but the petitioner is not included in these discussions and is, therefore, not in a position to contribute his or her views on the representations made by the licensee to the NRC staff. In some cases, petitioners were not provided with a copy of the licensee response to the petition. Consequently, these commenters believe that the public perception is that the 2.206 evaluation is conducted behind "closed doors" with the licensee. Other deficiencies noted by these commenters are cases where the NRC staff has actively pursued the resolution of safety issues raised in a petition even though the petition had been denied, in

effect belying the validity of the denial. In at least one of these cases where the NRC actively pursued resolution of the safety issues after the petition was denied, the petitioner was not notified of ongoing activities related to the issues raised in the petition, and was only able to obtain information related to the ongoing evaluation through the Freedom of Information Act and the Public Document Room.

One commenter noted, "[w]hile the NRC should consider holding an adjudicatory hearing on 2.206 petitions, even a mechanism that would allow a less formal type of hearing would be an improvement over the present means of processing such petitions." Another commenter stated that even if the 2.206 process was improved to provide more information to the petitioner, the process will still be inadequate if the petitioner is not given the opportunity to substantively participate in the process through some type of hearing where the petitioner can present his or her concerns personally to the NRC staff or the Commission.

Several commenters raised the perception that the evaluation of 2.206 petitions appears to occur in a "black box" because there are no criteria to guide the evaluation process. A number of commenters suggested that these criteria should, at a minimum, include compliance with the NRC regulations. They noted, correctly, that noncompliance with the regulations is not now a criterion for automatically granting a 2.206 petition. The commenters believed that the criteria applied to the original licensing of a plant, i.e., compliance with all applicable NRC regulations is necessary for licensing, should also apply to the continued operation of the plant. Consequently, these commenters maintained that if the violations of the regulations alleged in the petition are found to be true, then the petition should automatically be granted and appropriate enforcement action taken.

According to several commenters, another factor that undermines public confidence in the 2.206 process is the lack of independence in the review process. They criticized the current process because it often results in the petition being reviewed by the same staff who performed the original safety evaluation that is at issue. One commenter stated that many 2.206 petitions allege, at least implicitly, and in some cases explicitly, that the staff has failed to properly exercise its responsibilities. In their view, the staff response is predictably defensive of the status quo. These commenters noted that you can't expect the staff to be objective in these circumstances and that the resulting public perception is that the review is biased and that the NRC staff is rubber-stamping a decision that has already been reached. As one commenter noted "[e]ven giving full marks to the professional integrity of the NRC staff, there is a natural bias for people who have reached a conclusion to be drawn to the same result when they have confidence in their original judgement." There were a number of suggestions on who might best conduct this type of internal review, including

the Office of the Inspector General, the Atomic safety and Licensing Board Panel, the Office of Commission Appellate Adjudication, or a new special review group established for this purpose.

Many commenters believed that judicial review of the denial of 2.206 petitions is necessary to ensure the accountability of Commission decisionmaking on 2.206 petitions. Furthermore, they argued that the NRC should welcome the inclusion of judicial review in the 2.206 process as an opportunity to restore its accountability. The commenters posed the question of why the NRC should be wary of judicial review if we have confidence in our decisions. Other commenters in the petitioner category did not believe that judicial review would be a very constructive change in light of the deference that courts give to the technical expertise of the agencies and the high cost associated with judicial review.

An issue raised by one commenter concerned the NRC current practice of labeling correspondence, including postcards, as a 2.206 petition when no mention is made of 2.206 in that correspondence. This commenter's concern is that petitioners who do a thorough job in researching and documenting their 2.206 petitions will be prejudiced by the NRC's prior consideration as a 2.206 petition of general correspondence on the same issues which may be poorly researched and documented. On a related point, the commenter also objected to the consolidation of all 2.206 petitions on a particular issue without the consent of all petitioners involved. The commenter's concern is that consolidation of well-prepared petition with less adequate petitions can be damaging to the case of the well-prepared petition.

Perspectives on the 2.206 Process: Licensee Interests

Other commenters, representing the nuclear industry, believed that the 2.206 process was functioning reasonably well and that the NRC review of petitions has been thorough and well-reasoned. One commenter stated that no information has been presented from which the Commission could reasonably conclude that safety issues raised by petitions are not comprehensively addressed under the current 2.206 process. In addition, the industry representatives believed that any potential revisions to the 2.206 process must take into account the increased burden on NRC and licensee resources that might be involved. Industry representatives were concerned that revisions might result in the "overproceduralization" of the 2.206 process which will increase licensee and NRC costs without a commensurate increase in safety. In their view, such "overproceduralization" could actually have a negative affect on safety by unnecessarily diverting scarce NRC and licensee resources from more important safety issues. They also noted that 2.206 petitions were only one of several ways that safety issues are raised and evaluated by the NRC and that the NRC must have the

discretion to direct its resources to where they will have the most impact.

The industry representatives stated that the frequently cited fact that very few 2.206 petitions are granted is not a fair indicator of either the amount of effort devoted to evaluating a petition or of how well the underlying safety issues are being addressed. Rather, the high number of petitions denied is evidence of the fact that the principal mechanisms for protecting health and safety have functioned effectively. According to industry commenters, the 2.206 process is not designed to be the primary method by which the NRC is made aware of potential safety issues. Licensee operations, surveillance and review programs, NRC inspections, employee notification programs, the NRC Allegation Management System, and other mechanisms all function effectively to alert the NRC to potential safety problems. Therefore, according to the industry commenters, it is not surprising that in the vast majority of cases, the safety concerns identified by the public have been known to the NRC when the petition was submitted.

The industry representatives agreed that, to the extent that there are communication problems in the current process, then the Commission should act to correct these deficiencies. Failure to actively involve the petitioner creates a negative perception of the entire process. These commenters emphasized that the 2.206 process should be open, transparent, and "user-friendly." They supported any NRC actions to make the 2.206 process more understandable to the public and to achieve better communication between the NRC and the petitioner. The industry commenters recommended that petitioners should be provided with a copy of the licensee's response to the petition, should be given an opportunity to respond to the licensee's response, should be provided with the opportunity to participate in NRC-licensee meetings on the issues, should be routinely kept informed of the status of the staff review, and should know who on the NRC staff to contact for information on the petition. One commenter stressed the importance of NRC clearly understanding the requested action and the petitioner's supporting grounds, and if necessary, the NRC should ask the petitioner clarifying questions or meet with petitioner as appropriate. These commenters understood that the current NRC process may already provide for these types of involvement, but believed the NRC should take a more affirmative attitude in ensuring that the petitioner is kept informed and involved. One industry commenter also noted that a corollary to keeping the petitioner better informed is to assure that the licensee is fully informed regarding the petition and its status.

The industry commenters opposed additional independent review of Director's decisions on 2.206 decisions. One commenter emphasized that "no credible evidence of agency bias exists." This commenter believed that complaints of bias stem from a basic disagreement with the fact that the Atomic Energy Act permits power reactor

operations and that no amount of independent review will be able to assuage this disagreement. Other commenters noted that any independent review would lack the level of technical expertise possessed by the NRC staff who conducted the initial review, and therefore, would not add any further technical insights to the process. They expressed concern over the lack of adequate staff resources and expertise to conduct a separate independent review, as well as the potential for diversion of staff resources away from other, perhaps more important, safety issues. Several industry participants pointed out that staff decisions on 2.206 petitions were already subject to a formal independent review by the Commission. They noted that an informal review by the Office of General Counsel and the Commissioners' staff was also conducted. Furthermore, if there is a legitimate question of bad faith on the part of the NRC staff involved, a vehicle already exists through the Office of the Inspector General to investigate and review the decision.

An industry representative cautioned that 2.206 is enforcement oriented and that the NRC needs discretion as to how it employs its enforcement resources. According to this commenter, an Atomic Safety and Licensing Board, or other organizations proposed to conduct the independent review, would not be appropriate reviewers of that determination. One industry commenter, although opposed to independent review, saw the alternative of independent review by an Atomic and Safety and Licensing Board or the Office of Commission Appellate Adjudication as a much less attractive alternative than some type of independent technical review. This commenter believes that review by a Licensing Board would transform the process from a technical resolution of safety concerns into a legalistic process that would have little likelihood of contributing significantly to the soundness of the ultimate technical decision. Other commenters noted that a Licensing Board would not be an appropriate forum to "second guess" enforcement decisions which involve the weighing of many factors including resource allocation issues.

The industry was strongly opposed to the judicial reviewability of 2.206 petitions. The commenters stressed that the courts have held that enforcement decisions of Federal agencies, except in limited circumstances, are within the agency's discretion, and not subject to judicial review. Such holdings are soundly based on the fact that in making enforcement decisions, an agency must have the discretion to weigh such factors as whether a violation has occurred, the safety significance of the particular violation, actions that have already been taken in regard to the violation, the priority of the issue vis-a-vis other safety issues, and the availability of resources. According to the industry, these discretionary decisions within the expertise of the agency are not appropriate subjects for judicial review. Industry commenters also stated that the NRC's 2.206 decisions were equally well-supported and reasoned both before and after the Heckler v. Cheney decision. There is no credible evidence that judicial review will improve

upon the disposition of the issues raised in a 2.206 petition, while it will involve added costs and time.

Other Perspectives

A commenter representing a local community pro-nuclear citizens group stated that there is a "total lack of representation" by the segment of the population who support the licensee yet are often times negatively affected by decisions made by the NRC in response to 2.206 petitions. This commenter believed that this lack of representation must be redressed in any revision of the 2.206 process. Furthermore, the NRC should publish any petitions, licensee responses, or NRC actions in the local media. The NRC should request public input on these issues from those who are directly affected by the licensed facility.

Experience of Other Agencies

In order to determine whether any useful lessons could be learned from the experience of other agencies, the staff looked at several analogies to the 2.206 process from other agencies, including citizens suit provisions in environmental statutes such as the Clean Air Act (Attachment E). In regard to the latter, most, if not all, citizen suits brought under these statutes are confined to very specific and narrow violations, for example, noncompliance with an emission limit; whereas the relief sought in most 2.206 petitions is broader and more subjective, involving the evaluation of a particular safety issue. Unlike the 2.206 process, these other statutes allow a member of the public to bring suit directly against the alleged polluter. However, suits can also be brought against the Administrator of the EPA to force enforcement action against the alleged polluter. In these latter cases, the EPA has the same type of enforcement discretion that the NRC has and that decisions declining enforcement action are judicially unreviewable. We have also considered the practice of other Federal agencies that may have procedures similar to the Commission's 2.206 procedures (Attachment F). The practice of other agencies was not directly analogous to the Commission's 2.206 process. However, we believe that the Commission's existing procedures, along with the recommendations contained in this Paper, will comport well with the public participation aspects of the practice of other agencies. We would note that in one case, judicial review is specifically provided by statute of the refusal of the Administrator of the Environmental Protection Agency (EPA) to initiate a formal proceeding to cancel a pesticide registration.

STAFF ANALYSIS AND RECOMMENDATIONS

After evaluating the public comments and the Commission concerns expressed at the September 20, 1993 Commission briefing, we have developed a number of recommendations for Commission consideration. We also believe that it would be appropriate to incorporate the

recommendations ultimately approved by the Commission in a Management Directive on the 2.206 process. We also recommend that the Office of Public Affairs develop an information brochure on the 2.206 process. The Management Directive and the information brochure are discussed later in this Paper.

1. Involvement of the petitioner in the 2.206 process

Commenters representing both petitioner interests and licensee interests supported improved communication with the petitioner. This would take the form of--

- designating a staff contact for the petition;
- providing petitioner with a copy of the licensee's response to the petition;
- providing petitioner with adequate notice and an opportunity to participate in NRC-licensee meetings on the petition;
- routinely being kept informed of the status of the petition; and
- providing petitioner with copies of all relevant documents.

A recent revision to NRR Office Letter 600, Revision 3, "Procedures for Handling Requests Under 10 CFR 2.206 (Director's Decisions)", August 6, 1993 (Attachment C), establishes the NRR procedures for ensuring prompt actions for addressing 2.206 petitions. Letter 600 explicitly addresses all of the above points, with the exception of providing petitioners with an opportunity to participate in NRC-licensee meetings on the petition. This opportunity is already provided under the Commission's Open Meetings Policy and it was simply not referenced in the NRR procedures. The staff recommends that this be explicitly added to Letter 600. The 2.206 procedures of the Office of Nuclear Materials Safety and Safeguards (NMSS) also address all of the above points except for the "meetings" issue. As with the NRR procedures, we recommend that the essence of the Open Meetings policy be referenced in the NMSS procedures.

2. Informal Public Hearings

As discussed above, many commenters representing petitioner interests recommended that the NRC provide a public meeting opportunity for the petitioner to discuss the substance of the petition. As noted by one commenter, "[w]hile the NRC should consider holding an adjudicatory hearing on 2.206 petitions, even a mechanism that would allow a less formal type of hearing would be an improvement over the present means of processing such petitions." Although the staff does not believe that a public meeting would be necessary or feasible for most 2.206 petitions, the staff does believe that an informal public hearing would be an

improvement to the existing process for certain types of petitions. It would not only be a source of potentially valuable information for the NRC evaluation of the petition, but would also afford the petitioner more substantive involvement in the process.

The criteria for selecting petitions for the informal public hearing process would be focussed on the potential hazard presented by the alleged licensee deficiency and the extent to which the alleged deficiency had been previously evaluated by the NRC staff. Accordingly, an informal public hearing would be offered when the petition presents new information on, or a new approach for evaluating, a significant safety issue. This would include petitions that raise a significant safety issue that has not been previously evaluated by the staff, as well as petitions which present new information on, or a new approach to, a significant safety issue evaluated previously. Allowing for a "new approach" to an issue evaluated previously is meant to ensure that "new information" is not interpreted too literally to exclude petitions which, although not providing new technical information per se, do suggest a new way of looking at the particular safety issue or raise significant questions about the prior characterization of a safety problem. The criteria would also be applied to petitions that allege violations of NRC requirements. In these cases, the informal hearing would focus on potential remedies for the violation consistent with the Commission's enforcement policy, or on any implications that the violation may have for other safety issues at the facility, that the NRC should consider. Any need for immediate action on a petition would be addressed by the staff before the informal hearing process was initiated.

Using the procedures for the ranking of NRR review tasks as an illustration (Attachment G), many safety concerns in the Priority 1 and 2 categories, some in Category 3, and none in Category 4, could qualify for the informal hearing from the perspective of safety significance. The data developed in response to the SRM (Attachment D) indicate that the "new information" aspect of the criteria should limit the opportunity for informal hearings to a manageable number.

The procedures for conducting the informal public hearing would be set forth in the proposed Management Directive on the 2.206 process. The procedures should include provisions for meeting facilitation; a transcript of the meeting; presentations by the petitioner and the licensee; and public comment. It is anticipated that the informal public hearing would be held after the licensee has responded to the petition but before the petitioner submits a response, if any, to the licensee's response. In keeping with the recommendation noted earlier on notifying the local community of petitions concerning facilities in that community, the staff will directly notify local government officials of the petition and the proposed informal public hearing for any petition that meets the above criteria. In cases where the petitioner resides in the

vicinity of the site, the staff should attempt to hold the informal public hearing in the region or community where the facility is located. Although, the informal public hearing will only be convened for the most significant petitions, the existing staff 2.206 procedures also provide for other types of personal interactions with a petitioner and the staff should be encouraged to engage in such interactions when appropriate.

3. Independent Review

One common theme that was strongly emphasized by all the commenters representing petitioner interests was the need to address the perceived bias of the NRC staff who evaluate 2.206 petitions. According to these commenters, the perceived bias, and its resulting effect on the credibility of the 2.206 process, could be alleviated by instituting an independent internal review of 2.206 evaluations. Contrary to those views, the industry commenters did not believe that there is any evidence of bias in the NRC 2.206 evaluations. After evaluating the comments and the staff practice in regard to 2.206 petitions, we do not believe there is any bias in the review of 2.206 petitions. Accordingly, we do not believe that an independent review of a Director's Decision on a 2.206 petition would improve the technical accuracy of the staff response. However, we are also aware of the importance of ensuring the objective review of 2.206 petitions, and the importance of the public perception issue raised by the commenters, particularly in regard to petitions that raise significant safety issues. For all petitions where there has been an informal public hearing under the criteria discussed above, the appropriate Office Director must take a hard look at the information presented in the informal public hearing, and personally assure himself or herself that the proposed staff resolution is satisfactory. In addition, we recommend that the staff notify the Commission of all petitions that meet the criteria for an informal public hearing, both at the time that this determination is initially made and at the time that the Director's Decision is issued. The Office Director, on any petition, should be cognizant of the objectivity issue when assigning personnel to review the petition.

4. Shifting the focus of 2.206 from enforcement to evaluation of the underlying safety issue

This topic concerns the assertion that the 2.206 process might be more constructive and more credible if the focus were on the resolution of the underlying safety issue rather than on a specific enforcement action. Some petitioner commenters believed that if there was less focus on the specific enforcement action, then the process would be less adversarial and would result in less polarization between the petitioner and the NRC staff and the licensee. In these commenters view, this would result in a more constructive process. However, industry commenters, as well as some petitioner commenters disagreed, maintaining that the focus

should be on enforcement rather than on, as one commenter put it, "adding another issue to the Unresolved Safety Issue list." An industry commenter noted that if you're seeking a change in a facility, then the focus has to be on enforcement.

After consideration of these comments, the staff believes that the value of 2.206 provision is the potential it offers to the public to request enforcement action against a licensee, as opposed to simply raising a safety issue. As one petitioner commenter stated, petitioners want to know that there is an end point to the process and that the evaluation of the safety issue will not go into some type of regulatory "limbo." In addition, there are other mechanisms, e.g., petitions for rulemaking or letters to the staff, to raise safety issues.

We believe, however, that this issue has an underlying validity which should be addressed in a number of ways. First, the new criteria for determining when an informal public hearing and independent review will occur are focussed on the underlying safety issues. Although the informal public hearing, and the staff evaluation, will also address the appropriate enforcement remedy, the criteria will have the effect of focusing the staff's attention, in these more significant cases, on the underlying safety issue when evaluating any petition. Second, the staff should continue to endeavor to fully explain the rationale for its decision on 2.206 petitions, including what actions the staff has taken to evaluate and resolve the underlying safety issue and why this particular action is appropriate under the circumstances. Third, the staff should continue the practice of partially granting a petition in cases where there are legitimate safety deficiencies raised in the petition but the enforcement remedy requested is not appropriate.

5. Judicial review

The staff does not recommend that the Commission institute any revision to the 2.206 process that would alter the existing law on the judicial reviewability of enforcement decisions. It is important that the Commission have the discretion, in making enforcement decisions, to determine the most effective use of its resources. In evaluating an issue raised by a 2.206 petition, the NRC has many alternatives available to it. It is appropriate for the NRC to determine what alternative to follow based on a number of considerations, including prior NRC and licensee actions on the issue, the merits of the allegations contained in the petition, the relative safety significance of the concerns or noncompliances raised in the petition, the most appropriate means of resolving those concerns, and the most efficient use of NRC resources. These decisions involve a combination of judgment about the facts as well as agency expertise and experience. As one final note on judicial review, the additional procedures recommended above for convening an informal public hearing on certain petitions would raise the

possibility of judicial review on the issue of failure to follow the procedures.

6. Treatment of correspondence as 2.206 petitions

In reference to the public comments discussed previously on the potential problems associated with designating general correspondence as 2.206 petitions, we believe that the current staff practice will mitigate these problems. Under the current practice, the staff is taking a harder look to determine whether incoming correspondence provides sufficient information to be treated as a 2.206 petition.

7. Management Directive and Citizens' Information Brochure

In order to provide a uniform and comprehensive statement of the procedures governing the 2.206 process, we recommend that a Management Directive be developed on the 2.206 process. The Management Directive would set forth the procedures governing the 2.206 process, including any of the recommendations contained herein that the Commission chooses to adopt. For the most part, staff practice and procedures in the 2.206 area are not readily available to the general public or to most petitioners. The Management Directive, publicly available, would alleviate this problem. In addition to the Manual Chapter, we also recommend that the Office of Public Affairs develop a citizens information brochure on the 2.206 process. The brochure would explain the objectives of the process, its importance to the NRC, and how the 2.206 process works.

8. Tracking of 2.206 data

The Office of the General Counsel provides legal counselling to the staff in responding to requests made pursuant to 10 CFR 2.206. In conjunction with this role, OGC prepares and updates a monthly status report regarding 2.206 petitions, as well as maintains a historical listing of 2.206 petitions. We believe it is more appropriate for the individual staff offices to take responsibility for the monthly reports and the historical compilation. These responsibilities are administrative in nature and the source of the data is the staff office rather than OGC.

RESOURCES:

On the basis of an estimated four petitions each year that would meet the new criteria for convening an informal public meeting, we would anticipate approximately an additional .25 FTE for the informal public hearing procedure.

COORDINATION:

This Paper has been coordinated with the Executive Director for Operations.

RECOMMENDATION:

That the Commission:

1. Approve the recommendations to initiate an informal public hearing of 2.206 petitions that meet the criteria set forth on page 11 of this Paper;

2. Approve the development of a Management Directive and citizens information brochure on the 2.206 process;

3. Approve the recommendation to assign the responsibilities for preparation of the monthly status reports on 2.206 petitions to the individual program offices.

Note:

1. Proposed legislation that would provide for judicial review of the Commission's 2.206 petitions is currently being considered by the Congress. If the legislation is enacted, the Commission may need to reevaluate any revisions that it makes to the 2.206 process based on the recommendations contained in this Paper.

William C. Parler 12/23/93
General Counsel

Attachments:

A. Background Paper on the 2.206 process
B. Public comments
C. NRR 2.206 procedures
D. 2.206 petition data
E. Memorandum on citizen suit provisions
F. Memorandum on the petition processes of other agencies
G. Memorandum on Priority Determination for NRR Review Efforts

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Monday, January 10, 1994.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT January 3, 1994, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATTACHMENT A

A

REVIEW OF THE § 2.206 PETITION PROCESS

BACKGROUND DISCUSSION PAPER

U.S. NUCLEAR REGULATORY COMMISSION
June '993

INTRODUCTION

The Commission has approved the initiation of a review of its regulations and practice governing petitions under 10 CFR § 2.206. The first step in this evaluation process will be a public workshop where knowledgeable affected interests will share their advice and recommendations concerning the § 2.206 process with the NRC staff. In addition to providing an opportunity for representatives of affected interests to comment on the § 2.206 process, the workshop will also provide an opportunity for participants from citizens' groups, industry, and government to exchange information on the objectives of the § 2.206 process, its effectiveness, and what, if any, improvements could be made to the process. The Commission believes that, whatever the ultimate outcome of the Commission's evaluation of the § 2.206 process, this educational aspect of the workshop will be valuable for all participants in terms of fostering a better understanding the § 2.206 process. The purpose of this paper is to outline the scope of the review, to provide background information on the § 2.206 process, and to identify several broad categories of potential improvements for discussion at the workshop.

The § 2.206 petition is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC licensed facility, outside of a licensing or

rulemaking proceeding[1]. The petitioner need only ask in writing that some action be taken against an NRC licensee and identify the facts that the petitioner believes provide sufficient grounds for taking the proposed action. This action triggers an evaluation by the appropriate program office which concludes with a written decision by the Office Director which addresses the issues raised in the petition.

The NRC has not re-examined the process in any systematic way since this provision was added to the Commission's regulations in 1974. In addition, this process has been the subject of longstanding criticism by citizens' groups and by some members of Congress, primarily because most §2.206 petitions have been denied in whole or in part in the past. Therefore, the Commission believes that it is time to evaluate the § 2.206 process and to determine whether any changes should be made to that process. This evaluation is also consistent with current Commission efforts to enhance public participation in the Commission's decisionmaking process. The purpose of this review is to ensure that the § 2.206 process is an effective, equitable, and credible mechanism for the public to prompt Commission investigation and resolution of potential health and safety problems. In addition, given the reality of shrinking

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[1] A less formal process is also available for any person to bring an allegation of wrongdoing associated with NRC licensed activities to be investigated by the NRC. The Atomic Energy Act includes no provision for "citizen suits" whereby an interested person or group may bring suit directly against a licensee for violations of the Act or NRC rules or orders. (See, e.g., Section 304 of the Clean Air Act, 42 U.S.C. 7604).

rather than expanding resources, the Commission believes that the evaluation of the § 2.206 process must consider how to achieve a more effective § 2.206 process with equal or fewer resources.

Section 2.206 was added to the Commission's regulations in 1974 to specify the procedures to be used by members of the public to request action against an NRC licensee. The broad focus of the Commission's review of the § 2.206 process is to determine whether § 2.206 has proven to be an effective mechanism, for not only bringing potential safety problems to the Commission's attention, but also ensuring that the Commission has been responsive in evaluating any such potential safety problems. The review of the § 2.206 process will address such questions as: What is the objective of the § 2.206 process? Is it meeting this objective? How can the § 2.206 process be improved? Is this the most effective mechanism to bring safety problems to the Commission's attention? What other mechanisms exist, such as, for example, the allegation management system, for bringing safety problems to the Commission's attention? How are these different from § 2.206 both in objective and procedure? The workshop will not only focus on these broad issues, but will specifically address the procedures that the Commission uses to evaluate § 2.206 petitions. The staff has identified three broad areas of potential improvement to the § 2.206 process which are discussed later in this paper: 1. Increasing interaction with the petitioner; 2. Focussing on resolution of safety issues rather than on requesting enforcement

action; and 3. Categorizing petitions according to importance of issues raised.

II. Description of the § 2.206 Process

Any person may file a petition under 10 CFR § 2.206 to request that the Commission institute a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. This process provides the public with a mechanism to raise issues of concern, which must then be reviewed and addressed by the Commission's staff. Except as specifically provided in the regulations[2], each § 2.206 petition is reviewed by the appropriate major program Office Director, who must either initiate the requested proceeding or issue a formal Director's Decision providing a specific disposition of all issues raised in the petition within a "reasonable time." If the Director finds that the petition raises a substantial safety question, an enforcement order will be issued or other appropriate action taken, within the Director's discretion.

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[2] For instance, Part 52 at section 52.103(f) provides that a petition to modify the terms and conditions of the combined license will be processed as a § 2.206 petition. However, these petitions shall be considered by the Commission itself. The Commission must determine whether any immediate action is required prior to commencement of operation under the license. The scope of this workshop discussion is limited to the usual enforcement-type § 2.206 petitions, and specifically excludes § 2.206 petitions pursuant to Part 52 combined licenses.

In reviewing the issues raised in a § 2.206 petition, the staff generally relies on its own resources to gather and review information, including, when appropriate, the initiation of engineering reviews by headquarters staff or inspections by inspectors operating out of one of the NRC regional offices. Allegations of wrongdoing concerning the conduct of NRC-licensed activities which are contained in a § 2.206 petition may be referred to the NRC Office of Investigation, or, if the allegation suggests wrongdoing by a Commission employee, to the Office of the Inspector General, for further inquiry. The staff also may rely on studies prepared by NRC consultants and, for emergency planning issues, may refer the petition to the Federal Emergency Management Agency for its review and comment.

The licensee usually voluntarily responds in writing to the issues in the petition. Also, at the staff's discretion, it may require the licensee to submit under oath or affirmation, additional information in response to the petition. In many instances, the staff's review may not involve new engineering work or inspection; rather, the primary job of the staff may be to explain why results of earlier technical reviews or inspections do not warrant further agency action.

An important purpose of § 2.206 is to provide a simple method for any member of the public to bring facts or issues to the NRC's attention for evaluation. The petitioner bears a minimal burden in

filing a request under § 2.206. The petitioner need only ask that some action be taken against a licensee and identify the facts that the petitioner believes provide sufficient grounds for taking the proposed action. No showing of legal standing or interest is required. It is not even required that the petition mention § 2.206. The NRC's normal practice is to treat a request for action against a licensee as a § 2.206 petition, provided only that it identifies a sufficiently specific basis for the request.

The bases for the staff's determination on each § 2.206 petition are set forth in a formal Director's Decision signed by the Director of the appropriate program office. Decisions are published with reported agency adjudicatory decisions in the NRC Issuances although the Director's Decision are not adjudicatory in nature.

The filing of a § 2.206 petition does not, by itself, initiate a hearing, and § 2.206 petitions have resulted in hearings only rarely. If an order is issued as a result of a § 2.206 petition, it may trigger an agency proceeding in which the petitioner may intervene, although the intervention is allowed on a limited basis, within the scope of issues defined by the Commission. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). However, a formal hearing will usually result only when the licensee demands a hearing to challenge the proposed order. Also, in general, § 2.206 petitions may not be used to relitigate an issue that has already been

decided or to avoid an existing forum, such as a licensing proceeding, in which the issue is being or is about to be litigated. Consequently, some issues raised in § 2.206 petitions have been addressed in hearings associated with other NRC proceedings.

When a petition is granted, the Director may also issue an order to modify, suspend, or revoke a license pursuant to the NRC's rules in 10 CFR § 2.202. Not all actions granting a petition will necessarily require the issuance of an order. For example, without issuing an order, the staff may issue a notice of violation, or a civil penalty, or may obtain a licensee's agreement either not to restart its facility pending completion of certain safety reviews or to take other appropriate measures to correct a problem that has been cited in the § 2.206 petition.

A review of the record shows that in about 10% of the more than 300 petitions that have been filed with the NRC, regulatory action was taken which, in effect, granted, in whole or in part, the relief requested. The actions taken have included issuance of a Notice of Violation and Proposed Imposition of Civil Penalty, orders modifying, suspending or revoking licenses, and the initiation of further non-routine NRC inquiries into the safety issues raised in the petition. In addition, in many instances where the petition was denied, the action requested had already otherwise been taken, and thus the § 2.206 petition was effectively mooted.

Although no formal appeal of a denial of a § 2.206 petition is allowed under the rule, such denial decisions are subject to the discretionary review by the full Commission. If, after considering the Director's Decision, the Commission does not decide to take review of the Decision within 25 days, the Decision becomes the final decision of the agency. This review authority has been rarely exercised.

III. Areas of Opportunity to Enhance Participation in the § 2.206 Process

A significant concern with the § 2.206 petition process from the view of the participating public is that the majority of these petitions are denied, usually without any further input from the petitioner other than the original written petition. The NRC staff has found that, of the more than 300 petitions which have been filed, approximately 10% have achieved, in whole or in part, the objective which the petitioner sought. However even in many of these cases, the petition is at least partially denied. Therefore, the public perception may be that these petitions are almost automatically denied.

When a petitioner submits a petition, the NRC issues an acknowledgement letter and a Federal Register notice from the appropriate program Office Director. These documents are very often the only communication the petitioner receives from the NRC

until the date that the Director's Decision is issued. That may be a fairly long time period, depending on the issues raised in the petition. However, the Director's Decision itself will often recount extensive interactions between the NRC staff and the licensee in order to resolve the issues. A possible appearance of this practice may be that while there is little opportunity for the petitioner to participate in the resolution of the issues the petitioner has raised, the licensee has a much greater opportunity to become involved and influence the decision process. In fact, often by the time of the issuance of the Director's Decision, after interactions with the NRC staff, the licensee has taken measures to correct the problems noted in the petition and the NRC has evaluated the licensee action as acceptable. These actions are treated as grounds to deny the § 2.206 petition as moot and have the effect of avoiding initiation of formal enforcement proceedings.

On the other hand, from the point of view of the NRC staff, a disproportionate amount of time and resources are spent coordinating decisions on § 2.206 petitions. Time spent on § 2.206 petitions must be taken away from other direct regulatory responsibilities. Very often the facts alleged in a § 2.206 petition are gleaned from NRC documents, and are thus well known to the staff, and have already been or are being resolved in the normal course of regulatory interaction between the NRC and the licensee.

The goal in considering possible changes to the § 2.206 process would be to produce improvements in the opportunities for petitioner's participation, without adding significantly to existing resource burdens on either staff or petitioners, and with the possibility of reducing resource requirements by more efficient allocation. Some of the changes discussed below may require changes to the regulation, while others may be accomplished by directing internal staff practice and procedure:

1. Increasing interaction with the petitioner. One option involving only staff practices would be to implement a variety of internal staff procedures to enhance interactions with petitioners. Some of these practices are carried out currently to some extent, but these procedures could be made an explicit and mandatory part of the procedure for handling § 2.206 petitions.

One such example would be informal inquiries to clarify matters raised in the petition and the petitioner's concerns. This effort might serve also to focus or narrow the issues in question.

In appropriate cases, increased consideration could be given to requiring the licensee to respond under oath or affirmation (pursuant to a staff request under 10 CFR § 50.54(f)) to issues raised in the petition. The petitioner would be provided a copy of the licensees response and would be allowed to submit comments on

the response. This would also conserve NRC staff time and help to focus the issues of concern.

The petitioner could be put on the service list for all communications with the licensee regarding issues raised in the petition. In addition, the petitioner could be permitted to attend NRC staff meetings with the licensee regarding these issues and these meetings could be held in the area where the licensee is located. The petitioner could also be permitted to respond to any other submission of information on the issue from the licensee. Some of these measures have already been implemented to some extent, however, the practice could be made explicit.

Informal public discussions could be held on significant issues upon a determination that the scope of the issue(s) would be appropriate for broader public input.

2. Focussing on resolution of safety issues rather than on requested enforcement action. Another option would involve simply a change in approach to the resolution of issues raised in the petition. Although a petition under § 2.206 is phrased in terms of requesting a particular action from the Commission. i.e., to "modify, suspend, or revoke a license, or for such other action as may be proper", the underlying significance of the § 2.206 petition is to bring issues of potential health and safety impact to the attention of the Commission. Therefore, if a new issue of some

importance has been raised, and the staff decides that it should make additional inquiries, inspections, or investigations, the petition could be granted with the actual outcome of the additional efforts left open. This treatment would acknowledge the legitimacy of the petitioner's concerns.

A variation on this approach would involve a change to the rule in § 2.206 which would allow petitions that the Commission consider a safety issue or issues, alleging violation of a Commission rule or policy, rather than requesting a specific enforcement action (i.e. to modify, suspend, or revoke a license). This change of the focus of the rule would explicitly recognize and implement an important purpose of the § 2.206 petition, which is to bring alleged facts and concerns to the Commission's attention for further evaluation. It would de-emphasize the need to request a specific enforcement action.

3. Categorizing petitions and allocating more resources according to importance of issues raised. An option to allocate more effectively the limited existing amount of staff time and resources on § 2.206 petitions would be to establish internal criteria for determining the level of effort and the types of procedures to be used on each petition. One possible set of criteria would divide § 2.206 petitions into three categories:

In the first category would be § 2.206 petitions which merely raise issues and cite information which has already been evaluated by the NRC staff, without adding any new information or new issues. Some § 2.206 petitions merely incorporate publicly available NRC documents, such as inspection reports, and, without introducing any new information or issues or without arguing why previous decisions should be re-evaluated, request a more severe enforcement action. These petitions would be handled in the Director's Decision simply by confirming, and if appropriate, restating the staff's pre-existing evaluation of the issues.

At the other extreme would be a category of petitions which raise large significant unresolved generic issues affecting one or more licensees. An example of this type of petition involves the Thermo Lag issue. In this category, a larger scale effort could be expended, involving, as appropriate, solicitation of public comments, public workshops, Commission meetings, etc. In appropriate cases, a § 2.206 petition could be treated as a petition for rulemaking.

In the middle range would be a category of petition which raises a significant issue or issues with regard to a specific licensee. The approach on this category of petitions would be substantially similar to that used on most petitions now, involving a systematic resolution of all issues raised by the petition, allowing appropriate participation by the petitioner.

For the category of petitions which the Commission has determined raise the most significant issues, some consideration could be given to providing more explicitly some type of internal review by Commission staff of the Director's Decision. Section § 2.206 could be amended by rulemaking to incorporate some type of review within the NRC of the Director's Decision which would provide a solution for the petitioners' concern that § 2.206 petitions are reviewed only by the same NRC staff which may have already evaluated the information in the course of other regulatory responsibilities. For instance, as an example, a special internal staff group could be established to perform a review of the denial of a § 2.206 petition upon petition for review.

ATTACHMENT B

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August 26, 1993

Samuel Chilk
Secretary of the Commission
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Attention: Docketing and Services Branch

Dear Mr. Chilk:

I appreciate the opportunity to comment on the Nuclear Regulatory Commission's ("NRC") background discussion paper on the Review of the §2.206 Petition Process. I agree that it is appropriate for the NRC to reevaluate the process and its effectiveness. As the primary formal method for members of the public to request NRC review of potential safety problems at licensed facilities, the process serves two important purposes. First, it provides a means for the NRC to learn of potential safety problems. In addition, it serves as the primary formal mechanism for members of the public to raise concerns about specific safety issues at nuclear facilities. The criticism alluded to at page one of the background paper is primarily focused on the latter function of the §2.206 petition process.

In general, the NRC's record of processing §2.206 petitions has led to a perception by the public that the NRC is unresponsive to such petitions. The background paper at page 2 implies that this perception is engendered by the fact that only one out of ten petitions filed with the NRC is granted in whole or in part. Background paper p 8. However, the perception that the NRC is unresponsive to §2.206 petitions springs not merely from the fact that such petitions are regularly denied, but also from the method in which petitions are processed prior to their denial.

The background paper is correct in noting at pages 8-9 that in many, if not most, instances the only communications that a petitioner receives from the NRC is a letter acknowledging receipt of the petition along with a copy of the Federal Register notice to that effect and, sometime later, a decision by the Director denying the petition. In the meantime, there are often extensive communications between the NRC staff and the licensee on issues raised in the petition. Background paper p. 9. The petitioner is not privy to such interactions and is, therefore, not in a position to contribute his/her views on the representations made by the licensee to the NRC staff.

The one-sided interaction between the NRC staff and licensee contributes greatly to the perception that the NRC is unresponsive to public concerns. Certainly, instituting modifications in the process such as putting the petitioner on the service list, allowing the petitioner to attend NRC staff meetings of the licensee, and allowing the petitioner to respond to submissions by the licensee would help to alleviate the concern that the present §2.206 process is one-sided. Background paper p. 11. However, the NRC should also in its review consider instituting some sort of hearing where the petitioner could present his or her concerns personally to the NRC personnel assigned to review the §2.206 petition. While the NRC should consider holding adjudicatory hearing on §2.206 petitions, even a mechanism that would allow a less formal type of hearing would be an improvement over the present means of processing such petitions.

Another factor that undermines public confidence in the §2.206 petition process is the lack of independence in the review process. As the background paper notes at page 9, often the NRC staff involved in the review process are already familiar with the issue raised in the petition since the facts in the petition are drawn from NRC documents. In many instances, the NRC staff have already signed off on an issue that is the subject of a §2.206 petition prior the petition being filed. When such a petition is denied, it is perceived the NRC staff is rubber-stamping a decision that has already been reached. The NRC staff is viewed as locked into the initial judgment and having to uphold it or being at risk of raising questions about their professional judgment as it was initially exercised. Even giving full marks to the professional integrity of the NRC staff, there is a natural bias for people who have reached a conclusion to be drawn to the same result when they have confidence in their original judgment.

Given the limitations of NRC personnel resources, it may not be possible to have a fresh team of experts assigned to every §2.206 petition where members of the staff have already

reached a conclusion on an issue. However, in reviewing the §2.206 process consideration should be given to incorporating a mechanism that will afford an independent review.

One option for changing the §2.206 petition process that is discussed in the background paper at pages 11-12 is to focus on resolving safety issues rather than taking enforcement action. This appears to be what already occurs in large part. Apparently, the prime focus of the NRC staff in reviewing §2.206 petitions is whether a significant safety issue is raised. See transcript of July 28, 1993 Hearing on §2.206 Petition Process at p. 82-87. The identification of a regulatory violation in a petition does not necessarily mean that the petition will be granted because the NRC will permit plants to operate outside of its regulations. Hearing Tr. p. 83. However, the NRC staff's focus on safety has not enhanced the credibility of the §2.206 petition process because is not linked to any objective criteria. Indeed, whether a petition is granted appears to ultimately turn upon the staff's subjective judgment as to whether a significant safety issue is raised.

In evaluating changes to the §2.206 petition process, the NRC should consider adopting objective criteria for when a petition will be granted. One obvious criterion that may be considered is compliance with the NRC's own regulations. In licensing decisions the NRC has taken the position that compliance with its regulations ensures safety. Public Service Company of New Hampshire, et al., (Seabrook Units 1 and 2), 31 NRC 197, 213-217 (1990). In the interest of consistency, it would seem appropriate to apply the same standards for when enforcement action will be taken after licensing. At the same time, consideration should be given to adopting a means to impose optional sanctions to those which are sought in the petition.

For the above reasons, I believe that it is appropriate that the NRC consider rule changes for §2.206 petitions. Changes to the process could lend greater credibility to the process, and in turn, enhance the credibility of the NRC.

Sincerely,

Leslie Greer

Leslie Greer
Assistant Attorney General
Environmental Protection Division

August 26, 1993

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE") ON "REVIEW OF THE 2.206 PETITION PROCESS," 58 FED. REG. 34726 (JUNE 29, 1993)

OCRE commends the NRC for initiating this review of the petition process under 10 CFR 2.206. OCRE is pleased that the NRC conducted a workshop on this matter on July 28, 1993. It is OCRE's opinion that the workshop was extremely productive and informative, and helped illuminate the deficiencies in the 2.206 process. OCRE hopes the NRC will consider and implement serious reforms to the 2.206 process so that it can be a meaningful forum for public participation in the post-construction era.

I. Importance of the 2.206 Process

Filing a petition under 10 CFR 2.206 is the only process for formal public participation after a nuclear power plant is licensed. It is the only process by which members of the public can raise issues when new research calls the safety of a nuclear power plant into question, when plant operational performance is below par, when whistleblowers uncover deficiencies or violations, when operating events reveal unforeseen failure modes or vulnerabilities, or when external phenomena occur which exceed the plant's design basis.

Several regulatory trends within the NRC in recent years place even more importance on the 2.206 process.

First, the license renewal rule, 10 CFR 54, relies on the assumed adequacy of the current licensing basis, rather than conducting a thorough reexamination of the CLB as part of license renewal application review, with an opportunity for a public hearing. The only issue which can be raised in the public hearing for license renewal is aging degradation unique to license renewal. Any citizen concerns about the adequacy of the CLB must be raised through a 2.206 petition.

Second, the NRC is encouraging the relocation of items from the plant Technical Specifications to internal plant documents, where they can be changed at will by the licensees, under the 10 CFR 50.59 process, without seeking an operating license amendment. The NRC has issued six Generic Letters (see attachment) on removal of items from plant Tech Specs. In addition, the new standard Tech Specs will result in the relocation of approximately 36% of current Tech Specs to internal plant documents. The end result of this trend is that the universe of potential operating license amendments, and thus, the opportunities for a public hearing, is greatly diminished. Citizens are left with the 2.206 process for raising issues related to changes in the items so removed from the Tech Specs.

Third, the 1990 revisions to 10 CFR 72 which allow the onsite storage of spent nuclear fuel in dry storage casks approved under a general license also diminish the opportunities for an adjudicatory hearing on this issue. See 55 Fed. Reg. 29181 (July 18, 1990) Any site specific concerns must be raised through the 2.206 process. As the permanent disposal for high level waste is a moving target, and as spent fuel pools at the reactor sites are filling up, the use of onsite cask storage will increase, and accordingly, citizen concern will increase as well.

As more and more issues are shunted to the 2.206 process, instead of the license amendment process, it is imperative that this process be reformed so that is a meaningful procedure.

II. Purpose of the 2.206 Process

OCRE believes the purpose of the 2.206 process should be to provide a meaningful forum in which citizens can raise health and safety issues. OCRE would place the main emphasis on the word "meaningful." The 2.206 process should primarily be a due process mechanism equivalent to the procedures available to the public before plant licensing and equivalent to the procedures available to other entities after plant licensing.

It is illustrative to compare citizens' rights before and after licensing. For example, consider the Thermo-Lag issue. Suppose the problems with Thermo-Lag had been discovered in 1981 instead of 1991. Then, intervenors in the pending operating license cases could have filed contentions on Thermo-Lag. Considering the severity of the issue, the contentions would have most certainly been admitted. Then the intervenors would be entitled to discovery. If the matter survived summary disposition, the intervenors would participate in a hearing in which they could present oral and documentary evidence and cross-examine witnesses. They could file proposed findings of fact and conclusions of law with the Licensing Board. If the Board's decision was adverse to the intervenors, they could appeal the case within the agency. They could also seek judicial review of the NRC's final decision.

Now, since the problems with Thermo-Lag were not disclosed until 1991, when the licensing proceedings for almost all existing plants had long since been concluded, members of the public have only the 2.206 petition for raising concerns about Thermo-Lag. The 2.206 process contains none of the procedural mechanisms available to intervenors in a Subpart G hearing. Under 2.206, there is no discovery, no hearing, no proposed findings, no agency appeal, and no judicial review. By no stretch of the imagination could the 2.206 process be considered equivalent to the procedural mechanisms available in the initial licensing proceeding.

When contrasted with the opportunities for public participation in pre-operational licensing proceedings, it is not unfair to say

that citizen-initiated participation rights effectively cease after a nuclear power plant starts operating. This hardly makes sense, since that is precisely when a reactor becomes hazardous.

Why is there a difference in the procedures available to the public before and after licensing? Clearly with issues like Thermo-Lag, the only difference is that of timing: when the issue was discovered. If the issue is discovered before the nuclear plant is licensed, then citizens have hearing rights. If discovered after the plant is licensed, then citizens have no hearing rights. Is Thermo-Lag less of a problem because it was disclosed in 1991 instead of 1981? Clearly, no. Are nuclear power plants less dangerous when they begin operations than when they are under construction? Obviously not. Is public participation less important after a nuclear power plant is licensed? OCRE believes it should not be. The present situation is patently absurd. Upon issuance of the plant operating license, the site boundary truly becomes an "iron curtain" within which public participation is excluded.

An examination of the opportunities for formal public participation in the regulation of operating nuclear power plants reveals that meaningful opportunities are extremely limited. Such opportunities may be classified by the way they are initiated: NRC Staff initiated, licensee initiated, and citizen initiated.

NRC Staff initiated proceedings are enforcement proceedings. In such proceedings the licensee has a right to a hearing. However, a court has ruled that citizens have no right to intervene if the licensee does not seek a hearing. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). (Ironically, the court in Bellotti found that the petitioner was not left without a remedy, that remedy being the 2.206 petition. At the time of that decision, 2.206 denials were reviewable, and the court relied on that fact.)

Licensee initiated proceedings are operating license amendment proceedings. These are the only proceedings in which there is a clear right to a hearing under section 189a of the Atomic Energy Act. However, the scope of the proceeding is strictly limited to the subject matter of the specific amendment under consideration. Unlike 2.206 petitions, however, final NRC decisions on operating license amendment proceedings may be appealed to the U.S. Courts of Appeals.

The only mechanism available for citizens to initiate proceedings is a petition under 10 CFR 2.206. This regulation allows any person to file a petition with the NRC Executive Director for Operations seeking the institution of a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. However, this process does not provide a meaningful mechanism for public input. There is no right to a hearing on a 2.206 petition. The decision is issued by the NRC Staff, not by an independent Licensing Board. The vast majority of 2.206 petitions are denied. Petitioners may not request Commission

review of a Staff denial of a 2.206 petition. Finally, judicial review of NRC denials of 2.206 petitions is not available.

When compared in this manner, the 2.206 process is again clearly unfair. The NRC has the right to initiate a proceeding, the licensee has this right, but citizens are left with the woefully inadequate 2.206 petition.

With regard to the fact that the vast majority of 2.206 petitions are denied, comments were made at the July 28th workshop that it is inappropriate to play a numbers game; it is necessary to look to the merits of the petitions. Certainly it is not credible to assume that all of these petitions were meritorious and should have been granted. However, nor is it credible to assume that virtually all of the 2.206 petitions the NRC receives are lacking in merit. Many of these petitions are submitted by highly knowledgeable and respected petitioners, such as the Union of Concerned Scientists and state governments. Some, such as OCRE's seismic petition regarding the Perry Nuclear Power Plant (see DD-88-10), are based on the reports of qualified experts. With other petitions, such as the one submitted by NIRS on Thermo-Lag, the NRC has tacitly acknowledged the merit of the issue by continuing to pursue the resolution of this open item with industry, albeit without the participation of the petitioners, because their petition was denied as supposedly lacking in merit.

The lack of meaningful public participation opportunities after nuclear plants are licensed is inconsistent with the NRC's "Principles of Good Regulation," which states that "nuclear regulation is the public's business, and it must be transacted publicly and candidly. The public must be informed about and have the opportunity to participate in the regulatory processes as required by law . . . ." As the D.C. Circuit Court of Appeals has made clear, "Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984) (emphasis added).

We do not have a rational regulatory process when a licensee cannot correct a typographical error in its plant Technical Specifications without seeking an operating license amendment, complete with Federal Register notice and the opportunity for a hearing, while there is no right to a hearing on serious issues such as Thermo-Lag, Rosemount transmitters, motor operated valve problems, station blackout, etc.

The 2.206 process must be reformed to create a process in which citizens have meaningful participation rights.

III. The Lack of Judicial Review

A recent development which has made the 2.206 process even less meaningful is the lack of judicial review. This is based on lower court application of a 1985 Supreme Court case which interpreted

the Administrative Procedure Act. Specifically, 5 U.S.C. 701(a)(2) denies judicial review for those matters "committed to agency discretion by law." Instead of confining this prohibition to those matters explicitly committed to agency discretion by law, the Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985) expanded this provision to those implicit cases in which the governing statutes are so broadly drawn that no manageable standards exist for judicial review, or "no law to apply." While Chaney did not deal with atomic energy law, three circuits have applied its holding to 2.206 denials, finding that neither the AEA nor the applicable NRC regulations provide law to apply. MASSPIRG v. NRC, 852 F.2d 9 (1st Cir. 1988); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989); Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C. Cir. 1989).

The lack of judicial review has made the NRC completely unaccountable in its decisions on 2.206 petitions. The lack of judicial review enabled the NRC to evade serious consideration of OCRE's 2.206 petition concerning the Perry Nuclear Power Plant which raised serious concern, based on the report of an expert seismologist, on the seismic design of that facility.

Since the NRC knows that it will never be subjected to judicial scrutiny, it does what it pleases with 2.206 petitions, which means that the vast majority of them are summarily denied.

This lack of accountability is best revealed by the dialogue which took place during oral argument in OCRE's attempt to obtain judicial review of the Perry seismic case. (The court, within a week after oral argument, dismissed case due to Chaney and its progeny; OCRE v. NRC, 893 F.2d 1404 (D.C. Cir. 1990).) Judge Buckley posed the following question to NRC staff counsel: "Suppose the earthquake that occurred was a magnitude 6, and that the petitioner had six world-class seismologists, and that the NRC's decision was clearly incorrect; would that be reviewable?" The NRC attorney replied, "No."

It is interesting that prior to Chaney, 2.206 denials were considered reviewable, and the courts routinely reviewed them. See, e.g., Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979); Porter County Chapter of the Izaak Walton League of America v. NRC, 606 F.2d 1363 (D.C. Cir. 1979); Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982); Seacoast Anti-Pollution League of New Hampshire v. NRC, 690 F.2d 1025 (D.C. Cir. 1982); County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983). Only after Chaney did the NRC conveniently start advancing the unreviewability argument. OCRE believes that the NRC truly took advantage of Chaney to evade accountability.

Congress has stated that the hearing process is intended to serve "a vital function as a forum for raising relevant issues regarding the design, construction, and operation of a reactor, and for providing a means by which the applicant and the Commission staff can be held accountable for their actions regarding a particular facility. . . . (T)he hearing process is essential to obtain

public confidence in the licensing process which is needed if the nuclear option is to be preserved." H.R. Rep. No. 22, Part 2, 97th Congress, 1st Sess. 11 (1982) (emphasis added).

With no right to a hearing under 2.206, and no judicial review, it is clear that the NRC is accountable to no one in is regulation of operating reactors.

OCRE supports the restoration of judicial review for NRC denials of 2.206 petitions. This can be done legislatively, and there is currently pending in Congress a bill which would accomplish this.

It could also be done administratively. Although the adverse case law (Chaney and its progeny) does exist, the NRC could, the next time a petitioner tries to obtain judicial review of a 2.206 denial, not file a motion to dismiss based on Chaney. The NRC could support the petitioner's position that the case is reviewable. Professor Davis is of the opinion that Chaney is bad law, an aberration, and will not long endure. Kenneth Culp Davis, "No Law to Apply," San Diego Law Review, Vol. 25:1, 1988. The NRC could speed its demise by exercising leadership in urging the Supreme Court to revisit Chaney, much as the Justice Department in the Reagan and Bush administrations advocated the overturn of Roe v. Wade.

In addition, the NRC could amend its regulations to clearly provide "law to apply." Since manageable standards for judicial review would then exist, Chaney's mandate would not extend to the NRC.

Although OCRE supports judicial review in 2.206 cases, we recognize that it is not a panacea, due to the highly deferential standard of review which the Courts have established. See, e.g., Baltimore Gas and Electric Co. v. NRDC, 463 U.S. 87 (1983) (the NRC is making predictions "at the frontiers of science" and the Courts must be extremely deferential). Therefore, OCRE supports administrative reforms as well as the restoration of judicial review.

IV. Remedies

While OCRE certainly supports the suggestions for improvement of the 2.206 process contained in the NRC's background discussion paper, OCRE feels that they do not go far enough.

The root cause of the problem is the fact that the NRC Staff is the decisionmaker in 2.206 decisions. Every 2.206 petition alleges at least implicitly, and in some cases explicitly, that the Staff has failed to properly exercise its responsibilities. Predictably, the Staff's response is defensive of the status quo. This problem was clearly explained by Ms. Jane Fleming at the July 28th workshop. Tr. 25-26, 251.

Is it reasonable to expect the NRC Staff to objectively view a petition which criticizes the Staff's performance? Obviously

not. This is really a separation of powers issue, and the remedy is review by an independent tribunal within the NRC. The present provision for sua sponte review by the Commission is inadequate. Petitioners must have the right to seek review and to receive it.

The ideal entity within the NRC which would serve as the independent tribunal for reviewing 2.206 decisions is the Atomic Safety and Licensing Board Panel. As explained by Mr. Lee Dewey, counsel for the Licensing Board Panel, at the July 28th workshop, the Licensing Board Panel has the legal and technical expertise to review these cases. Tr. 255-256. Indeed, the Licensing Boards evaluate similar complex technical issues in initial licensing and license amendment proceedings. There is no reason why they would not have the expertise to review 2.206 cases. To continue the hypothetical example cited earlier, if the problems with Thermo-Lag had been discovered in 1981 instead of 1991, the Licensing Boards would have considered contentions and conducted hearings on Thermo-Lag in licensing proceedings. It would be ridiculous to assert that the Licensing Boards could properly evaluate the Thermo-Lag issue in an operating license case but are unable to do so in reviewing a 2.206 decision.

Moreover, members of the Licensing Board Panel have expertise in due process of law, a concept which desperately needs to be inserted into the 2.206 process. As an independent tribunal which is not involved in preparation of the Staff's 2.206 decision, the ASLB Panel will not have the bias inherent in having a Staff person evaluate a petition which criticizes the Staff's work (perhaps the work of that very individual).

The ASLB Panel is more appropriate for this review than is the Commission. The Panel has the personnel resources and technical expertise that the Commissioner offices lack. Reviewing every 2.206 decision at the petitioners' request would create too great a burden on the Commission.

A suggestion was made at the July 28th workshop that the Office of Commission Appellate Adjudication should perform this review function. Tr. 252-253. Under 10 CFR 1.24, this office has a very limited role and actually acts in an advisory and opinion writing capacity to the Commission. In addition, it is OCRE's understanding that the personnel and resources of this office are very limited.

Another suggestion was made at the workshop that the Office of Inspector General should conduct this independent review. Tr. 230. This office likewise has a limited role and limited resources.

OCRE believes that the ASLB Panel is the ideal entity to conduct reviews of 2.206 decisions. The Panel has the technical expertise and the procedural expertise in conducting fair hearings. Significantly, the Panel already has the personnel in place to perform this review function. With the diminished caseload in the post-construction era, the Panel is an under-utilized re-

source in the NRC.

It is also within the Commission's statutory authority to use the ASLB Panel in this manner, as Section 191 of the AEA authorizes the Commission to "delegate to a board such other regulatory functions as the Commission deems appropriate."

OCRE would propose the following revisions to the 2.206 process under this review scenario:

The "front end" of the process (from the filing of the petition to the issuance of the Director's Decision) would proceed much as it does now, with these exceptions:

(1) there is much more interaction and communication between the petitioner and the NRC Staff; the petitioner is to be "in the loop" in any interactions between the NRC and the licensee concerning the petition.

(2) the petitioner has the absolute right to reply to any responses to the petition filed by the licensee, or, in the case of generic issues, industry groups such as NUMARC, INPO, or owners groups. No Director's Decision is to be issued before the petitioner has had the opportunity to reply, and all responses and replies, of both the petitioner and the licensee, shall be considered and evaluated by the Staff in preparing the decision. The NRC Staff should remain in communication with both the petitioner and the licensee to determine whether further responses are forthcoming. The petitioner also has the right to supplement the petition should new relevant information be discovered.

The "back end" of the process, from issuance of the Director's Decision to final agency action, is as follows:

Within 30 days after issuance of the Director's Decision, the petitioner may seek Licensing Board review of the record in the 2.206 case. This is to be done by filing a notice of appeal with the ASLB Panel Chairman.

Upon receipt of a notice of appeal, a Licensing Board, consisting of an attorney chairman and technical members having the appropriate areas of expertise, is appointed.

Within 45 days after the appointment of the Licensing Board, the petitioner should file a statement with the Licensing Board, with copies to the Director and the licensee, explaining why the petitioner believes the Director's Decision is in error.

The Licensing Board would then review the record in the 2.206 case, which consists of the 2.206 petition (and any supplements or amendments thereto), any responses to it filed by the licensee, any replies to these responses filed by the petitioner, the Director's Decision, and the petitioner's statement of appeal.

The Licensing Board should afford the parties (being the peti-

tioner, the NRC Staff, and the licensee) the opportunity to file additional written statements with the Board.

The Licensing Board would have substantial discretion in fashioning whatever informal procedures it deems necessary for the resolution of the case. These procedures would include conferences with the parties, oral argument, and the use of alternative dispute resolution techniques.

At the conclusion of the Licensing Board's review of the 2.206 case, the Licensing Board will issue an opinion either affirming the Director's Decision or referring the matter to the Commission recommending the institution of a formal proceeding or other such actions as may be appropriate. The Licensing Board's opinion should thoroughly explain the basis for its decision and recommendations.

If the Licensing Board does not affirm the Director's Decision, but refers the matter to the Commission, the Commission should issue an opinion in the case within a reasonable time. Before rejecting any recommendation of the Licensing Board, the Commission shall give the parties the opportunity to conduct oral argument before the Commission.

If the Licensing Board affirms the Director's Decision, the petitioner may request Commission review of the 2.206 case. Commission review in such situations shall be entirely discretionary.

In either case, the decision of the Commission shall be final agency action in the 2.206 case.

OCRE believes that these procedures would provide the accountability now missing in the 2.206 process. These procedures would also provide an opportunity for meaningful public input. They would enhance the credibility of the 2.206 process and of the agency.

V. Other Matters

A. Labeling Misc. Correspondence as a 2.206 Petition; Consolidation of Petitions

As stated in the July 28th workshop, OCRE has strong objections to the NRC's current practice of labeling correspondence, including postcards, as a 2.206 petition when no mention of that regulation was made by the author of such correspondence.

OCRE believes that persons who want the NRC to consider their concerns under the formal 2.206 process should be familiar enough with the NRC's regulatory program to cite the regulation. If there is any doubt about the petitioner's intentions, the Staff should contact the petitioner to determine his or her wishes

regarding treatment as a 2.206 petition.

OCRE's concern is that petitioners, such as OCRE, that do a thorough job in researching and documenting their 2.206 petitions will be prejudiced by the NRC's prior consideration, as a 2.206 petition, of general correspondence on the same issues which may be poorly researched and documented. Despite Staff protestations to the contrary at the July 28th workshop, the NRC does in fact apply a "res judicata" standard, even if not specifically articulated as such. For example, in the Director's Decision on the Perry seismic case, DD-88-10, the staff repeated its earlier conclusions set forth in its 1986 SSER 10 for Perry, without addressing or refuting the new evidence in the petition based on the report of an expert seismologist. Another example is PRM-50-49, a petition for rulemaking filed by OCRE on the exemption rule, 10 CFR 50.12. The NRC denied this petition, and did not even publish a notice of it in the Federal Register for public comment, a highly unusual move, on the basis that the issues raised in OCRE's petition had already been considered and resolved in the 1985 rulemaking on 10 CFR 50.12 and in the backfit rule remand rulemaking. (*)

OCRE also objects to the consolidation of 2.206 petitions without the consent of all petitioners involved. In DD-86-4 regarding the Perry Nuclear Power Plant, OCRE's 2.206 petition was consolidated with a petition which was poorly written and unfocused. OCRE's petition addressed the seismic issue only. The other petitioner addressed the seismic issue and over a dozen other matters. The Director's Decision mainly addressed the other petition and lumped OCRE's concerns in with it. In fact, the Director's Decision even included a statement that both petitioners claimed that the January 31, 1986 earthquake had damaged the Perry plant. OCRE never made such a statement, although the other petitioner did. OCRE believes that this consolidation damaged our case. Certainly, the fact that such a statement appeared in the Director's Decision is evidence that the NRC Staff did not thoroughly read OCRE's petition.

OCRE is especially concerned with the NRC's willingness to paint both petitioners with the same brush. The NRC's inability to distinguish a quality petition from one decidedly lacking in quality suggests that the agency has basic disrespect for members of the public. Not every person who is critical of the nuclear industry is a flake.

(*) The NRC claimed that no purpose would be served by soliciting public comment on issues already resolved in recent rulemakings. However, this standard is not applied uniformly to all petitioners. Shortly after the NRC published the final revisions to 10 CFR 20 in May 1991, the NRC published for comment in the Federal Register a notice on PRM-20-20, which raised issues already considered and resolved in the recent Part 20 rulemaking.

B. Standards for Operating Plants: Safety or Regulatory Compliance

As discussed at the July 28th workshop by Ms. Leslie Greer (Tr. 115), the NRC apparently uses a double standard before and after licensing. In the licensing proceeding compliance with regulations is required and is the standard of safety. After a plant is operating, regulations can be violated but the NRC considers the plant safe anyway.

OCRE believes that a single standard should be used both before and after licensing. That standard should be compliance with all regulations.

In a licensing proceeding, an intervenor cannot argue that, even though the plant complies with the regulations, it is still unsafe. That is considered to be a challenge to the Commission's regulations, prohibited by 10 CFR 2.758. Nor can an applicant claim a plant is safe anyway even if not in compliance. Twenty years ago the Appeal Board clearly articulated that safety means regulatory compliance:

> As a general rule, the Commission's regulations preclude a challenge to applicable regulations in an individual licensing proceeding. 10 CFR 2.758. This rule has frequently been applied in such proceedings to preclude challenges by intervenors to Commission regulations. Generally, then, an intervenor cannot validly argue on safety grounds that a reactor which meets applicable standards should not be licensed. By the same token, neither the applicant nor the staff should be permitted to challenge applicable regulations, either directly or indirectly. Thus, those parties should not generally be permitted to seek or justify the licensing of a reactor which does not comply with applicable standards. Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected. For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety.
>
> In short, in order for a facility to be licensed to operate, the applicant must establish that the facility complies with all applicable regulations. If the facility does not comply, or if there has been no showing that it does comply, it may not be licensed.

* * *

> It bears repetition that, under the principles we have set out above, it cannot be argued that, even though the reactor does not comply with the criteria, it should receive an unrestricted full-power, full-term license on the ground that there is reasonable assurance that it can operate without adversely affecting the public health and safety. Such an argument might be factually supportable, but would constitute an indirect attack on the applicable Commission regulations. Again, the point to be made

is a simple one: reactors may not be licensed unless they comply with all applicable standards.

Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 528-9 (1973). See also Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009 (1973) ("the sine qua non of adequate protection to public health and safety is compliance with all applicable safety rules and regulations promulgated by the Commission").

This is the standard which should apply after the plant is licensed as well. This should be the standard against which 2.206 petitions are judged. If the violations alleged in the petition are found to be true, then the petition should be granted and appropriate enforcement action taken. Codification of this standard could provide "law to apply" which would enable the courts to review the Director's Decisions.

Curiously, the Appeal Board did not accept a "two-track" scheme of regulations as was mentioned by Mr. Marty Malsch at the July 28th workshop (Tr. 88). The Appeal Board did not classify some regulations as necessary for adequate protection, while some are going beyond adequate protection. The Appeal Board clearly stated that compliance with all regulations is mandatory. To repeat, "once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety." Vermont Yankee at 528.

VI. Conclusion

OCRE urges the NRC to carefully consider all the comments made at the July 28th workshop and made in writing. It is essential that the 2.206 process be reformed so it is a meaningful mechanism for public participation in the regulation of operating reactors. The NRC needs to enter a new era in which adversarial relationships with the public are replaced with a spirit of partnership with the public in the pursuit of safety.

Respectfully submitted,

Susan L. Hiatt

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GENERIC LETTERS ON REMOVAL OF ITEMS FROM TECH SPECS

- 88-06 Removal of Organization Charts from Technical Specifications Administrative Control Requirements (3-22-88)
- 88-12 Removal of Fire Protection Requirements from Technical Specifications (8-2-88)
- 88-16 Removal of Cycle-Specific Parameter Limits from Technical Specifications (10-4-88)
- 89-01 Implementation of Programmatic Controls for Radiological Effluent Technical Specifications in the Administrative Controls Sectionof Technical Specifications and Relocation of Procedural Details of RETS to the Offsite Dose Calculational Manual or the Process Control Program (1-31-89)
- 91-01 Removal of the Schedule for Withdrawal of Reactor Material Specimens from Technical Specifications (1-4-91)
- 91-08 Removal of Component Lists from Technical Specifications (5-6-91)

NEW STANDARD TECH SPECS: APPROX. 36% OF CURRENT TECH SPECS WILL BE RELOCATED TO INTERNAL PLANT DOCUMENTS, CHANGED THROUGH 50.59

PROPOSED RULE PR 2
(58 FR 34726)

(3)

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'93 AUG 27 P4:10

August 27, 1993

Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Re: Comments Regarding § 2.206 Process

Dear Mr. Chilk:

In the Federal Register notice of June 29, 1993 (58 Fed. Reg. 34726), the Nuclear Regulatory Commission requested comments regarding its review of its regulations and practices governing petitions filed under 10 CFR 2.206.

In response to such request, we are pleased to submit the enclosed "Comments Regarding the § 2.206 Process" on behalf of:

- Arizona Public Service Co.
- Florida Power & Light Co.
- Houston Lighting & Power Co.
- Illinois Power Co.
- Iowa Electric Light & Power Co.
- Southern California Edison Co.
- Texas Utilities Electric Co.

All of these companies hold NRC operating licenses for nuclear reactors and believe in the importance of an effective § 2.206 process for use by the public.

As shown in the enclosed comments, the § 2.206 process has met its objective of providing the public an effective, equitable and creditable mechanism to bring to the NRC's attention concerns that a facility is not operating in conformity with applicable regulatory requirements, or other safety concerns, to request action on those concerns, and to obtain a reasoned decision from the agency in response to those concerns. Although some potential enhancements have been identified, primarily with respect to interactions between the NRC and

petitioners, there are no indications of any significant flaws in the § 2.206 process. Accordingly, we urge the NRC not to adopt any changes that would further formalize the process and divert scarce NRC and licensee resources from other tasks that are more important to safety of operations.

Sincerely yours,

Maurice Axelrad

Maurice Axelrad

/tg

Enclosure: As Stated

COMMENTS REGARDING § 2.206 PROCESS

In its Federal Register notice of June 29, 1993 (58 Fed. Reg. 34726), the Nuclear Regulatory Commission (NRC) announced that it was initiating a review of its regulations and practices governing petitions filed under 10 CFR 2.206. As the first step in that process it held a public workshop on July 28, 1993 where participants from citizens' groups, industry and government could exchange information on the objectives of the § 2.206 petition process, its effectiveness, and, what, if any, revisions should be made to the process. To help focus discussion at the workshop, the NRC issued a Background Discussion Paper which outlined the scope of the review, provided background information on the § 2.206 process, and identified several broad categories of potential improvements for discussion at the workshop.

The Federal Register notice established an agenda for the workshop which focused on the four areas of principal interest to the Commission, i.e., whether the § 2.206 process was meeting its objectives and three broad areas of potential improvements in the process (increasing interaction with the petitioner; focusing on resolution of safety issues rather than on requesting enforcement action; categorizing petitions according to importance of issues raised).

The first four sections of the comments below address the four areas identified in the Federal Register notice. The last two sections of the comments (1) address an extraneous subject (judicial review) that was briefly discussed during the open portion of the workshop agenda, and (2) summarize our principal conclusions regarding the § 2.206 process.

1. Perspectives On The § 2.206 Process - What Are The Objectives Of the § 2.206 Process? Do The Current Procedures And Process Meet These Objectives? What Is The Relationship Of The § 2.206 Process To Other Mechanisms For The Public to Identify Safety Problems?

The objective of the § 2.206 process is to provide members of the public an effective, equitable and credible mechanism to bring to the Commission's attention concerns that a facility is not operating in conformity with applicable regulatory requirements, or other safety concerns, to request agency action on those concerns, and to obtain a reasoned decision from the agency in response to those concerns.

In our view, the § 2.206 process meets its objective and functions effectively.

The process is readily available for use by the public and facilitates the filing of petitions. A petitioner is not required to make any showing of standing or affected interest. The petition itself can be very simple. The petitioner need only identify a requested action and state minimal facts that would provide grounds for the action. In practice, the petitioner need only provide sufficient information so that the NRC can understand the safety concern to be reviewed.

Review of the petition is assigned to the NRC office with programmatic responsibility for the subject matter of the petition. This assures that the most knowledgeable and expert resources within the agency will perform the review. It also assures the most effective use of the agency's resources.

If the petition is denied, in whole or in part, the NRC provides the petitioner a carefully reasoned, detailed decision summarizing the basis for the agency's decision, including related actions that may have been taken by the licensee or the NRC and the reasons why the action requested by the petitioner is not warranted. Although formal review of the decision by the Commission is discretionary, each Commissioner, with the assistance of his/her staff, examines each decision to determine whether more formal review is warranted.

As discussed in the workshop, some enhancements in the § 2.206 process would be useful. For example, as discussed in Section 2 below, some improvements could be made in interactions between the NRC and petitioners. But there has been no showing of any basic flaw in the § 2.206 process, and major changes are not warranted and would be counterproductive.

Criticisms of the § 2.206 process because it has historically resulted in few formal enforcement actions or formal hearings are mistaken. Since the vast preponderance of § 2.206 petitions involve issues that have been or are already being addressed by licensees and the NRC and rely on licensee or NRC documents, it's understandable that few petitions would result in formal actions. When additional action is warranted, it is usually undertaken voluntarily by the licensee. If the § 2.206 process were, in fact, to result in a significant number of formal hearings or enforcement actions, that would be an indicator that the overall NRC regulatory process is not functioning effectively.

There is no merit to the argument that additional hearings should be provided through the § 2.206 process in order to attain more public credibility for the process. Such action would unnecessarily divert scarce NRC and licensee resources that are better spent in assuring safe operations of facilities. It would result in overjudicialization of the § 2.206 process rather

than the achievement of sound technical resolution of safety concerns.

Both the Background Issues Paper and the agenda in the Federal Register notice questioned the relationship between the § 2.206 process and other existing mechanisms to bring safety problems to the Commission's attention.

The most effective mechanisms for identifying and resolving any safety problems at a plant, and for bringing any significant problems to the NRC's attention, are a licensee's extensive operational, surveillance and review programs. Literally hundreds of thousands of issues are routinely identified and resolved each year through these standard programs.

The NRC inspection program, which includes at least two resident inspectors stationed at each reactor site and frequent inspections by Regional and Headquarters personnel, is another effective mechanism for identifying any safety problems.

In addition, most reactor licensees have a formal program (such as Hotline, Safeteam, Speakout, etc.) under which current employees of the licensee or its contractors, exiting or former employees, and members of the public can bring safety problems to the attention of the licensee. These programs provide a mechanism under which individuals can identify concerns anonymously or in confidence, if they prefer.

Similarly, employees or members of the public can bring safety concerns directly to the NRC, where they are handled under the NRC's allegation management system. Allegations are assigned to the appropriate office or region of the NRC for processing, and are assessed for safety significance to permit ranking and resolution in a timely manner. The licensee is often requested to address the area of concern, subject to NRC audit, in order to minimize expenditure of NRC resources. Allegations are tracked to resolution and the alleger is informed of the close-out. The allegation management system is an effective process which is complementary to, but not a substitute for, the § 2.206 process.

The public also has other opportunities to participate in oversight of a licensee's activities. An interested person can request a hearing on any license amendment. Any member of the public can request and/or participate in rulemakings. If an order has been issued, an interested person can request a hearing on whether the order should be sustained.

Thus, it is apparent that § 2.206 is not the primary mechanism for bring safety concerns to the Commission's attention, but rather a back-up to other effective means of identifying issues. Section 2.206 petitions frequently consist

of a reiteration of matters that were previously disclosed and addressed as a result of licensee programs, the NRC inspection system or the allegation management system. Accordingly, as previously noted, it is understandable that few § 2.206 petitions would result in additional formal NRC actions.

2. Potential Revisions To The § 2.206 Process: Increased Interaction Between The NRC Staff And The Petitioner

Although the NRC effectively addresses concerns raised in § 2.206 petitions, it is apparent that some petitioners are dissatisfied with their ability to participate in the process and with the information that they receive as to the progress of the NRC's review.

We would urge the NRC to take reasonable steps to improve its interaction with petitioners. When a petition is accepted, the NRC should inform the petitioner of the identity of an NRC contact at the working level who can respond to any inquiries by the petitioner as to the status of its petition. In addition, if resolution of the petition will be prolonged the petitioners should be periodically informed as to the progress of the NRC's review.

It is important that the NRC clearly understand the requested actions and the petitioner's supporting grounds. If necessary in order to achieve such understanding, the NRC should ask the petitioner clarifying questions or meet with the petitioner, as appropriate.

Although the NRC indicated at the workshop that its internal procedures call for providing the petitioner with copies of NRC-licensee correspondence relating to the petition, it appears that this practice has not been followed uniformly. The NRC should assure that the petitioner receives such material (unless it is of a proprietary nature). If the NRC holds meetings with the licensee relating to the petition, the petitioner should be provided an opportunity to attend as an observer. Subsequently, the petitioner should have an opportunity to address any additional information relating to the petition that has been provided by the licensee in its correspondence or meetings with the NRC.

A corollary to keeping the petitioner better informed is to assure that the licensee is fully informed regarding the petition and its progress. A licensee should receive copies of all correspondence between the petitioner and the NRC and be provided an opportunity to attend any NRC-petitioner meetings as an observer. The licensee should also be given an opportunity to address any additional information that has been provided by the petitioner in its correspondence or meetings with the NRC.

In its discussion of increased interaction with petitioners, the Background Discussion Paper mentioned possible consideration of increased formalization of interaction with a licensee, such as requesting licensees to respond to issues raised in the petition under § 50.54(f). Such formalization of the relationship with the licensee is unnecessary and would be counterproductive. Many licensees already provide voluntary responses to petitions. When requested by the NRC, they readily cooperate in providing any additional information desired by the NRC without the need for a formal request. Formalizing the obtaining of information from licensees relating to § 2.206 petitions would waste resources and would imply, contrary to existing practice, that voluntary cooperation by licensees has been insufficient to meet NRC needs.

3. **Potential Revisions To The § 2.206 Process: Shift The Focus Of § 2.206 Petitions From A Specific Enforcement Action To The Exploration And Resolution Of The Underlying Safety Issue**

Any member of the public who wishes to raise a safety issue, without requesting a specific enforcement action, can readily do so outside of the § 2.206 process. Presumably such issue would be addressed by the NRC under its allegation management system, would be tracked to resolution and the member of the public would be informed of the close-out of the issue.

However, it does not seem that this would be a substitute for the present § 2.206 process that enables a member of the public to request an enforcement action and to receive a reasoned decision on his/her request from a responsible NRC official.

Nevertheless, even though the § 2.206 process hinges on a petitioner's request for action, it should be possible to shift the focus of the NRC responses to emphasize how the underlying safety issue has been addressed, rather than on whether a formal hearing has been granted or a formal enforcement action taken.

As previously discussed, the effectiveness of the § 2.206 process should be judged by whether safety concerns raised in petitions have been fully and timely resolved, and not by whether additional formal hearings or enforcement actions were required to achieve such resolution. Although the NRC does seek to explain its rationale in its § 2.206 decisions, it appears that the public may still not fully understand that the basic purpose of the process has been satisfied through resolution of the underlying safety concern. The NRC should strive to make this point more explicit in each of its § 2.206 decisions.

4. Potential Revisions To The § 2.206 Process: Establishing Categories Of Petitions According To Significance Of The Issues Raised And Specifying Different Levels Of Internal Review According To These Categories

The Background Discussion Paper mentioned the possibility of establishing internal NRC criteria for categorizing petitions in order to determine the level of effort and the types of procedures to be used on each petition.

Particularly in view of the limited number of § 2.206 petitions filed each year, there appears to be no need to establish such criteria. There is no indication that the NRC has misapplied its resources in dealing with § 2.206 petitions or has failed to consider petitions adequately. In fact, discussion at the workshop indicated that § 2.206 petitions may get expedited treatment beyond that warranted by the safety significance of the issues raised -- which may be understandable in view of the public involvement. The screening of petitions and assignment of resources are typical functions that should be performed by agency management through the exercise of discretion based on the specific circumstances involved. The process should not become overformalized through the establishment of criteria. Such criteria may even be counterproductive, since they might cause delay or diversion of resources because of potential disputes regarding appropriate categorization.

There was extensive discussion at the workshop about the possibility of establishing some type of internal review of NRC decisions on § 2.206 petitions. The principal reason cited appeared to be a concern about the credibility of an NRC decision when a § 2.206 petition is reviewed by the same NRC personnel who were responsible for previous evaluations of the safety concerns.

In our view, establishing routine NRC internal review of § 2.206 petitions is wholly unnecessary and would constitute a wasteful diversion of NRC resources. Each § 2.206 decision is reviewed informally by the Commissioners, with the assistance of their staffs, who can readily determine whether any particular decision is sufficiently significant or questionable that a second review might be useful. If such question arises, the Commissioners obviously have the discretion to decide on an ad hoc basis what type of additional NRC review should be conducted.

Concerns about having review of § 2.206 petitions performed by the same individuals who performed previous evaluations are without foundation. These are technical questions decided by professionals, with oversight from multi-levels of review within the agency. Since these professionals are competent to decide without bias the thousands of issues that arise each year in the course of reviewing amendment requests, inspection reports, and enforcement actions, they are certainly

able similarly to act competently in the review of § 2.206 petitions.

The establishment of routine internal reviews of § 2.206 decisions would not be an effective use of NRC resources. Since the most knowledgeable and expert NRC personnel are assigned to act on the § 2.206 petition, it is doubtful that other personnel assigned to a review of the § 2.206 decision would add significant technical insight to the decision. Moreover, assigning personnel to such review would divert scarce NRC resources from regulatory functions that would contribute more effectively to safety of operations. Similarly, retaining additional personnel or consultants simply to perform internal reviews of § 2.206 decisions would be a wasteful diversion of NRC funds. It can always be argued that a second opinion has some value, but there is no reason to believe that, in the absence of specific circumstances where the Commission so determines, NRC § 2.206 decisions would benefit from such additional review.

The suggestion was made at the workshop that NRC internal review of § 2.206 decisions could be performed by the Atomics Safety and Licensing Board or the Office of Commission Appellate Adjudication, perhaps on an informal basis. In our view, this suggestion is even less worthy of consideration than a technical internal review within the NRC Staff. Regardless of how this review were structured, it would transform a process for the technical resolution of safety concerns into a legalistic process, which is not a desirable mechanism for addressing technical questions. Such a process would be even more wasteful of NRC and licensee resources, with little likelihood that it would contribute significantly to the soundness of the ultimate technical decisions.

5. Judicial Review

Although not part of the overall topic of actions that could be taken by the NRC to improve the efficacy of the § 2.206 process, the subject of judicial review of NRC denials of § 2.206 petitions was briefly discussed during the open portion of the agenda at the workshop. Accordingly, we are providing some brief comments on that extraneous subject.

For many of the reasons that were expressed by Chairman Selin both at the workshop and in his recent testimony on S. 1165, "Nuclear Enforcement Accountability Act of 1993," we are strongly opposed to judicial reviewability of denials of § 2.206 petitions. The courts have held that the enforcement decisions of Federal agencies, except in limited circumstances, are within the agency's discretion and not subject to judicial review. Such holding is soundly based on the fact that in making enforcement decisions, an agency like the NRC must have the discretion to

weigh such factors as whether a violation or other safety concern exists, the safety significance or seriousness of the particular violation or concern, actions that have already been taken or are being taken by the licensee and/or the NRC, priority of the violation or concern as compared to other issues that are being or could be addressed by the licensee and/or the NRC, and availability of NRC resources and their appropriate allocation. Such discretionary decisions within the expertise of an agency should not be subject to judicial review.

The judicial decisions denying reviewability of enforcement actions apply uniformly to federal agencies. There is no reason why the NRC should be singled out to have its enforcement decisions subject to judicial review. In fact, in light of the comprehensive regulatory program implemented by the NRC, which is unmatched by any other Federal agency in its breadth and thoroughness, there is even less justification for making NRC enforcement decisions subject to judicial review than there would be for any other agency.

In addition, although NRC representatives at the workshop indicated that the NRC has not changed its practices regarding § 2.206 petitions since courts have held NRC decisions unreviewable, we are concerned that under current circumstances the NRC would feel compelled to develop a more extensive record if its decisions became judicially reviewable. This would additionally escalate and focus disproportionate attention and NRC resources on the relatively small number of allegations raised in § 2.206 petitions, without regard to their actual safety significance. The Commission may also be inclined to formally review more decisions in order to minimize the possibility of subsequent judicial reversal. These additional efforts would not only divert NRC efforts from attention to more important safety issues, but would increase regulatory costs chargeable to industry in license fees.

Section 2.206 has provided an effective process for NRC to review and respond to enforcement petitions and there has been no showing that petitions have been treated improperly or that significant safety issues have not been properly addressed. The burdens that would arise from judicial reviewability should not be superimposed on the § 2.206 process in the absence of a demonstration that current practices are inadequate. Although, as discussed above, some enhancements of the § 2.206 process should be considered by the NRC, there is no basis for singling out the NRC for judicial review of its decisions regarding requested enforcement actions.

6. Conclusions

The § 2.206 process has proven to be an effective mechanism for the public to raise safety concerns before the NRC, request action and obtain a reasoned decision from the NRC. The process can readily be initiated by any member of the public and is implemented by knowledgeable, responsible NRC personnel. There is no indication that underlying safety issues identified in § 2.206 petitions have not been soundly addressed and resolved.

Although few formal hearings or enforcement actions have resulted from § 2.206 petitions, this does not reflect any deficiency in the § 2.206 process. To the contrary it demonstrates the effectiveness of the numerous other licensee and NRC programs, which are the primary mechanisms for routinely identifying and resolving safety issues.

The § 2.206 process could be enhanced through improved interactions between the NRC and petitioners and increased emphasis in NRC decisions on how the underlying issues raised in the petition have been addressed and resolved. However, any changes that would further formalize the § 2.206 process are unnecessary, would be counterproductive and should be avoided. In the absence of any showing of a significant flaw in the process, no change should be adopted that would divert scarce NRC and licensee resources from other tasks that are contributing to safety of operations.

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

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Robert W. Bishop
Vice President &
General Counsel

August 27, 1993

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTN: Docketing and Service Branch

RE: Notice of Workshop
Section 2.206 Petitions Requesting Institution of a Proceeding To Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper;
58 *Fed. Reg.* 34726 (June 29, 1993)

Dear Mr. Chilk:

On behalf of the nuclear industry, Nuclear Management and Resources Council (NUMARC)[1] submits the following comments on the 10 CFR § 2.206 process. These comments respond to the June 29, 1993 *Federal Register* notice (58 *Fed. Reg.* 34726).

The June 29 *Federal Register* notice stated that the NRC was initiating a review of its regulations and practices governing petitions filed pursuant to 10 CFR § 2.206. As a part of its review, the NRC held a workshop on July 28, 1993, to allow interested individuals and groups to voice their opinions and concerns regarding the objectives of the § 2.206 process, its effectiveness in meeting those objectives and what, if any, revisions should be made to the process. NUMARC and several members of the nuclear industry bar[2] participated in that workshop. The workshop provided a valuable forum for

[1]NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

[2]Participants were Messrs. Maurice Axelrad (Newman & Holtzinger), Robert Bishop (NUMARC), Joseph Gallo (Gallo and Ross), James Miller III (Balch & Bingham), Jay Silberg (Shaw, Pittman, Potts & Trowbridge), and Mark Wetterhahn (Winston & Strawn).

the NRC staff to explain its approach to the § 2.206 process and to better understand the differing perspectives of the participants.

The nuclear industry views this issue as one of great importance. The NRC's review of its regulations and practices governing petitions submitted pursuant to 10 CFR § 2.206 is a useful assessment and should assist the Commission in determining whether it is adequately carrying out this aspect of its regulatory responsibilities. The discussion during the workshop made clear that the § 2.206 process satisfies its purpose of providing a structured means by which any member of the public may bring to the attention of the NRC a potential safety concern and request that the NRC take enforcement or other action in response. At no time during the workshop did members of the public, public interest group representatives or government representatives claim that they or their constituencies were impeded from bringing potential safety issues to the attention of the NRC.

The major complaints expressed by several of the workshop participants appeared to be that petitioners were not kept abreast of the NRC's ongoing actions undertaken in response to their petitions, NRC reviews of § 2.206 petitions were performed by the same individuals whose decisions were the subject of the § 2.206 petitions and thus were not independent. Some individuals also expressed concern about the NRC's failure to institute proceedings when requested and about the lack of judicial review of NRC decisions denying § 2.206 petitions.[3] However, no information has been presented from which the agency could reasonably conclude that safety issues raised by petitions, which should be the ultimate concern of those who submit and review them, are not comprehensively addressed under the current process. The NRC subjects § 2.206 petitions to rigorous technical analysis and dispositions the petitions through a detailed, written response to the issues raised.

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[3]The NRC designated judicial review of Director's Decisions of § 2.206 petitions as a topic outside the scope of the workshop. Although the industry opposes judicial review on § 2.206 petitions, these comments do not address the basis for the industry's position. The industry's views will be clearly stated in comments submitted to the Subcommittee on Clean Air and Nuclear Regulation of the U.S. Senate Committee on Environment and Public Works. During the June 30, 1993, subcommittee hearing, Chairman Selin and the representatives of Nuclear Information Research Service discussed at length the subject of judicial review of § 2.206 petitions.

The § 2.206 Process Adequately Meets Its Objective

The objective of the § 2.206 process is to provide members of the public with an easily initiated mechanism to direct the NRC staff's attention to licensee operating actions, practices or conditions which do not conform with regulatory requirements, or other safety concerns, and to request NRC enforcement action thereon. The § 2.206 process as presently implemented, meets this objective.

In providing this structured process to focus the NRC's attention on a particular issue, a petitioner is given wide latitude in presenting his or her concerns. The current regulation allows "any person" to bring any matter of concern with respect to a licensee to the attention of the NRC. That is, any member of the public may submit a § 2.206 petition without meeting any requirement for standing or for the issue's safety significance. It is without exaggeration to say that a § 2.206 petition may be submitted on no more than a post card with a bare description of the concern and the requested action. In practice, a petitioner need only provide sufficient information for the NRC to understand the potential issue for which enforcement action is sought. The lack of a standing requirement or other formal requirements unquestionably facilitates the public's ability to have its concerns considered by the NRC and, if warranted, to have them serve as the basis of enforcement or other NRC action.

The fact that § 2.206 petitions result in few hearings or orders does not mean that the safety concerns underlying the petitions are given short shrift or that the agency's decision-making process is flawed. Chairman Selin, in his opening remarks at the workshop, articulated this thought:

> ...[W]hat percentage of all petitions are granted? It doesn't seem to me to give the answer unless you know how many of the petitions are meritorious, unless you have a way of finding out how many of the petitions have affected agency actions even if they were not formally granted. (Tr. at 5-6)

The numbers of § 2.206 petitions denied have been cited to support the proposition that the § 2.206 process is not functioning properly. Such an isolated numerical focus upon the number of petitions not resulting in the requested action distorts the significance of the § 2.206 process and ignores the many other mechanisms and processes in place to bring safety issues to the Commission's attention. We believe that the relatively high number of petitions denied is evidence of the fact that the principal ways of protecting the

public health and safety are indeed functioning effectively. In numerous instances, although a § 2.206 petition is denied, the underlying safety issue has been evaluated and the requested relief has either already been granted or is no longer necessary. The value of the public input process provided by § 2.206 should be measured by whether the issues raised are timely and adequately addressed, not by whether a hearing, enforcement action or other formal action is instituted. The industry's efforts to ensure safe reactor operation, coupled with the NRC's pervasive regulatory process, have resulted in timely identification of safety issues and their resolution by licensees and/or the NRC.

The § 2.206 process is intended to allow the public to bring their post-licensing concerns to the NRC. It was not designed to be, is not, and should not be the primary means by which the NRC is made aware of potential safety issues. The process under § 2.206 was deliberately adopted in addition to the many other processes and mechanisms employed for this purpose. For example, licensees have extensive operational, surveillance and review programs. These are the most effective mechanisms for identifying and resolving safety issues at a plant and for bringing significant safety issues to the Commission's attention. Also, the NRC assigns at least one, and often two, resident inspectors at each reactor site and conducts routine and special inspection programs and audits involving all safety aspects of the plant and its operation. Further, various programs are maintained by reactor licensees for employees and contractors to identify safety issues to the licensee. The NRC also has a program for employees and contractors to bring safety problems directly to the agency (either personally or anonymously) and have the allegations processed through the NRC's Allegation Management System.[4] In addition to the processes just described, the public has other meaningful opportunities to participate in the oversight of licensees' activities: a member of the public may be present at the numerous public meetings the NRC holds with licensees each year, may initiate and participate in rulemakings, may, if certain procedural requirements are met, request and participate in a hearing on any license amendment, and may submit concerns directly to the NRC through the agency's Allegation Management System. Thus, it is unsurprising that in the vast majority of cases, the safety concerns identified by the public were already known to the NRC when the petition was submitted.

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[4]To the extent it is relevant to a discussion of § 2.206, we believe that the Allegation Management System is effective. It is properly viewed as complementary to, and was not intended to be a substitute for, the § 2.206 process.

Additional Independent Review Of Director's Decisions Is Not Warranted

The § 2.206 process accomplishes its objective not only because it is accessible even to an individual unsophisticated in the workings of government, but also because those at the NRC knowledgeable about the particular technical issue are assigned to review it and to provide a reasoned decision for the determination about whether or not to take enforcement or other action. A § 2.206 petition is referred to the director of the NRC office responsible for the subject matter of the petition. The staff reporting to that director reviews the petition, including an analysis of relevant facts, and provides a detailed response. The director either institutes the requested enforcement or other regulatory action against the licensee, or advises the petitioner of the basis for the petition's denial. The Commission reviews the disposition of each § 2.206 petition to determine whether it is necessary to engage in a more formal review, which may be undertaken by the Commission on its own motion.

Criticism was levied by some at the workshop that there may be some inherent bias by the NRC reviewers because their decisions are the subject of a § 2.206 petition. The basis of this criticism may in fact be dissatisfaction with the result of the NRC's review of a particular § 2.206 petition rather than any real concern over whether the staff put forward a good faith effort to address the petition. A suggestion was made at the workshop that the process be revised to incorporate an additional independent review of § 2.206 petitions by other NRC personnel including, possibly, an Atomic Safety and Licensing Board.

The industry opposes such a revision for several reasons. First, the NRC staff assigned to review the petition are likely to possess the most k+nowledge about the particular issue. It is not sensible from either a resource allocation or safety standpoint to reserve one or more individuals who are the most capable to perform the initial assessment so that they may later perform the independent review. Second, and following from the first, the independent reviewer or reviewing body (e.g., a licensing board) will not have the same level of expertise on the issues that are the subject of the petition that the initial review team had. In that case, there is no reason to believe that an independent review would provide additional value in the safety determination. Third, from both a cost and safety perspective, it would not be an effective use of NRC resources to assign personnel to perform an independent review if they are more appropriately assigned to other significant safety issues. Fourth, the system to evaluate and respond to § 2.206 petitions already includes internal NRC reviews of § 2.206 petitions. These reviews should eliminate the possibility of bias influencing the

evaluation of and response to a petition. Fifth, even assuming such an independent review is desirable, it will not be effective unless the reviewer or reviewing body is also provided with authority to overrule or amend the initial decision on the petition. If such authority is not provided, and a different conclusion is reached by the independent reviewer, a mechanism for conflict resolution must be instituted. This would add another infrastructure to an already burdened regulatory system. Finally, an additional internal NRC review would certainly increase the time required to reach a disposition of the concern underlying the § 2.206 petition, and might result in a compromise of the protection of public health and safety.

Suggested Enhancements To The § 2.206 Process

In determining whether the 10 CFR § 2.206 process ought to be enhanced, one must again return to the purpose of the regulation. As noted above, the regulation's purpose is to provide the public with an opportunity to bring safety concerns to the NRC and have those concerns evaluated and, if warranted, acted upon. These procedures, however, were deliberately made part of the NRC's enforcement process, an area where the NRC is entitled to exercise its informed discretion. The agency is appropriately provided discretion in this context because the most effective use of its resources will always be dependent upon the specific circumstances involved. As the NRC investigates an issue raised by a § 2.206 petition, the agency has and should have many alternatives available to it. It is appropriate for the NRC to be able to determine what course to follow based upon a number of factors, including prior licensee and NRC actions on the issue, the merits of the allegations contained in the petition, the relative safety significance of the concerns raised in the petition, the most appropriate means of resolving the perceived concerns, and the most efficient use of NRC and licensee resources. Such decisions are and should remain within the agency's informed discretion because the basis for these decisions necessarily involves a combination of judgment about the facts at hand as well as agency expertise and experience.

Although the § 2.206 process is easy to set in motion (no standing requirement, only a bare description of the concern is necessary, etc.), the industry supports NRC action to make the § 2.206 process better understood by the public. Any steps to make this process better understood should be implemented in full recognition of the fact that § 2.206 petitions are part of the NRC's enforcement process and, therefore, that the ultimate decision whether to take enforcement action in a particular case must lie within the agency's discretion.

The industry supports enhancements to achieve greater communication between the petitioner and the NRC as the NRC evaluates and responds to the petition. For example, the NRC could assign a specific identifier to the petition for the purpose of tracking documents related to its disposition. The agency also could identify a contact person within the NRC and provide that person's phone number to the petitioner. Further, to ensure accuracy in framing the potential safety issue and its resolution, the NRC could meet or otherwise communicate with the petitioner to ask clarifying questions if necessary for the NRC to fully understand the safety concern and the requested action. Such discussion should provide additional assurance to the petitioner that the NRC understands the petitioner's concerns. Also, the NRC could ensure that the petitioner and the licensee receive a copy of correspondence among the parties and the published NRC documents developed in response to the petition. Finally, the NRC could provide that information to the petitioner and the licensee on some periodic basis.

In response to the dissatisfaction expressed at the workshop regarding the petitioner's opportunity to remain involved in the § 2.206 process, the petitioner could be notified and made aware of the opportunity to attend any NRC/licensee meetings held to evaluate the issues that are the subject of the petition (while observing appropriate safeguards for proprietary information). If the NRC then believes that information in its possession is sufficient to make a determination on the petition, certainly it is within its discretion to do so. If, however, the NRC believes more information is needed, the NRC could, in its discretion, provide an opportunity for the petitioner and the licensee to provide additional information.

The § 2.206 Process Should Not Be Made More Formal

The NRC's Background Paper asks whether it may be appropriate to increase the formality of the NRC's interactions with licensees on a § 2.206 petition (e.g., increased use of 10 CFR 50.54(f) information requests). The industry believes that steps to increase the formality of the process are not necessary and would be counterproductive. It would make this aspect of the enforcement process overly formal and would divert NRC resources without achieving any commensurate safety benefit. Moreover, licensees provide voluntary responses to § 2.206 petitions and readily cooperate with the NRC by providing additional information to the agency if requested. More formality within the

§ 2.206 system would serve no useful purpose. Indeed, at the workshop a representative of the state of Massachusetts noted that formalizing the § 2.206 process would not do anything to change the outcome or make the staff more accountable:

> I would certainly hope that if you were to institute an independent office or if there was to be adjudicatory review...I would expect that the results would be little different from what they are today, because I think that the staff does try to -- does view themselves as being accountable and does try to do a good job.
> (Tr. at page 243.)

It has also been suggested that the NRC should develop and use formal criteria to categorize § 2.206 petitions. We believe that the agency should not do so. It is not necessary and would be wasteful and counterproductive. The NRC already has internal mechanisms for categorizing the petitions and assigning a priority to them and their underlying safety concerns. This is also an area where the agency's ability to use its informed discretion should be left undisturbed.

Conclusion

The industry believes that the NRC's process for handling § 2.206 petitions effectively provides the public with an opportunity to request that the NRC review and take action on a perceived concern. Nevertheless, we endorse the enhancements suggested in these comments. We believe that they will effectively address many of the concerns identified. In light of our view that the § 2.206 process achieves its objective and that no increased safety will derive from any revisions to make the process more formal, no such efforts are necessary.

NUMARC would be pleased to discuss these comments with NRC personnel and to respond to any questions they may have regarding the industry's position on the current areas of the 10 CFR § 2.206 process where modification may be appropriate.

Sincerely,

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RWB/ECG:bjb

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(5)

Dave Morey
Vice President
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Southern Nuclear Operating Company
the southern electric system

August 27, 1993

Docket Nos. 50-348
50-364

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTENTION: Docketing and Service Branch

Comments on
"Section 2.206 Petitions Requesting Institution of a Proceeding to Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper"
(58 Federal Register 34726 of June 29, 1993)

Dear Mr. Chilk:

A representative of Southern Nuclear Operating Company has attended the workshop "Section 2.206 Petitions Requesting Institution of a Proceeding To Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper," published in the Federal Register on June 29, 1993. In accordance with the request for comments, Southern Nuclear Operating Company is in total agreement with the NUMARC comments which are to be provided to the NRC.

In addition to the comments by NUMARC, Southern Nuclear Operating Company requests the Commission to consider the cost effectiveness of any proposed changes to the 2.206 process. Statements at the public workshop were virtually unanimous that the underlying safety issues raised by 2.206 petitions are being addressed carefully by the Staff. Even though some commentators expressed dissatisfaction that petitions were not granted as frequently as they wished, there was no suggestion that reasonable assurance of protecting public health and safety is undermined by the current 2.206 process. This means that any enhancements or refinements of the process can legitimately consider the increased regulatory burdens imposed on power reactor licensees. A balance should be struck between any proposed changes to the 2.206 process and any increase in regulatory burdens so the utility customer does not unfairly bear the cost of a new 2.206 process without a concomitant enhancement of safety.

There should be, also, a system of checks and balances that protect both the licensee and the petitioner from abuse of the 2.206 process. Undoubtedly, there are incidences where a petitioner pursues a secondary motive besides one associated with public health and safety. Should the Staff determine that this is the case, then the Staff should act swiftly to dismiss the petition. Should a licensee somehow abuse the 2.206 process, the NRC has ample authority to take appropriate action.

Should you have any questions, please advise.

Respectfully submitted,

DM Morey

Dave Morey

DNM/JDK

cc: Southern Nuclear Operating Company
R. D. Hill, Plant Manager

U. S. Nuclear Regulatory Commission, Washington, D. C.
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REGULATORY, ENGINEERING, AND ENVIRONMENTAL SERVICES

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PROPOSED RULE PR 2
(58FR34726)

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August 27, 1993

Docket Nos. 50-321 50-424
50-366 50-425

HL-3446
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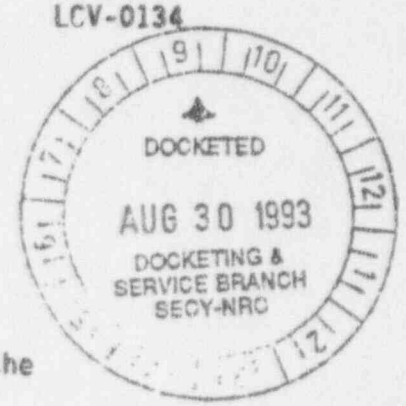

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Comments Regarding the NRC Staff's Review of the
10 CFR Section 2.206 Process
(58 Federal Register 34726 of June 29, 1993)

Dear Mr. Chilk:

I. INTRODUCTION

On June 29, 1993, the Nuclear Regulatory Commission (NRC) invited comments on its review of the 10 C.F.R. Section 2.206 process. 58 Fed. Reg. 34,726. The Nuclear Utility Management and Resources Council (NUMARC) has submitted comments in response to the NRC's invitation. Georgia Power Company endorses NUMARC's comments and herein provides supplemental comments based on Georgia Power's experience, as a licensee, with the 10 C.F.R. Section 2.206 petition process.

In sum, we believe the NRC's current process for receiving and addressing Section 2.206 petitions strikes the appropriate balance between (1) affording interested members of the public an opportunity to raise potential safety issues and request enforcement action associated with licensed activities, and (2) providing the NRC with the flexibility necessary to carry out its statutory mandate to protect public health and safety.

Initially, while we believe it is appropriate for the NRC to examine the Section 2.206 process and consider methods for enhancing public participation, based on our experiences and the information contained in the Commission's Background Discussion Paper (NRC Paper), there is insufficient evidence to warrant substantial changes to 10 C.F.R. Section 2.206 or the NRC policies and procedures implementing that rule.

In particular, the NRC Paper, as well as the Federal Register notice, state that the review was undertaken most notably because of the "long-standing criticism by citizens groups and some members of Congress, primarily because most Section 2.206 petitions are denied." NRC Paper at 2; 58 Fed. Reg. at 34,726. Considering the primary goal

Georgia Power

of the Section 2.206 process -- the identification and correction of safety deficiencies[1] -- it does not follow that the process is flawed merely because a small percentage of the petitions are granted. One would expect few safety deficiencies to be uncovered by such petitions when the NRC and licensees have extensive programs and methods for ensuring public health and safety. Indeed, it should be a rare occurrence when these processes fail to identify and resolve conditions that could create a substantial safety question.

Nevertheless, Georgia Power Company strongly supports the Section 2.206 process' goal of providing interested members of the public with an opportunity to raise potential safety issues with the NRC and to request that action be taken thereon. To that end, we offer below our specific observations regarding the current Section 2.206 process.

II. DISCUSSION

As a preliminary matter, we note that the NRC Paper gives no consideration to the potential resource burden upon licensees which might arise from changes to the Section 2.206 process. While recognizing that "the reality of shrinking rather than expanding [NRC] resources" mandates that the evaluatior result in a "more effective Section 2.206 process with equal or fewer resources" (NRC Paper at 3-4), the NRC Paper does not express an interest in ensuring that the costs of any proposed changes be justified based on an increase in nuclear plant safety. As discussed in Georgia Power Company's comments below, the current Section 2.206 process already incorporates many of the suggestions discussed in the NRC Paper. Georgia Power submits that further modification to the Section 2.206 process to increase public participation is not warranted as it will increase costs for plant operators, as well as the NRC Staff, without a commensurate increase in safety.

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[1]Based on the comments at the NRC's July 28, 1993, workshop on the Section 2.206 process, it appears that some public citizen groups consider the primary goal of Section 2.206 to provide a mechanism for any member of the public to obtain a full adjudicatory hearing on the safety concerns they raise. We submit that such a position mischaracterizes the purpose of the rule and evidences an inappropriate agenda - one based on a philosophical opposition to nuclear power in general.

A. Increasing Interaction Between the Petitioner and the NRC Staff

The NRC Paper offers several options for increasing interaction between the Staff and petitioners. The suggestions, for the most part, can be implemented without any formal change to the existing Section 2.206 process. This has been demonstrated in the case of a Section 2.206 petition filed with respect to Georgia Power's Plant Vogtle. In that case, there was (and continues to be) extensive interaction with the petitioners including, for example, the following:

1. Petitioner was interviewed on several occasions (some of which were transcribed) by the NRC with respect to a number of allegations which he brought to the NRC. (Because the petitioner raised safety issues with the NRC which were later incorporated into a Section 2.206 petition, his concerns were initially handled as allegations.)

2. Georgia Power Company was required to response, in writing and under oath, to the Section 2.206 petition and its supplements.

3. Petitioner was provided a copy of each of Georgia Power Company's responses. This process directly resulted in the petitioners filing a supplemental petition.

Thus, as the NRC Paper notes, procedures for increasing the interaction between the Staff and petitioner are currently in use. It follows that no formal change to the current process is necessary for the NRC Staff to continue this practice in appropriate cases. Indeed, the NRC Staff should have some flexibility to decide which Section 2.206 petitions are necessary and appropriate for such increased interaction techniques.

Of course, Georgia Power Company discourages any increased interaction techniques which would impose a substantial burden on licensee resources. For example, the NRC Paper notes that a disproportionate amount of NRC Staff time and resources are spent coordinating Section 2.206 petition responses. In response to this, the NRC Paper, at 10-11, discusses shifting responsibility to the licensee to respond to extensive information requests, and perhaps meet with the petitioner in "informal public discussions," without regard for the time and resource burdens placed on the licensee. As in the case of NRC Staff resources, this practice would be inappropriate to the extent it would require an inordinate amount of licensee time and resources. This is especially true for the majority of Section 2.206 petitions which raise issues that are either already known to, and being resolved by, the NRC and the licensee or are unsupported and frivolous.

B. Focusing on Resolution of Safety Issues Rather Than on Requested Enforcement Action

This area of inquiry is, in our opinion, the most important contained in the NRC Paper. Section 2.206 provides the public with a mechanism of raising potential safety issues for prompt action by the NRC. As stated above, its fundamental purpose is the identification and resolution of potential safety issues. Under limited circumstances, an adjudicatory proceeding may result. However, as stated above in n.1, based on some comments of public citizen groups at the NRC's July 28, 1993 Section 2.206 Workshop, it would appear that these groups are more interested in the latter rather than the former.[2] Increasing the opportunity for a full adjudicatory hearing in the Section 2.206 process will wreak havoc on the licensee, as well as NRC Staff resources. This, rather than the resolution of safety issues, would appear to be the goal of those who insist on adjudicating any safety issue raised in a Section 2.206 petition, no matter how small. An appropriate focus on the resolution of safety issues will achieve the purposes of Section 2.206 while minimizing the perception that petitioner's safety concerns are being summarily dismissed by the Staff.

One problem with the current Section 2.206 process is that petitioners often ask for extreme sanctions (e.g., shutdown of the plant) based on alleged improper actions by a licensee. Such "requested relief" is often out of line with the alleged safety deficiencies, even if such allegations were 100% accurate. The result is often a denial of the petitioner's requested relief because the petition did not raise a significant public health and safety issue. Nonetheless, the NRC Staff and the licensee would have addressed and resolved any of the safety issues raised in the petition which are found to be substantiated. Of course, any decision regarding enforcement action with respect to those allegations which were substantiated, appropriately rests exclusively with the NRC.

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[2]See e.g., comments by Ms. Susan Hiatt, Director of the Ohio Citizens for Responsible Energy, to the effect that meaningful public participation under Section 2.206 can only be achieved through citizen-initiated adjudicatory hearings (Tr. at 95-96) and comments by Mr. Martin Malsch, NRC Deputy General Counsel, summarizing a Union of Concerned Scientist study that concluded the appropriate purpose of Section 2.206 should be to provide the public with a formal, public hearing on any matter or safety issue raised by a petition (Tr. at 55).

Georgia Power Company agrees with the suggestion of the NRC Paper that the NRC decision on a Section 2.206 petition should focus on the safety issues raised by the petition. In this regard, the Director's Decision could de-emphasize the granting or denying of the specific enforcement action requested by the petitioner. For example, instead of concluding that a petitioner's request for the NRC to order a plant shutdown is denied, the responsible NRC director could simply state that the petition's allegation was either substantiated or not substantiated and then state that the NRC will take enforcement action, if applicable, consistent with NRC's enforcement policy.

C. Categorizing Petitions and Allocating More Resources According to the Importance of Issues Raised

Categorizing petitions as suggested by the Staff (NRC Paper at 12-13) appears to be the current, albeit informal, approach to allocating Staff resources. We recommend that the Staff continue with this informal approach, without adopting specific procedures and inflexible criteria for segregating petitions.

Additionally, in Georgia Power's opinion, there is room for improvement in the length of time required by the NRC Staff to resolve Section 2.206 petitions. The Staff is to complete its review in a "reasonable time." However, the Staff view of what is a "reasonable time" does not necessarily coincide with that of the licensee or, for that matter, the petitioner. The length of the Staff's review time directly impacts licensee resources and has an effect on the public's perception of the licensee's competence. In order to further conserve licensee (and NRC Staff) resources, as well as to ensure timely resolution of the petitioner concerns, the NRC Staff should consider what is a "reasonable time" for all concerned, and strive to meet that time frame. This approach would avoid extended periods of inaction which frustrate licensees and, in some cases, inadvertently provide the petitioner with an unintended remedy. In other cases, extended periods of inaction apparently frustrate petitioners.[3]

D. Providing For a Formal Review Process for Director's Decisions

The NRC's existing procedures, whereby the Commission has the authority to review Director's Decisions, provide adequate review of such decisions. Judicial review is inappropriate because it invades the authority of the NRC to take appropriate enforcement action which it

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[3]This issue was raised as a concern at a July 15, 1993 hearing held by the Senate Subcommittee on Clean Air and Nuclear Regulation.

Georgia Power

deems necessary, within its sole discretion. This would disturb a fundamental precept of agency enforcement authority applicable to all government agencies with enforcement authority. See Heckler v. Chaney, 470 U.S. 821 (1985). As aptly discussed at length in that case,

> an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion. This is attributable . . to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agencies overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . .

Id. at 831-32.

Furthermore, there is no credible evidence to suggest that judicial review will improve upon the disposition of issues raised in the current Section 2.206 process, while it is certain that it will increase costs and create substantial delays in ultimate resolution of the issues raised.

III. CONCLUSION

Georgia Power Company submits that, on the whole, the current Section 2.206 process has served as a credible, equitable and effective mechanism for the public to raise potential safety concerns to the NRC

Georgia Power

for resolution. The process allows any person to raise any issue to the NRC, without regard for the petitioner's legal standing or his basis for the concern, for NRC investigation and resolution. NRC experience to date demonstrates that the current process is serving its goal of identifying, and causing the resolution of, safety issues which had not previously been addressed by either the licensee or the NRC. While few petitions have identified significant safety questions, this is an indication that licensees and the NRC Staff are adequately protecting the public health and safety rather than an indication that the Section 2.206 process is broken.

Concerns about the Section 2.206 process which have been expressed to the NRC appear to be grounded in a desire for more public involvement in the process. As discussed above, informal procedures are available within the current Section 2.206 process which will enhance public participation in the Section 2.206 process without creating a significant increase in the resource burdens on the NRC Staff and licensees. Substantial modifications to the process to provide for increased public participation will not yield a significant safety benefit and are, therefore, not warranted.

Should you have any questions, please advice.

Respectfully submitted,

C. K. McCoy

CKM/CRP

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HL-3446
LCV-0134

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Health Research Group • Litigation Group

Ralph Nader, Founder

COMMENTS OF PUBLIC CITIZEN'S CRITICAL MASS ENERGY PROJECT

Introduction

The Commission has initiated a review of its regulation and practices governing 2.206 or "show cause petitions. The purpose of the review is purportedly to ensure that the process is an effective, equitable, and credible mechanism for the public to prompt the NRC to investigate and resolve the potential health and safety threat raised by the petition. In the Commission's background paper the staff identifies three broad areas of potential improvement:

1) increasing interaction with the petitioner;
2) focussing on resolution of safety issues rather than on the requested enforcement action; and
3) categorizing petitions according to importance of issue raised.

Furthermore the review of the 2.206 process raises questions as to the objective of the process and whether the process is meeting this objective. Public Citizen participated in the Commission's workshop on the 2.206 process in which there was unanimous agreement among citizen petitioners that the process does not work. Public Citizen welcomes the opportunity to help improve the 2.206 process. Our specific comments follow.

THE PROCESS FAILS TO PROVIDE AN EFFECTIVE, EQUITABLE AND CREDIBLE MECHANISM FOR THE PUBLIC TO ENSURE THE SAFE AND ENVIRONMENTALLY SOUND OPERATION OF A NUCLEAR POWER PLANT.

Once a nuclear reactor has been licensed to operate the ability of the public to participate in the regulation of that reactor is practically non existent. The only opportunity for the public to question the operation of a nuclear reactor is through a 2.206 or "show cause" petition.

Under the Commission's regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper. (10 CFR 2.206) Unfortunately, it has been the practice of the Commission to summarily deny citizens petitions.

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Between 1985 and the end of 1991, the NRC staff issued 93 directors decisions on "show cause" petitions regarding nuclear reactor safety. The NRC staff rejected every petition. In only one case, involving the Yankee Rowe reactor, has the commission exercised its jurisdiction over a "show cause" petition and reviewed the staff's decision. (Curran, The Public as Enemy: NRC Assaults on Public Participation in the Regulation of Operating Nuclear Power Plants, Union of Concerned Scientists, April 1992, p. 24.)

In a 1990 case, Nuclear Information and Resource Service v. NRC, the Commission attempted to argue that the public's right to bring a "show cause" petition was an adequate substitute for the public's right to a hearing under section 189 (a) of the Atomic Energy Act. However, Commission attorneys failed to come up with a single instance in which a "show cause" petition raising safety concerns had been granted since the early 1980s.

In testimony given a year later, the Nuclear Regulatory Commission admitted that it had allowed only two hearings in response to 321 requests under section 2.206 in the more than 10 years that the regulation had been on the books. (Hearings Before the House Subcommittee on Energy and Power, House Committee on Energy and Commerce, 102d Cong., 1st session, May 8, 1991, p. 743 - 744). This hardly constitutes an effective, equitable and credible mechanism.

By the Commission's own admission, it is evident that the NRC has almost always denied to the public that which it is expressly authorized to seek under the regulations -- proceedings against the licensee. In its defense, the Nuclear Regulatory Commission has argued that "show cause" petitions have been granted in whole or in part about 10 percent of the time because they result in some regulatory action being taken. This claim is impossible to substantiate. Since the NRC failed to institute a proceeding against the licensee, there is no public record.

The Union of Concerned Scientists has studied the Commission's handling of 2.206 petitions. The study found that, even in the rare instance where the Commission did not reject the "show cause' petition, little if any meaningful public participation occurred. UCS found that the NRC followed a "pattern of delaying (a) ruling on the petitioners requests for hearings until it could make a plausible claim that its own, private interactions with the licensee had yielded sufficient improvement to justify denial of the hearing requests." (Curran at p. 15.)

The Commission's stated goal in this review is to determine whether the 2.206 process is an effective, equitable and credible mechanism. Public Citizen believes that the problem with the process is not there is no mechanism by which to raise safety issues but that the Commission lacks the will to use it.

Under the Commission's regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper. (10 CFR 2.206) Rather than institute a proceeding which the petitioner has requested, the Commission circles its wagons with the licensee to formulate a plausible rationale for denying the petition. If the Commission were truly concerned with affording the public an "effective, equitable and credible mechanism" it would institute a proceeding under 2.202.

INCREASED INTERACTION WITH THE PETITIONER WILL NOT ENSURE AN EFFECTIVE, EQUITABLE AND CREDIBLE MECHANISM FOR ADDRESSING SAFETY ISSUES RAISED IN THE 2.206 PETITION.

While increased interaction between the NRC and the petitioner would be welcomed it will not provide for an effective, equitable and credible mechanism for addressing safety issues raised in the 2.206 petition.

As acknowledged in the NRC's discussion paper, the Commission's handling of 2.206 petitions fosters the appearance that "while there is little opportunity for the petitioner to participate in the resolution of issues the petitioner has raised, the licensee has a much greater opportunity to become involved and influence the decision process." Increasing interaction with the petitioner will not address this problem. While the petitioner will have more information, they will still be excluded from the process.

The NRC suggests that the petitioner could be placed on the service list for all communications regarding issues raised in the petition. The petitioner could be allowed to attend meeting with the licensee and the staff. Furthermore, the NRC has suggested that the petitioner be allowed to respond to any submissions by the licensee regarding the issues raised in the petition.

While these suggestions would be welcomed by the petitioner they fail to ensure an efficient, equitable and credible mechanism for addressing issues raised in the petition. The suggested practices would enhance the public's understanding of the NRC's handling of the petition and thus the Commission's credibility, but they do nothing to address the inequity of the process. The petitioner is still an outsider to a process which is dominated by the NRC and the licensee. The petitioner's presence at meetings is not the same as public participation. The petitioner has no procedural rights and no chance for judicial review of the NRC's handling of the petition.

Information about the process is not the same as having access to it. Without the ability of the petitioner to substantively participate in the process, the NRC will not have an equitable mechanism for handling the safety issues raised in the petition.

FOCUSSING ON RESOLUTION OF SAFETY ISSUES RATHER THAN ON REQUESTED ENFORCEMENT ACTION WILL NOT SOLVE THE PROBLEMS ENDEMIC TO THE 2.206 PROCESS.

The NRC suggests changing the 2.206 rule to allow petitioners to allege a violation of a commission rule or policy rather than request a specific enforcement action, i.e., to modify, suspend or revoke a license. The NRC states that the underlying significance of the 2.206 petition is to bring issues of potential health and safety impact to the attention of the commission.

Public Citizen believes that petitioners are interested in more than merely bringing issues to the attention of the NRC. The petitioner requests the commission to institute a proceeding to modify, suspend or revoke a license. Petitioners want not only to raise potential safety issues but to participate in a process that will see them resolved.

Concentrating on the underlying safety issue rather than the specific enforcement action requested would result in further removing the petitioner from the process which they initiated. Resolution of the safety issue is the goal but there must be a consistent process in which the petitioner can participate on an equal footing with the licensee. By NRC focusing on resolving the underlying safety issue, the petition could be denied or left in some regulatory limbo while the agency and licensee concentrate on justifying further operating of the nuclear reactor.

Petitioners file a 2.206 based on what they perceived as violations of the license, NRC regulations or technical specifications. Most serious petitioners cite the NRC's code of federal regulations and the actions which they believe constitute the infraction. They are looking for the NRC to enforce its own regulations and not allow nuclear reactors to operate outside of their licenses.

Unfortunately it seems as though many petitioners take the regulations more seriously than do the NRC or the industry. We have learned through the NRC's workshop that there is a hierarchy of regulation. Yet this is not made evident in the regulations.

Further confusion is caused by the double standard imposed by the NRC before and after a nuclear reactor is licensed. The NRC takes the position in the licensing stage that compliance with regulations constitutes safety and then once the plant is licensed the NRC shifts to a different standard based on its hierarchy. This results in the NRC allowing nuclear reactors to operate outside of regulations.

The NRC has acknowledged that it has a hierarchy of regulations based upon safety. The NRC should communicate this hierarchy to the public so that petitioners don't' waste their time and effort attempting to enforce regulations which the Commission and staff consider to be of lesser importance.

CATEGORIZING PETITIONS AND ALLOCATING RESOURCES ACCORDING TO THE IMPORTANCE OF THE ISSUE FAILS TO ADDRESS THE PROBLEMS IN THE 2.206 PROCESS.

In the 2.206 workshop, NRC's Jim Partlow acknowledged that the NRC already performs a sort of triage on 2.206 petitions. However, this does not ensure that the NRC provides an efficient, equitable and credible mechanism for addressing safety issues raised in the petition. For instance the NRC gave a high priority to the 2.206 petition filed by the Nuclear Information and Resource Service (NIRS) regarding the use of Thermo-Lag fire barrier. However, the NIRS petition was denied prior to the resolution of several significant safety issues including the potential combustibility of a material that is supposed to act as a fire barrier.

As noted above, Public Citizen believes that the problem with the process is not there is no mechanism by which to raise safety issues but that the Commission lacks the will to use it. Under NRC regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper.(10 CFR 2.206) The NRC can best ensure an efficient, equitable and credible mechanism for addressing safety issues raised in the 2.206 petition by instituting the requested proceeding.

We thank the Commission for the opportunity to participate in the workshop and to comment on this most important subject.

Respectfully Submitted August 25, 1993:

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(8)

Nuclear Information and Resource Service
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August 27, 1993

COMMENTS ON NUCLEAR REGULATORY COMMISSION'S REVIEW OF THE 2.206 PROCESS

Recognizing the need to strengthen meaningful public participation in identifying and mitigating safety issues at operational nuclear power plants, Nuclear Information and Resource Service (NIRS) offers the following comments on the Nuclear Regulatory Commission's Review of the 2.206 process.

Judicial Review of the 2.206 Petition

First and foremost, NIRS supports a provision for the judicial review of an Nuclear Regulatory Commission (NRC) denial of a 2.206 request that is based on material evidence that reasonably demonstrates a significant noncompliance with the terms of the license and activities by the licensee that pose significant health and safety hazards to the public.

NRC has argued that because it is an enforcement agency, and since no other federal enforcement agency is subject to judicial review, that it is inappropriate to subject NRC to judicial review. In fact, as Commission Chair Ivan Selin addressed the issue before Senator Joseph Lieberman's Subcommittee on Clean Air and Nuclear Regulation June 30, 1993 hearing on S.1165, it is a matter of "honor" that NRC not be subjected to such unfair treatment.

To the contrary, NIRS submits its complaint filed August 18, 1993 with the NRC Inspector General regarding NRC mishandling and denial of the NIRS 2.206 petition on Thermo-Lag 330-1 fire barrier material. The complaint alleges NRC favoritism and protectionism of the manufacturer of the fire barrier material resulting in the ongoing noncompliance of 10 CFR 50 Appendix R, "Fire Protection Program for Nuclear Power Plants" as installed in seventy-nine U.S. nuclear power plants. The NIRS complaint is presented in context of the current investigations by a Federal Grand Jury into product claims made by the manufacturer and investigations by both the Inspector General and the House Energy and Commerce Committee's Oversight and Investigation Subcommittee into the lack of NRC oversight.

In another example, the U.S. General Accounting Office Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce "Nuclear Safety and Health: Counterfeit and Substandard Products Are a Governmentwide Concern" (GAO/RCED-91-4, October, 1990) states in its principle finding that "the NRC is deferring its regulatory responsibility." The report goes on to state that "the magnitude of the problem, cost to the taxpayers, and potential dangers resulting from using such products are not known."

It is the NIRS position that NRC because of its dual responsibilities to both an increasingly economically burdened industry and an ever more safety minded public could welcome the inclusion of judicial review in the 2.206 process as an opportunity to restore its accountability.

Increasing interaction with the petitioner

It is our experience that the petitioner under the current 2.206 process has little or no reciprocal interaction with the NRC process. Again using the example of the Thermo-Lag petition, rather than being regularly notified about issues, meetings, etc; germane to our petitions, and being included in them, NIRS had to learn about them on our own, and interaction was generally between NRC and industry, with no inclusion. The only NRC communications with NIRS regarding theThermo-Lag petition were decision notifications.

NIRS submits that the NRC can increase the interaction with the 2.206 process by placing the petitioner on a NRC service list to receive all relevant public documents, including but not limited to information notices and bulletins, generic letters, SECYs, Operating Reactor Event Briefings, and other NRC information pertinent to the petitioner's issue, such as public meeting notices. NIRS recognizes that this might place an economic burden on the NRC to absorb all the copy cost of documentation and postage. Consequently, the fall back would be to place the petitioner on a service list that would include notification of issuance of NRC documentation with information on accessing the information at a NRC Public Document Room or placing an order for documentation through the NRC PDR copy service. The computer experienced petitioner could also be given retrieval access through the NRC computer network.

Focusing on resolution of safety issues rather than on requested enforcement action

The resolution of public safety issues raised by 2.206 petitions is paramount to both the petitioner and the regulator. In our real world, however, resolution often requires enforcement. NRC has already demonstrated a reluctance or inability to enforce implementation of safety issues as documented by NUREG-1435 Supplement 2 "Status of Safety Issues at Licensed Nuclear Power Plants" (December, 1992). In light of the significant lack of implementation of identified safety issues, NIRS comments would focus on strengthening NRC enforcement actions, in that NRC must carry and use a much bigger stick to implement meaningful resolution of licensee safety issues.

The 2.206 process is phrased in limiting terms of the requested action, i.e. "to modify, suspend, or revoke a license, or for such other action as may be proper." While requests for license modifications, suspensions and revocations should remain among the options open to petitioners,

we believe the 2.206 language should be broadened to encourage a focus on resolution of safety issues rather than the current focus on requesting imediate shutdowns. For example, there is currently no legal basis for a petitioner to request (for a hypothetical example) that portions of electrical wiring used in 3 reactors be replaced during each reactor's next refueling outage because it has been proven faulty. Instead, the petitioner must request the more drastic stop of shutdown or license modification. (Of course, without judicial review, there is little legal clout behind the process at all). This could make the 2.206 process both less controversial and more meaningful for all parties.

Categorizing petitions and allocating resources according to importance of issues raised

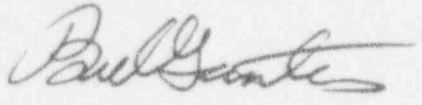
NIRS recognizes that the 2.206 process is focused on safety related issues. Petitioners generally do not submit non-safety related petitions.

NIRS submits that the obvious problem with NRC categorizing petitions and allocation of resources according to importance of issues raised is contingent on which interests are prioritized first: public safety or the economic interests of the nuclear industry. Industry and regulator are currently looking at the elimination of issues marginal to safety based largely on the economic burden compliance with safety regulations place on the industry. On the other hand, a significantly large portion of the public sector lacks confidence that NRC will consistently prioritize legitimate issues of public safety over the economic interests of licensees.

The NIRS Thermo-Lag 2.206 is again a case in point. NRC staff relegated the petition on the defective fire barrier into a catagory defined as not a significant safety issue. NRC staff declared that compensatory measures were adequate so that the "continued operation does not pose an undue risk to the public health and safety."[1] NIRS argued strenuously that fire watches do not constitute an adequate substitute for passive fire barrier systems, nor do they comply with regulations. In so doing, NIRS contends that NRC staff prioritized the industry's economic interests by the continued operation of 79 nuclear power plants over public safety and compliance with fire safety regulations.

NIRS submits that an independent review mechanism needs to be incorporated into the 2.206 process. Initially perhaps, the NRC Inspector General's office could review the petitions pending congressional approval of judicial review.

Respectfully submitted,



Paul Gunter
Nuclear Watchdog Project

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[1] Partial Director's Decision Under 10 CFR 2.206, DD-93-03 (2-01-93), p.14.

Nuclear Information and Resource Service

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August 18, 1993

Mr. David Williams
Inspector General
U.S. N.R.C.
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Dear Mr. Williams:

NIRS is filing a complaint to your office regarding the Nuclear Regulatory Commission Director's Decision DD-93-11 issued June 25, 1993 and Notice of Issuance of the Final Director's Decision issued May 23, 1993 and the Partial Director's Decision Under 10 CFR 2.206 issued February 1, 1993 denying the NIRS petitions on the controversial fire barrier material Thermo-Lag 330-1, manufactured by Thermal Science, Inc.(TSI).

NIRS asserts that the NRC, in denying the NIRS petitions under 10 CFR 2.206, has acted to prematurely close the proceedings on issues brought forward in the petition while many of those issues remain open and/or are unimplemented safety items before the Commission. Current NRC compensatory actions for the faulty fire barrier at 79 nuclear power plants are inadequate to guarantee the public's health and safety. It is also our concern that a number of issues raised in the petition are not currently being addressed with remedial or enforcement action by the regulator and the industry and have been dismissed without action. We further contend that the NRC Commissioners and Staff have exhibited undue and inexplicable favoritism toward Thermo-Lag and its manufacturer, Thermal Science, Inc., (TSI) to the point that the agency's actions have driven one major competitor out of the nuclear business, and have resulted in the apparent approval of "fixes" to the Thermo-Lag problems that would result in direct benefit and profit to Thermal Science, Inc., whose unethical and perhaps illegal actions caused many of the problems in the first place. NIRS contends that these issues remain valid concerns to public health and safety.

In summary, the following issues remain open items or inadequately addressed:

Favoritism. It cannot have gone unnoticed by either the NRC Commissioners or Staff that there are competing fire barrier materials which have passed the basic ASTM E-119 test and other

independent tests as well. Yet the NRC seems determined on changing its regulations, considering exemptions from regulations, approving fire barrier configurations with 2, 3, even 5 times the amount of Thermo-Lag originally specified, with the apparent intention of approving the use of Thermo-Lag as a fire barrier regardless of regulatory requirements.

This position is in spite of the NRC Inspector General's report of August 12, 1992, which flatly stated that TSI had used indeterminate tests to back up its claims that it met NRC fire barrier regulations, and that TSI had conducted and overseen its own tests at an unqualified laboratory where TSI itself approved its test results or, as seems apparent, conspired with testing facility personnel--including top-level management--to approve test results.

It is NIRS position that TSI has proven itself either unable or unwilling to adequately protect the public health and safety, and is thus unfit to remain a supplier to the nuclear power industry. For this reason alone, the NRC should order the immediate removal of all Thermo-Lag products from commercial nuclear power plants.

However, it has become obvious that the NRC Commissioners and Staff are more concerned with protecting TSI than they are with protecting the public health and safety. Despite the fact that Thermo-Lag has been proven through repeated testing not to meet existing fire protection regulations, the NRC has not ordered its removal.

While competing products have demonstrated their ability to meet existing fire protection regulations through widely-recognized independent testing, including passage of the ASTM E-119 test, the NRC has acted not to encourage the use of competing products, but to encourage testing of "enhanced" Thermo-Lag configurations (which generally require the use of 2-5 times as much Thermo-Lag as originally specified), thus bringing greater profit to TSI at the expense of its competitors.

Further, the NRC has acted to actually weaken independent testing criteria (E-119) when the only possible beneficiary is TSI, and its product Thermo-Lag, since competing fire barrier products already have passed this rigorous test. This NRC initiative has implications not only for the commercial nuclear power industry, but for nearly every use of fire barrier materials. In its zeal to protect TSI, the NRC is essentially endangering millions of Americans who live in apartment buildings, work in high-rise office buildings, etc. This demonstrates a remarkably callous and cavalier attitude toward public health and safety with again, only one possible beneficiary, Thermal Science, Inc.

The NRC's favoritism toward TSI has been so overt and damaging to TSI's competitors and the free enterprise system that TSI's largest competitor, the 3-M Company, recently announced that it will no longer supply the nuclear industry with nuclear-grade fire barrier material, since it cannot afford the cost of documentation to prove safety when TSI's documentation is being paid for by the federal government and the nuclear power industry (through the trade association NUMARC) in an NRC-approved testing program. The fact that the NRC continues to procrastinate and defer their regulatory role to NUMARC is demonstrated by the comments of James Taylor in a May 4, 1993 letter to NUMARC President Joseph Colvin underscoring NRC "commitments to

Congress" (i.e. Chairman. John Dingell's House Energy Subcommittee on Investigation and Oversight) that the Thermo-Lag problem would be taken care of by the NUMARC testing program. "Thus it is essential that we understand the scope and timing of the industry testing program...(for) long term corrective actions," wrote Taylor,[1] in a clear indication that the NRC--the regulatory body--was awaiting instruction from NUMARC, an industry trade association, to respond to Congressional inquiries about the progress of the Thermo-Lag testing program.

We also raise serious questions about the ethics of allowing Thermal Science, Inc. to be a major contributor to the NUMARC "independent" testing program of Thermo-Lag, since it was the TSI tests, discredited by the Inspector General, which led to the widespread use of Thermo-Lag despite its tested ineffectiveness.

NIRS thus submits that the NRC's activities--in the denying of NIRS' petitions and subsequent actions, have been driven by an inexplicable, unwarranted, and, we believe, potentially illegal favoritism toward Thermal Science, Inc. at the expense of TSI's competitors and the public health and safety. Such favoritism has no place in the federal government and must be rooted out and eliminated by independent public investigators such as the NRC Inspector General.

In addition to the above complaint, there are a number of technical issues which the NRC Commissioners and Staff have not adequately addressed.

Combustibility of the fire barrier material remains an open item. NRC acknowledges that Thermo-Lag is combustible. Yet the NRC does not address in response to the NIRS petition that the fire barrier material in fact represents an installed fire load in areas required to be free of combustible materials. 10 CFR 50 Appendix R specifically requires "Separation of cables and equipment and associated non-safety circuits of redundant train by a horizontal distance of more than 20 feet with *no intervening combustibles or fire hazards*" (Section G.2.d.) and "Separation of cables and equipment and associated non-safety circuits of redundant trains by a *noncombustible* radiant energy shield." (Section G.2.f.)[Emphasis added] Furthermore, Branch Technical Position CMEB 9.5.1 requires all fire barrier materials to be made of noncombustible materials.

The regulations are clear: combustible materials are not allowed in areas near vital electrical cables, yet every test of which NIRS is aware indicates that Thermo-Lag is indeed a combustible material.

There remains the discrepancy between the NRC Information Notice 92-82 "Results of Thermo-Lag 330-1 Combustibility Testing" findings that Thermo-Lag is combustible and the NUMARC Thermo-Lag Combustibility Assessment Program finding that Thermo-Lag "can be considered a non-combustible" as presented at the NUMARC/NRC Thermo-Lag meeting 6/28/93.

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[1] "NRC Impatient With NUMARC Work on Generic Solution to Thermo-Lag Woes," Inside N.R.C., May 17, 1993, p.1.

Combustion Toxicity of Thermo-Lag remains an open issue in so far as the NRC has failed to adequately explain the discrepancy in findings between the Promatec Final Report CTP1099 referencing Southwest Research Institute Final Report No. 01-8818-101 and evaluation by Southwest Certification Services as presented in the NIRS petition versus the NRC independent toxicological evaluation. This contention was dismissed by NRC without addressing the underlying question as to why these reputable testing laboratories came up with different results regarding the concentrations of hydrogen cyanide, carbon monoxide and ammonium resulting from the combustion of Thermo-Lag. The NRC Staff cannot merely deny NIRS' petition based on its own test results, without explaining why its test results are different, or controlling over NIRS' submitted evidence.

Ampacity Derating remains an open issue with regard to the effects of TSI underestimating the ampacity derating figure for Thermo-Lag installations on cables and cable trays. While an NRC Special Review Team recognized that a nonconservative ampacity derating could be instrumental in the installation of inappropriately sized cables which in turn could suffer premature cable jacket and cable insulation failure, NRC dismissed the contention in the NIRS petition by concluding that a sufficient margin exists to preclude any immediate safety concern. NIRS remains concerned that these Thermo-Lag installation errors, occurring in most cases over ten years ago, are causing electrical cables to operate with a diminishing safety margin, and with no regulatory remedy in sight.

Further concern is warranted by the failure of NRC to address the correlation of the ampacity derating problem and "Potential Cable Deficiencies of Certain Class 1E Instrumentation and Control Cables" as identified in Information Notice 93-33. IN 93-33 alerts licensees to the potential failure of instrumentation and control cables due to premature thermal and radiation aging. Without merit, NUMARC does not plan to share with NRC an industry-wide information survey on how extensively the faulty cable jacketing is in use, nor does NRC, at present, appear to be inclined to demand this information. NIRS contends that the combined effect of Thermo-Lag ampacity derating errors and 1E cable deficiencies are factors that neither the NRC nor NUMARC have factored to determine the postulated safety margin.

It should be of additional concern to the NRC that postulated tests performed by NUMARC are with new cable and are not indicative of aged cable found in existing nuclear power plants.

Seismic issues have not been adequately addressed by NRC and subsequently have been dismissed. NRC dismisses NIRS contentions that Thermo-Lag may not perform its fire barrier function for safe shutdown earthquakes (SSE) and may even act as a shear severing cables and shattering cable trays. NRC acknowledges that TSI has not performed seismic tests of prefabricated panels, but instead has referenced a TSI independent consultant's computer-based seismic analysis of Thermo-Lag. All other manufacturers of electrical envelop systems have performed actual seismic qualification tests. Only TSI has been allowed to function with an engineering evaluation report based on computer modeling.

While NRC rejects the NIRS contention that the material may shear cables and shatter cable trays during an earthquake, NRC acknowledges that Thermo-Lag "may crack or crumble into a powdery material or small fragments under an SSE." NRC fails to address the results of the disintegration of the material as a protective fire barrier for the safe shutdown cables and cable trays in the event of a fire caused during or after a SSE. NIRS acknowledges that a strict reading of the regulations does not require that fire barrier materials function during an earthquake. It is well-known, however, that fires are the most damaging after-effects of earthquakes, and often cause more damage than earthquakes themselves. We believe it unthinkable that the NRC would, in this instance, hide behind a legalistic reading of the regulations, and fail to offer the American people protection from nuclear meltdown induced by earthquake-initiated fire.

NRC also fails to address the consequences of the use of fire suppression systems and the increased water solubility of Thermo-Lag as a "powdery material" dissolving into the sump.

Hose Stream test failures have not been adequately addressed by NRC. NRC has acknowledged that Thermo-Lag barriers have failed hose stream tests and that cables may be damaged by thermal effects of the fire if the barrier fails as a result of a hose stream. NRC further commented in the February 1, 1993 response to the NIRS petition that "the NRC staff will require the successful completion of a hose stream test in fire barrier qualification." This has now apparently been requalified to mean that a fog nozzle test is sufficient to qualify the material. NRC Chairman Ivan Selin stated to a Congressional hearing that Texas Utilities hasn't proven they can pass the solid stream test, yet has allowed the acceptance criteria to exclusively use the fog nozzle test, an admittedly weaker test.

While NRC General Counsel William Parler acknowledged, in a March 1993 Commissioners' meeting, that the NRC cannot use the Texas Utilities fog nozzle tests on a generic basis without public comment, it is evident that the NRC is leading an effort to change ASTM testing criteria, not only for nuclear plants but for all fire barrier uses, to allow use of fog nozzle rather than the more realistic full hose stream tests. NRC personnel have attended ASTM committee meetings with the explicit mission of encouraging such a change--again, with the only possible beneficiary being TSI, since other materials already have passed the more rigorous full hose stream tests. As described by 3-M Company representative Richard Licht in House Energy Subcommittee on Oversight and Investigations hearings March 3, 1993, the full hose stream tests are essential to replicate not only the effects of fire-fighting water, but also the effects of fire barrier aging, fire-induced missiles attacking the barrier, and other unforeseen, but realistic circumstances. In any event, the NRC has no business using its funds and personnel to attempt to change basic ASTM tests to benefit a single commercial nuclear supplier, and those utilities which have purchased that supplier's material. This, again, represents rank favoritism, and a cavalier attitude toward public safety which extends even beyond the NRC's nuclear arena.

Fire watch programs do not constitute an appropriate short term substitute for a passive fire barrier system. The 1988 to 1991 four year average of fire events at U.S. nuclear power plants involving ignition and flame or smoke was 35.25 events per year and 2.94 events per month.[2]

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[2] SECY-93-143, "NRC Staff Actions To Address the Recommendations in the Report on

Events have ranged in severity, but include such accidents as the 3/02/89 fire which rendered both fire pumps inoperable at Peach Bottom, the 10/09/89 hydrogen fires at Shearon Harris which burned for 2 1/2 hours, and the Maine Yankee Main Generator fire on 4/29/91 which was allowed to burn out after 3 hours. In answering the NIRS petition, NRC acknowledges that fire watch personnel can not act as physical shields but NRC fails to adequately address how fire watch programs compensate for this specific task. In some cases, passive fire barrier protection is assigned to the specific task of protecting cables and cable trays that are behind walls or otherwise inaccessible to fire watch personnel.

Fire watch programs do not constitute adequate short term or long term compensatory actions. As documented by 24 Licensee Event Reports since 1984 and over 100 Violation Notices since 1979, fire watches are subject to a host of problems. A short list of identified areas of concern includes;

-missed fire watches due to miscommunication, personnel error, and management deficiencies
-inadequate training of fire watch personnel
-inattentiveness on fire watches and personnel observed sleeping on duty
-falsification of fire watch records and logs
-vandalism of plant property by fire watch personnel.

In conclusion, we acknowledge that the 2.206 process has a remarkably high Commission denial rate; for that reason, we recently participated in a Commission-sponsored workshop on this process, much of which was devoted to our Thermo-Lag petitions. This case, however, "takes the cake," and is a perfect example of "missed opportunities," as NRC Chairman Dr. Selin described the 11-year history of the NRC handling of the Thermo-Lag 330-1 issue in his report to the Subcommittee on Oversight and Investigations with the House Committee on Energy and Commerce on March 3, 1993.

It is our understanding that the Commission decision to deny the NIRS petition was largely based on the relief requested by the petitioner with particular emphasis focused on "the immediate suspension of the operating licenses of all nuclear power plants which use the material Thermo-Lag as a fire barrier, until the Thermo-Lag is removed and replaced." In fact, NIRS requested, as a perfectly reasonable alternative (although not a legal alternative under the current 2.206 process), "Alternatively, NIRS requests that the NRC order each reactor to remove and replace its Thermo-Lag during its next refueling outage."

In denying the NIRS petition without adequately answering the issues brought forward by the petition, the NRC has closed out an opportunity for our informed involvement in addressing the multiple problems created by the continued installation of Thermo-Lag in 79 nuclear power plants. Admittedly, in the transcript of the NRC public workshop on the 2.206 process held on

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the Reassessment of the NRC Fire Protection Program." Re-assessment of the NRC Fire Protection Program, February 27, 1993, Enclosure 1 "Safety Significance of Nuclear Power Plant Fires," Appendix G, H, and J.

July 28, 1993, Jack Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation, in responding to a NIRS concern that the Thermo-Lag 2.206 had been denied prematurely, Mr. Partlow responded "*On the specific Thermo-Lag issue, to the extent the petitioner has continuing information to bring to the process, I agree with you. We may have closed it out too early, to the extent that you might continue to have meaningful information to bring to the process.*"[3]

The NRC resolution of the Thermo-Lag problem continues to trend towards protectionism and favoritism of the manufacturer of an inferior fire barrier product rather than mitigating the identified inadequacies resulting from its use. Why has NRC not simply required TSI to comply with the original E119 standard? Why does the NRC not require Thermo-Lag to meet the same critieria competing products already have met? Instead, it is becoming more apparent that the NRC is conducting its investigation of TSI so as to rewrite the fire protection standards to accommodate an inferior product and indeed provide for the installation of additional Thermo-Lag as the resolution. This can only result in a weaker standard and the exemption of nuclear power plants from meaningful fire protection regulations. This is pure and simply favoritism, by a federal agency toward a single supplier, that has a serious effect on the public health and safety. It is immoral, unethical, and possibly illegal. We urge the Inspector General to take every action to ferret out the cause of this favoritism, to require the NRC Commissioners and Staff to enforce their own regulations, and to take every action necessary to protect the health and safety of the American people and their environment.

Sincerely,

Michael Mariotte
Executive Director

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[3] Official Transcript of Proceedings, "Review of the 2.206 Petition Process," July 28, 1993, p. 187-189.

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August 31, 1993

BY HAND

Mr. Samuel J. Chilk
Secretary, U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

Re: Commission Review Of Regulations And Practice Governing Petitions Under 10 C.F.R. §2.206; 58 Fed. Reg. 34726 (June 29, 1993)

Dear Mr. Chilk:

On June 29, 1993, the Nuclear Regulatory Commission ("NRC") initiated a review of its regulations and practice governing petitions under 10 C.F.R. §2.206 requesting the NRC to take enforcement action (58 Fed. Reg. 34726). In connection with this review, the NRC requested public comment on the §2.206 process and, in particular, on a background discussion paper prepared by the NRC Staff. In response to that request, we submit these comments on behalf of Florida Power Corporation, Niagara Mohawk Power Corporation, Northeast Utilities, Public Service Electric & Gas Company, the Tennessee Valley Authority, and Washington Public Power Supply System.

I. INTRODUCTION

The §2.206 petition is the primary formal procedure for a member of the public to request the NRC to take enforcement action. It is in addition to the many mechanisms for the identification and resolution of safety and regulatory issues by licensees and the NRC. The vast majority of issues are routinely identified and resolved by licensees. In addition, the NRC maintains comprehensive oversight of the operation of its licensees through extensive and intensive inspection and regulatory programs.

The §2.206 process provides the public with a valuable mechanism to bring concerns to the attention of the NRC, and thereby aids the NRC in assuring that its enforcement

responsibilities are carried out. Through the development of this petition practice, the NRC has created an innovative procedure that encourages public participation in the enforcement arena. In this respect, the §2.206 process has worked well as one part of the Commission's overall framework for identifying and resolving safety issues. Therefore, while some improvements to the process of review of §2.206 petitions by the Staff may be appropriate, significant alterations to the NRC's current §2.206 practice are unnecessary.

The §2.206 process, while providing this opportunity for public participation in the enforcement context, also preserves the NRC's discretion to determine whether action is warranted in a given situation. This discretion is essential for the NRC to evaluate the complex factors that lead to a decision to enforce or not to enforce. As the Supreme Court has stated:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.[1/]

The NRC staff must have this flexibility to react to new safety issues and to prioritize its resources. Excessive formalism associated with one class of issues would only detract from the agency's ability to carry out its mission.

Consistent with the concerns noted by the Supreme Court, and the NRC's recognition of "the reality of shrinking rather than expanding resources,"[2/] we concur that the NRC's review of its §2.206 practice should seek to accomplish two goals:

1/ Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655-56 (1985).

2/ 58 Fed. Reg. 34726.

(1) maximize public participation to the extent practicable, given limited NRC Staff and licensee resources; and

(2) avoid over-proceduralization of the §2.206 process that might detract from the Staff's ability to exercise its discretion in considering §2.206 petitions or lead to judicial review of Directors' Decisions.

With these goals in mind, the remainder of our comments address specific issues outlined in the Staff background discussion paper, as well as concerns regarding judicial review of citizen petitions (as discussed at the NRC's public workshop on July 28, 1993). We also provide specific recommendations for improvements to the §2.206 process.

II. DISCUSSION

The Staff background discussion paper prepared in anticipation of the public workshop focused on three specific areas of potential change to the NRC's §2.206 practice:

- Increasing interaction with the petitioner;
- Focusing on resolution of safety issues rather than on requested enforcement action;
- Categorizing petitions and allocating more resources according to importance of issues raised.

We examine each of these areas below and also discuss issues surrounding the possibility that changes to §2.206 might result in judicial review of Director's Decisions.

A. Increasing Interaction Between The NRC Staff And The Petitioner

Although the NRC Staff makes every effort to foster public participation in the regulatory process and openness in its decisionmaking, petitioners sometimes complain that, from their perspective, the §2.206 process appears to be a "black box." At the public workshop, public interest group representatives stated that they sometimes submit petitions and subsequently receive denials from the NRC with no intervening communication with the Staff. Therefore, the Staff background discussion paper offers

several suggestions for increasing interaction between the Staff and the petitioner.

Of those suggestions, we agree that the NRC should assure that the petitioner receives copies of all correspondence related to the petition in question until the disposition of the petition by the NRC. In addition, the NRC should expand its practice of opening informal lines of communication with the petitioner after a petition is filed to focus or narrow the issues in question. Such improvements to the process could enhance public participation without over-proceduralizing the practice or adding to Staff or licensee burdens. Participants in the public workshop also expressed a related concern that the NRC sometimes treats letters from members of the public to the NRC as §2.206 petitions regardless of whether the writer actually intended to file a formal petition. Increased informal communication between the Staff and members of the public writing to the NRC -- e.g. asking the writer if a §2.206 petition was intended -- could alleviate this concern.

The NRC should not, however, create formal procedures for meetings involving the Staff, licensee, and petitioners, licensee responses under oath pursuant to 10 C.F.R. §50.54(f), or public discussions of issues raised in the petition. Informal use of these practices depending upon the particular circumstances surrounding a petition might improve interaction between the petitioner and the Staff. In many cases, this type of informal interaction already exists. For example, licensees often provide unsolicited responses to §2.206 petitions. However, institutionalization of meetings or responses under oath would create a significant drain on Staff and licensee resources and would not offer any offsetting increase in safety. In addition, any new regulatory requirements concerning §2.206 procedures might be interpreted as "law to apply" to a given case and thereby subject Directors' denials of petitions to judicial review (see Section II.D below).[3/]

3/ See Greater Los Angeles Coun. On Deafness v. Baldridge, 827 F.2d 1353, 1360 (9th Cir. 1987) (Department of Commerce regulations requiring Department official to "make a prompt investigation whenever a compliance review, report, complaint or any other information indicates a possible failure to comply" constituted law to apply for reviewing court). See also, Wallace v. Christensen, 802 F.2d 1539, 1552 n. 8 (9th Cir. 1986) (en banc); Abdelhamid v. Ilchert, 774 F.2d 1447, 1450 (9th Cir. 1985).

B. Focusing On Resolution Of Safety Issues Rather Than On Requested Enforcement Action

The Staff background discussion paper examined two options to refocus the §2.206 petition process towards resolution of safety issues, rather than specific enforcement actions. The first option raised in the paper was that if the Staff decides that an issue of some importance has been raised, and the Staff decides that it should make additional inquiries, inspections, or investigations, the petition could be granted with the actual outcome of the additional efforts left open. According to the background paper, this would serve to acknowledge the legitimacy of the petitioner's concerns.

The Staff should not, however, leave open the outcome of a petition simply to acknowledge that issues were raised by a petitioner. §2.206 petitions request that the NRC take specific actions, such as shutting down a plant or modifying or revoking a license. Thus, postponing a final determination would place a licensee in the difficult position of not knowing for extended periods of time whether a particular license provision is valid or, indeed, whether a plant may be operated at all. This uncertainty would complicate licensee planning efforts and result in significant expenditures that might not otherwise be necessary.

The second option examined in the background discussion paper would involve a change in the regulation permitting petitioners to request that the Commission consider a safety issue or issues, alleging violation of a Commission rule or policy, rather than requesting a specific enforcement action. According to the paper, this would de-emphasize the enforcement implications of a petition and focus on more general safety concerns.

There is no need, however, to promulgate additional regulations to permit a petitioner to ask the Commission to consider general safety issues. Petitioners could more appropriately address generic issues by filing a petition for rulemaking under §2.802, or by informal means, such as a letter to the Staff. In addition, §2.206 petitions already often raise general safety concerns in the context of requesting enforcement action, and the NRC may effectively act on these safety concerns, even though it denies the specific relief requested in the petition. The recent Thermo-Lag petition provides a notable example of this. Finally, as previously noted, additional regulatory requirements could be interpreted as triggering judicial review of Directors' denials of petitions.

C. **Categorizing Petitions And Allocating More Resources According To Importance Of Issues Raised; Providing An Internal Review Process For Directors' Decisions**

The background paper noted that one option being considered by the Staff would be to establish internal criteria for determining the level of effort and the types of procedures to be used on each petition. In addition, for the category of petitions which the Commission has determined raise the most significant issues, the paper stated that the Staff might consider explicitly amending §2.206 to provide some type of internal review of the Director's decision.

The NRC should not formalize the §2.206 process in this manner. As the Staff stated in the discussion paper, a "disproportionate" amount of time and resources are already spent coordinating decisions on §2.206 petitions. In addition, the Staff indicated in the public workshop that safety issues -- including §2.206 petitions -- are categorized depending upon safety significance utilizing the same standards and procedures as for all issues before the Staff. Thus, formal categorization of petitions would further divert limited Staff and licensee resources from other direct regulatory responsibilities, such as processing license amendment requests, inspection and enforcement activities, research, and promulgation of regulations. The three categories of petition proposed by the Staff[4/] are too inflexible to account for the complex range of technical and regulatory issues that may be raised by a petition. The Staff must have the flexibility to address each petition individually and expend the appropriate level of effort.

In particular, the NRC should not amend §2.206 to provide for internal review of Director's Decisions, or, as some public interest groups have recommended, to provide for Atomic Safety and Licensing Board ("ASLB") review of these decisions. There is no need for such review. With its combination of regulatory experience and technical expertise, the NRC Staff is the organization most qualified to decide upon §2.206 petitions. A

4/ The background discussion paper divides petitions into three categories: (1) those that merely raise issues and cite information previously evaluated by the NRC Staff; (2) those that raise a significant issue or issues with regard to a specific licensee; and (3) those that raise large significant unresolved generic safety issues affecting one or more licensees.

subsequent review by persons less qualified would only add to the time and resources spent on petitions without offering any corresponding safety benefit. Furthermore, ASLB judges should not review Director's Decisions. The ASLB panel was designed specifically to rule only after the compilation of an exhaustive administrative record and a hearing, rather than to consider enforcement decisions and compile such a record itself. Thus, the ASLB panel, while containing both legal and technical judges, should not be put in the position of second-guessing NRC Staff determinations regarding the myriad of factors -- including decisions concerning complex technical matters and resource allocation considerations -- that inform a decision to enforce or not to enforce.

In addition, during the public workshop, Staff representatives stated that the NRC Office of General Counsel ("OGC") reviews Directors' Decisions to ensure that the Staff has adequately addressed issues raised in petitions. Thus, there is already an informal review of Staff determinations under §2.206. Finally, as explained in detail below, any regulatory change specifying a formal review process or categorization of petitions could potentially constitute "law to apply" in a given case and thereby subject Directors' Decisions to judicial review. Such a result would consume Staff time and would impose further costs on licensees with no countervailing benefit.

D. Judicial Review Of §2.206 Petitions

The Supreme Court has recognized for over a century that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion and presumptively unreviewable.[5/] The Court has noted that such enforcement decisions are unsuitable for judicial review because they involve factors within the peculiar expertise of the agency, such as resource allocation considerations and technical expertise, and because "an agency generally cannot act against each technical violation of the statute it is charged with enforcing."[6/] With respect to §2.206

5/ Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649 (1985); United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198 (1979); United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967); Confiscation Cases, 7 Wall. 454 (1869).

6/ Heckler v. Chaney, 470 U.S. at 831, 105 S. Ct. at 1656.

petitions in particular, courts have generally found that Director's Denials are within the NRC's enforcement discretion and therefore judicially unreviewable.[7] Chairman Selin, in his introduction to the public workshop on July 28, 1993, reiterated his opposition to judicial review of §2.206 petitions requesting enforcement action, noting that agency enforcement decisions in general are not subject to such review.

The NRC should avoid promulgating regulatory changes to the petition process that would provide specific, formal standards or procedures for review of §2.206 petitions. One of the bases of the Supreme Court's Heckler v. Chaney holding that enforcement decisions are presumptively unreviewable was that Congress had provided no "law to apply."[8] That is, Congress did not indicate an intent to circumscribe agency enforcement discretion or provide meaningful standards for defining the limits of agency discretion.[9] Several U.S. Court of Appeals decisions subsequent to Heckler v. Chaney have found that agency regulations could provide a court with "law to apply" and thereby subject agency decisions to judicial review.[10] Thus, when considering

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7/ See, e.g., Safe Energy Coalition v. NRC, 866 F.2d 1473 (D.C. Cir. 1989); Massachusetts v. NRC, 878 F.2d 1516 (1st Cir. 1989). Nonetheless, Congress is currently considering legislation that would amend Section 189 of the Atomic Energy Act ("AEA") to provide for judicial review of §2.206 petitions. (See S.1165, "Nuclear Enforcement Accountability Act of 1993," proposed by Senator Joseph Lieberman (D-Conn.) on June 24, 1993.) The NRC should oppose this legislation. It is unnecessary, and would result in placing costly burdens on licensees and, ultimately, utility ratepayers. As Chairman Selin stated at the public workshop on July 28, 1993, the NRC already has an extremely thorough inspection and enforcement regime, and Congress should not single out the NRC for review of enforcement decisions.

8/ Heckler v. Chaney, 470 U.S. 834-35, 105 S. Ct. 1657.

9/ Id.

10/ See Greater Los Angeles Coun. on Deafness v. Baldridge, 827 F.2d 1353 (9th Cir. 1987); Wallace v. Christensen, 802 F.2d 1539, 1552 n. 8 (9th Cir. 1986) (en banc);

(continued...)

regulatory changes, the NRC must take into account the possibility that creating a more formal, structured process could restrict its enforcement discretion and subject Director's Decisions to review by the courts.[11/]

III. CONCLUSION AND RECOMMENDATIONS

The §2.206 process has worked well in the past and does not need significant modification. However, informal measures to enhance public participation may be desirable. Such measures could include increased communication between the Staff and petitioner, and/or providing petitioner with correspondence related to issues raised in the petition. In addition, the NRC might clarify the procedures that it currently follows in reviewing §2.206 petitions and update petitioners as their requests for enforcement action move through each step of the §2.206 process.

The NRC should not, however, make any formal changes to its §2.206 practice, including provision of an independent review of Director's Decisions, categorization of §2.206 petitions, or a modification of NRC regulations governing the petition process. These steps are unnecessary, and would divert scarce Staff and Licensee resources from other important regulatory responsibilities.

Respectfully submitted,

Mark J. Wetterhahn
Mark J. Hedien
WINSTON & STRAWN

10/ (...continued)
Abdelhamid v. Ilchert, 774 F.2d 1447, 1450 (9th Cir. 1985); State Bank of India v. NLRB, 808 F.2d 526, 536 n. 12(7th Cir. 1986); Hill v. Group Three Hous. Dev. Corp., 799 F.2d 385, 394-95 (8th Cir. 1986).

11/ If the NRC does decide regulatory changes are necessary, any new regulations should plainly protect agency discretion. See Webster v. Doe, 486 U.S. 592, 602 n. 7, 108 S. Ct. 2047, 2053 (1988).

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Revisions in the NRC's Petition 2.206 process are vital in two essential areas. The present petition process allows a minimal of interaction between the petitioner, the licensee, and other local interested parties who may be impacted by the petitioner's requests. This results in a continued animosity between all concerned as well as a total lack of communication between the licensee and the petitioner. It ought to be clear that the old " he said, they said, she said" routine with the NRC as the messenger boy can only breed distrust and confusion for all parties involved. The second area of needed change is in the total lack of representation by the segment of the population who support the licensee yet are often times negatively impacted by decisions made concerning the licensee by the NRC in response to petitions filed against the licensee in the 2.206 process. This failing must be redressed in any revision of the petition process.

I would like to propose the following suggestion as a possible revision to the current petition process. The process should be broken up into three stages. The first stage following a petitioner's letter of concern would be for the NRC to arrange a meeting between the petitioner and licensee with or without the NRC present as a mediator or facilitator. If at this stage an agreement about the concern can be reached between the petitioner and licensee then the petition can be dropped without NRC intervention. However, should one or both parties feel unsatisfied with the outcome of this meeting, the NRC after listening to both parties (either while in attendance at the meeting or after reading a transcript of the first stage meeting) should proceed to initiate the 2nd stage of the process in which the NRC would offer its <u>suggestions</u> as to actions to be taken by either the licensee or the petitioner. For example, the NRC may wish the licensee to investigate more fully a specific health or safety problem (with which the petitioner is concerned) and then present their findings at the 2nd stage meeting. The 2nd stage meeting should be open to the public (the local population should always be kept informed of any potential threat since <u>they</u> are the people impacted by the plant's presence). The NRC may also make the suggestion to the petitioner that the licensee has adequately addressed the petitioner's concern and unless they find new evidence that would support their concern then they should drop their petition (a reasonable time limitation should be set so that the initial petition process may be resolved). The third and final step in the

process would entail official action by the NRC after reviewing the petitioner's and licensee's response to the stage 2 suggestion. In addition to this third stage, the local citizens living in the area of the facility should be given 30 days to respond to the NRC action and counter the petition's concerns if they can show possible higher risks to their health, safety, and economy due to the proposed actions of the NRC. In revising the petition process in this manner, the NRC gives the local people who are most directly impacted by decisions concerning the facility a voice in the regulating of their communities' health, safety, and economic standards.

The present petition process does not allow representation from local people in support of the licensee. It is designed only to address the complaints of a radical few who often times are not directly impacted by the operations of the licensee or the repercussions of NRC actions which they initiated. Also, a petitioner should be limited to one petition action in process at a time. This should help to hold down cost and focus attention on the most important and immediate concerns without wasting valuable resources on trivial matters which lack substantial evidence of a health or safety problem.

All petitions' transcripts from the initial first stage should be kept on file. If another petitioner duplicates a previous petition, a copy of the transcript of the resolved petition should be sent to them. If they can provide new information not previously used, the NRC may initiate a new petition process.

I further suggest that the NRC in the best interest of the local population publish any petitions, licensee responses or NRC actions in the local media. The NRC should request local public input on these items to better gage the level of concern for these issues among people who are directly impacted by the facility.

I respectfully submit these suggestion in the hopes that the NRC may be able to put them to use in remedying a an ailing process which presently robs many of a voice in their own future.

Sincerely,

Angie Ellis

Angie Ellis, Sec./Tres. SAFEST
Sequoyah Advocates For
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(58FR 34726)

(11)

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Ted C. Feigenbaum
Senior Vice President and
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NYN-93122

August 30, 1993

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attention: Docketing and Service Branch

Subject: Comments on the NRC's Review of the 10CFR2.206 Petition Process

Gentlemen:

On June 29, 1993, the Nuclear Regulatory Commission (NRC) published notice (58FR34726) of its intent to review the regulations and practice regarding the 10CFR2.206 petition process. In connection with this review process, the NRC prepared a background discussion paper that addressed the present practice regarding the treatment of 10CFR2.206 petitions and proposed several alternatives to the present process. The June 29, 1993 notice invited comments on both the published notice as well as the background paper.

North Atlantic Energy Service Corporation (North Atlantic) is responsible for the management and operation of Seabrook Station. Personnel from North Atlantic attended the workshop held on July 21, 1993 and have reviewed the discussions in both the notice and the background paper. North Atlantic appreciates the opportunity to present the following comments on the present 10CFR2.206 petition process and the alternatives proposed.

North Atlantic believes, based upon its experience, that information related to the safe operation of commercial power plants is being brought to the Commission's attention through existing processes and no change to the basic process is warranted. It is through our own self-assessment programs and the NRC's extensive inspection and allegation managment programs that the vast majority of issues are identified and resolved. In addition, the 10CFR2.206 petition process does provide a formal mechanism by which the public can identify and resolve those few issues not resolved by other means.

This is not to say that there are no improvements possible in the 10CFR2.206 process. The NRC's proposal to enhance communication with the petitioner will improve the credibility of its regulatory role. The specific proposal to place the petitioner on the service list for written communications is an appropriate one. Further, informal NRC efforts to discuss the issue with the petitioner would potentially serve to narrow the issue such that the impact on NRC and licensee resources is minimized. However, North Atlantic opposes any formal process by which meetings of the NRC, Petitioner and Staff are held or by which formal responses are required and rebuttal responses allowed. Aside from the problem of who gets the "last word", such formal activities would have a significant impact on both NRC and licensee resources.

Given that the 10CFR2.206 process, in combination with the other processes available, has been achieving the objective of raising safety issues, North Atlantic sees no need for the more drastic modifications to the program suggested in its background paper.

Finally, North Atlantic strongly opposes the recommendation by several of the representatives of public citizen groups at the workshop that Director's decisions be reviewed by the Atomic Safety and Licensing Board (ASLB). Having gone through extensive ASLB proceedings associated with the licensing of Seabrook Station, North Atlantic is absolutely certain that such proceedings would require a significant expenditure of licensee, NRC and petitioner resources. This is clearly counter to the NRC's expressed goal of improving petitioner participation without adding significantly to existing resource burdens.

To summarize, North Atlantic believes that the 10CFR2.206 petition process has worked well and needs little in the way of improvements. The proposal to add informal measures to improve information flow to petitioners may be desirable to enhance the credibility of the process and the results.

Very truly yours,

T. Feb Dietrich for
Ted C. Feigenbaum

TCF:AMC/act

cc: Mr. Thomas T. Martin
Regional Administrator
U.S. Nuclear Regulatory Commission
Region I
475 Allendale Road
King of Prussia, PA 19406

Mr. Albert W. De Agazio, Sr. Project Manager
Project Directorate I-4
Division of Reactor Projects
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Noel Dudley
NRC Senior Resident Inspector
P.O. Box 1149
Seabrook, NH 03874

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September 1, 1993

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTN: Docketing and Service Branch

RE: Notice of Workshop
Section 2.206 Petitions Requesting Institution of a Proceeding to Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper; 58 Fed. Reg. 34726 (June 29, 1993

Dear Mr. Chilk:

We participated in the development of the comments submitted by NUMARC's General Counsel with respect to NRC's initiative to re-examine its section 2.206 process. These comments, which we support, are comprehensive, and they are well-directed to the issues being considered by the NRC.

On a personal note, my participation as a panel member at the workshop was a very beneficial experience. I believe the exchange of diverse views among panel members furthered mutual understanding. One diverse viewpoint warrants further comment, however.

Some of the panel members were critical of the section 2.206 process because of a perception of agency bias in it's decisionmaking. They seemed to believe that agency 2.206 decisions either unduly favor the nuclear industry and/or unduly protect the NRC's regulatory posture at the expense of a fair assessment of the issues raised by section 2.206 petitioners. This lack of trust motivated the panel's critics to urge that NRC Staff 2.206 decisions be subjected to re-examination through adjudicatory hearings or less formal procedures under the aegis

of the Atomic Safety and Licensing Board Panel.[1] The NRC, in our judgment, should not seriously consider these recommendations because their underlying premise is specious.

No credible evidence of agency bias exists, and none was provided at the Workshop. Moreover, it would be improper to ascribe such bias to the NRC, as some may, from the fact that most requests for action by 2.206 petitioners are denied. As explained in NUMARC's comments, the high number of 2.206 denials is a function of the many other mechanisms and processes already in place and available to the NRC to address safety issues. In short, no 2.206 petitioner should be surprised that the NRC, which was created to protect public health and safety, has addressed or is already addressing a proffered safety concern in the normal discharge of the agency's regulatory responsibilities.

In our view, the critics' complaints of bias and distrust stem from a basic disagreement with the structure of the Atomic Energy Act of 1954, which, among other things, permits power reactor operations so long as NRC-determined measures to protect public health and safety are satisfied with reasonable assurance. Neither adjudicatory hearings nor ASLB reviews of NRC 2.206 decisions will resolve the objections of those who disagree with the Act or the manner by which the NRC prudently exercises the discretion granted by the Act to discharge its regulatory responsibilities. Their recourse more properly lies with the ballot box.

We appreciate the opportunity to provide these comments.

Sincerely,

Gallo and Ross

by: Joseph Gallo

JG/as

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[1] See transcript of 2.206 Workshop entitled "Review of the 2.206 Petition Process", pp. 145, 159, 182-83, 198-99, 205-06, 230, 232-33, July 28, 1993.

ET-NRC-93-3959

Westinghouse Electric Corporation Energy Systems

'93 SEP 10 ... :20

Nuclear and Advanced Technology Division

Box 355
Pittsburgh Pennsylvania 15230-0355

September 3, 1993

Mr. Samuel C. Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Chilk:

SUBJECT: REQUEST FOR COMMENTS ON 10 CFR SECTION 2.206

Westinghouse Electric Corporation ("Westinghouse") files these comments on 10 CFR 2.206 in response to the invitation to comment set forth in the Notice of Workshop on Section 2.206 set forth at 58 Fed. Reg. 34726 (June 29, 1993). In the Federal Register Notice, the NRC stated that it was initiating a review of its regulations and practice governing petitions under 10 CFR 2.206. As part of that review, the NRC held a public workshop on July 28, 1993, to obtain an exchange of information on the objectives of the Section 2.206 petition process, its effectiveness and what, if any, revisions should be made to the process. Representatives of Westinghouse worked with Nuclear Management and Resources Council ("NUMARC") in development of the nuclear industry position in connection with this important matter, and Westinghouse representatives attended the Workshop.

Westinghouse endorses the comments filed by NUMARC on behalf of the nuclear industry on August 27, 1993, in connection with this matter. We believe that the 2.206 process as currently operating appropriately meets the objective of providing members of the public with an effective mechanism to bring to NRC attention safety concerns with respect to the operation of nuclear power facilities outside of a licensing or rulemaking proceeding. As noted by NUMARC, the 2.206 process is intended to be part of the NRC enforcement process and provides a method readily available to the public to have the NRC apply its significant resources to evaluate the concerns stated in the 2.206 petition and consider whether any enforcement or other action is appropriate. As such, the process is in addition to many other mechanisms employed by the NRC to become aware of potential safety issues. Thus the effectiveness of the 2.206 process must be evaluated in the context of NRC enforcement, taking into consideration the availability to the Commission of the various methods by which the NRC addresses safety issues.

Westinghouse also agrees with NUMARC that some enhancements can be made such that the 2.206 process is better understood. It is to the benefit of the Commission, its licensees and the public that the process actually be and be viewed as open. Thus, the suggestions in the NUMARC comments with respect to additional procedures which might be part of the 2.206 process are supported by Westinghouse. These procedures, of course, must be kept within the framework of NRC enforcement, an area where the NRC is entitled to exercise its informed discretion. It would be counterproductive if enhanced procedures were to increase the formality of the 2.206 process or overjudicialize the process. The ultimate goal of Commission regulation is to assure the health and safety of the public and the common defense and security. Additional procedures which involve

increased commitment of time and resources without commensurate safety benefits would not be warranted.

Westinghouse appreciates the opportunity to comment on this matter and would be pleased to discuss these views on the 2.206 process with the NRC.

Very truly yours,

N. J. Liparulo, Manager
Nuclear Safety and Regulatory Activities

/p

(16)

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(58FR 34726)

'93 OCT 15 P4:24

Comments on the Nuclear Regulatory Commission's Review of Regulations and Practices Governing Citizen Petitions Under 10 CFR 2.206 for Instituting Proceedings Against Licensees

by the

UTILITY RADIOLOGICAL SAFETY BOARD
OF OHIO

November 1, 1993

The Utility Radiological Safety Board of Ohio is pleased to offer comments for the Commission's review of the 10 CFR 2.206 petition process.

The Utility Radiological Safety Board of Ohio (URSB or Board) was established by the Ohio General Assembly in July of 1989. The Board's purpose is to:

> "...develop a comprehensive policy for the state regarding nuclear power safety. The board's objectives shall be to promote safe, reliable, and economical power; establishing a memorandum of understanding with the federal nuclear regulatory commission and the state ... and recommend policies and practices that promote safety, performance, emergency preparedness, and public health standards that are designed to meet the state's needs."

Additionally, Ohio Revised Code Chapter 4937 requires the Board to:

> "...make recommendations to increase cooperation and coordination among the member agencies toward the promotion of nuclear safety and mitigation of the effects of a nuclear electric facility incident."

The URSB consists of six state agencies: the Ohio Departments of Agriculture, Health and Industrial Relations, the Ohio Emergency Management and Environmental Protection Agencies, and the Public Utilities Commission of Ohio.

The URSB is advised by the URSB Citizens Advisory Council on Nuclear Power Safety (CAC) on technical and public safety and health issues linked with the operation of Davis-Besse, Perry, and Beaver Valley nuclear power plants. The CAC is composed of local government officials, academics, representatives from environmental organizations, scientists, nuclear and health professionals, and citizens residing near the nuclear power plants. The primary objective of the CAC is to represent diverse views and ideas on the safe operation of nuclear power plants and to bring these views and ideas to the URSB.

The CAC has expressed interest in the effectiveness of the NRC's 2.206 petition process and has recommended that the URSB participate in reviewing the process and make recommendations for reform.

It has been noted by the NRC that the 2.206 petition process has not been comprehensively reviewed since this provision was added to the Commission's regulations in 1974. The NRC has acknowledged the criticism that the process has received since its inception. The reevaluation of the process is therefore appropriate and will serve the Commission's efforts to enhance public participation in the Commission's decisionmaking process. The URSB agrees with the Commission's goal for this review: to ensure that the 2.206 process is an effective, equitable and credible mechanism for the public to prompt Commission investigation and resolution of potential health and safety problems.

The Commission has identified three broad areas for improving the 2.206 process: (1) Increasing interaction with the petitioner; (2) Focusing on resolution of safety issues rather than on requesting enforcement action; (3) Categorizing petitions according to importance of issues raised.

The URSB, with the advice of its advisory council of citizens, recommends improvements in two areas of the 2.206 petition process: there should be a prioritization of 2.206 petitions so that the NRC can better use its resources to address important safety issues; and to increase interaction among the petitioner, the NRC staff and the licensee. To achieve these objectives, the URSB offers the following recommendations:

I. The URSB recommends that the NRC establish a formal mechanism to prioritize petitions filed under 10 CFR 2.206. The goal of the system should be to assure available resources are focused on minimizing the risk to public health and safety. Petitions that are known to or could reasonably be expected to have merit, and that identify a significant risk to public health and safety should receive immediate and thorough review. Petitions that are without merit should be handled on a low priority basis and should use a minimum amount of NRC staff resources and no licensee resources.

   Factors that should play a role in determining a petition priority include:

   1. Does an adverse impact on public health and safety now exist?

   2. What are the potential consequences of a delay in action?

   3. How many people and/or plants are at risk?

   4. Does the petition have sufficient merit to warrant an aggressive review?

II. The URSB recommends that the NRC improve communications with 2.206 petitioners and require that NRC Staff make a more articulate and comprehensive response to petitioners by:

   1. Assigning a point person to each case. Petitioners should be given the name and telephone number of the point person so that petitioners may initiate discussions or ask questions regarding the petition.

   2. Providing petitioners the opportunity to communicate with NRC staff who will analyze the petitioner's case. The communications may be made in person, by telephone, or in writing. Granting the opportunity for petitioners to participate in discussions of the petition among NRC staff, licensee, and vendors should be considered.

3. Notifying petitioners about correspondence or other documents concerning the petition. Petitioners should be given the opportunity to request copies from the NRC.

   The NRC should respond to the petitioners by providing the following information:

   a. The decision.

   b. Summary of what was done to reach the decision.

   c. The rationale behind the decision.

Conclusion

The URSB applauds the NRC for taking the initiative to reform the 2.206 petition process. The NRC's background discussion paper and the workshop conducted to review the 2.206 petition process provided an excellent foundation for reform. A sound petition process is essential to enhancing public participation in Commission decisionmaking, benefits all the participants, and advances our common safety objectives. The Board encourages the NRC to develop a 2.206 reform strategy and to consider our recommendations as the NRC prepares this strategy.

ATTACHMENT C

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 6, 1993

MEMORANDUM FOR: All NRR Employees

FROM: Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

SUBJECT: NRR OFFICE LETTER 600, REVISION 3, "PROCEDURES FOR HANDLING REQUESTS UNDER 10 CFR 2.206 (DIRECTOR'S DECISIONS)"

PURPOSE

This Office Letter establishes procedures for (1) ensuring prompt and appropriate notification and distribution of actions handled in accordance with 10 CFR 2.206; and (2) coordinating information from the Office of Investigations (OI) in preparing a Director's Decision in response to a petition submitted pursuant to 10 CFR 2.206. This revision supersedes NRR Office Letter 600, Revision 2, November 7, 1988.

DEFINITION

A 10 CFR 2.206 petition is a request filed by any person, pursuant to 10 CFR 2.206, requesting a proceeding to modify, suspend, or revoke a license or for such other action as may be proper. A person need not cite 10 CFR 2.206 in order for the request to be treated as a 10 CFR 2.206 petition.

The petition must demand, essentially, that a license be modified, suspended, or revoked, or that other enforcement-related action be taken. However, a request to modify an existing license should be distinguished from a request to deny an initial license or a pending amendment. The latter type of request should be handled with the relevant licensing action, not under 10 CFR 2.206. Petitions must specify the action requested and specify the facts that constitute the bases for taking that particular action. General opposition to nuclear power or a general assertion, without supporting facts, should not be treated as a formal petition under 10 CFR 2.206. Such letters should be treated as routine correspondence.

A 10 CFR 2.206 petition based on wrongdoing consists of assertions of either (a) deliberate violations of regulatory requirements or (b) violations resulting from careless disregard of or reckless indifference to regulatory requirements, or both (a) and (b). A reasonable basis for belief of wrongdoing exists when the circumstances surrounding a violation of a regulatory requirement indicate that the violation more likely than not was deliberate or resulted from careless disregard or reckless indifference, rather than resulted from error or oversight. Requests for OI investigations should be prepared in accordance with NRC Office Letter 1000.

CONTACT:
Cynthia A. Carpenter, DRPW
504-3641

RESPONSIBILITIES AND AUTHORITIES

Office of the Executive Director for Operations (EDO)

a. Assigns a green ticket to each request under 10 CFR 2.206 and forwards it to the Office of the General Counsel (OGC) for initial review. As necessary, consults with OGC prior to assigning a green ticket to determine whether the incoming correspondence constitutes a request under 10 CFR 2.206.

b. Approves each NRR request to OI for an investigation into matters raised in a 10 CFR 2.206 petition.

c. Assigns the initial schedule for completion of the acknowledgement letter and the Director's Decision, and approves each request for an extension.

Office of the General Counsel (OGC)

a. Performs initial review of the request to confirm that it should be treated as a petition filed under 10 CFR 2.206. Assuming confirmation that the request should be handled under Section 2.206, prepares the Federal Register notice and draft letter of acknowledgement to the petitioner, including an identification of information that NRR needs to provide to respond to requests for immediate action. Forwards these documents to the Director, NRR, if NRR is the appropriate office to handle the petition.

b. Reviews all correspondence written in connection with the petition for legal sufficiency.

c. Gives advice on all 10 CFR 2.206 matters.

Director, NRR

a. Authorizes all OI referrals related to matters raised in Section 2.206 petitions that NRR forwards to the EDO for final approval.

b. Approves and signs all documents pertaining to 10 CFR 2.206 actions. No changes will be made to the package after the Director, NRR, has signed all documents in the package.

The Associate Director for Projects, NRR

Approves each NRR extension request and forwards the extension request to the EDO.

The Division Director, NRR

Has overall responsibility for 10 CFR 2.206 actions assigned to his or her Division.

The Project Director, NRR

a. Has lead responsibility for coordinating all 10 CFR 2.206 actions assigned to his or her project directorate.

b. Concurs on all correspondence that leaves the office involving the 10 CFR 2.206 petition.

The Project Manager, NRR

a. Coordinates the 10 CFR 2.206 package, works closely with the OGC case attorney, and monitors the progress of OI investigation, if one is conducted.

BASIC REQUIREMENTS

Upon receiving a 10 CFR 2.206 request, a letter of acknowledgement is prepared and sent to the petitioner.

A. Acknowledgement of Request

After reviewing the 10 CFR 2.206 petition for appropriate handling, if NRR is the appropriate office to handle the petition, OGC will refer it by memorandum to the Director, NRR, within 2 weeks of receipt, list the key issues that must be addressed, include a draft letter of acknowledgement to the petitioner and a draft Federal Register notice, and identify the OGC contact.

The lead project directorate will ensure that the appropriate licensee is sent a copy of the letter of acknowledgement and a copy of the incoming 10 CFR 2.206 request at the same time as the petitioner. If appropriate, the licensee will be requested to provide a response to the NRC on the issues in the 10 CFR 2.206 petition, normally within 60 days. The exception to the involvement of the licensee in the resolution process is where a licensee could compromise an investigation or inspection because of knowledge gained from the release of information. The decision to release information to the licensee in this case shall be made by the Director of the action office. If the licensee is to be asked to respond to the petition, the staff should inform the petitioner of this request in the letter of acknowledgement. All letters of acknowledgement require the office director's signature. The project manager should ensure that the petitioner receives copies of all correspondence with the licensee pertaining to the 10 CFR 2.206 petition by placing the petitioner on distribution for all NRC correspondence to the licensee that pertain to the petition. Additionally, the licensee should be encouraged to place the petitioner on distribution for any responses to the NRC pertaining to the 10 CFR 2.206 petition. If the licensee does not include the petitioner on distribution for their response, the project manager should forward a copy of the licensee's response to the petitioner.

The petitioner should also be on distribution for other NRC correspondence that relates to the issues raised in the petition, including generic letters or bulletins that are issued pertaining to the petitioner's concern.

If the 10 CFR 2.206 petition contains a request for immediate action by the NRC, such as to immediately suspend reactor operation until final action is taken on the request, the letter of acknowledgement must respond to the immediate action requested. If such immediate action is denied, the staff must explain the basis for the denial in the letter of acknowledgement.

The lead NRR project directorate will issue the final version of the acknowledgement letter and the Federal Register notice by the date specified on the green ticket. The acknowledgement letter must be sent to the NRR mailroom at least 4 working days before the due date to give the office director time to review it. The green ticket remains active until the final Director's Decision is made.

B. Director's Decision

After receiving the 10 CFR 2.206 petition, the staff should immediately begin to evaluate the petition, determine if the schedule is sufficient, and prepare the Director's Decision. The Director's Decision is due 90 days from the issue date of the letter of acknowledgement. This date is the revised due date that is issued by the EDO's office. OGC must be informed of this date. However, the 90-day response time may not be feasible if an OI investigation is necessary to respond to the 10 CFR 2.206 petition, or if other reasons dictate that additional time is needed to prepare the Director's Decision. In these instances, the staff should immediately prepare a request for schedule extension.

The project manager has lead responsibility for coordinating all information required from other divisions and branches and from OI (if required) and will work closely with OGC. In addition, the project manager has lead responsibility to ensure that the petitioner is notified at least every 60 days of the status of the 10 CFR 2.206, and to provide the petitioner the opportunity to ask further questions.

The staff can prepare a partial Director's Decision when the technical issues associated with the 10 CFR 2.206 petition can be completed without resolving the remaining concerns and if significant schedular delays are anticipated. The OI investigation (if applicable) must be completed for the petition to be denied or granted in whole.

Petition Denied

After OI completes its investigation (if applicable), and if the petition is denied in whole or in part, NRR should prepare a "Director's Decision Under 10 CFR 2.206," explaining the basis for the denial and discussing

all matters raised by the petitioner in support of the request. The staff will send a letter to the petitioner transmitting the Director's Decision along with a Federal Register notice explaining that the request has been denied. The licensee and individuals on the service list are informed of the denial by copy of the transmittal letter. The petitioner's copy is to be dispatched before issuance of the licensee's and service list copies.

Petition Granted

When OI completes its investigation (if applicable), and if a portion of the petition is granted, the Director's Decision should explain the respects in which the petition has been granted and identify the actions that the staff has taken or will take to grant that portion of the petition. If the petition is granted in full, no Director's Decision is required. Generally, an Order under 10 CFR 2.202 will be issued. It may be appropriate to cite the petitioner's request (for such an Order) in any Order that is issued.

If the request is granted by issuing an Order, the staff will send a letter to transmit the Order to the licensee. The staff will prepare another letter to explain to the petitioner that the 10 CFR 2.206 request has been granted and will enclose a copy of the Order.

C. Action by the Project Manager

Upon receiving OGC's referral memorandum, the project manager will discuss the issues with the project director to ensure agreement between NRR and OGC or to address any differences about the issues. The project manager will then obtain OGC's "no legal objection" to a final acknowledgement letter, after filling in any of the reasons or details identified by OGC as falling within NRR's responsibility and expertise, and Federal Register notice.

Before writing a decision, the project manager will discuss an outline and the intended approach and format with OGC. OGC will provide, upon request, several issued Director's Decisions as models for the appropriate level of detail and format for the decision to be prepared. If appropriate, before completing an entire decision on all issues, the project manager will submit a partial decision on one or several issues for NRR management and OGC review. If a different approach, format, or level of detail is appropriate, these can be resolved at this early stage rather than after an entire decision is prepared.

When all 10 CFR 2.206 concerns have been satisfactorily addressed, the project manager will submit a complete decision to the project director, assistant director, and division director for their review and will incorporate their revisions. This decision must be submitted sufficiently before the NRR due date to allow for OGC review and subsequent revisions requested by OGC. Technical editor review and concurrence is obtained on the decision following concurrence by the project director, and prior to

technical staff or OGC review. Any changes resulting from a review by a technical editor must be incorporated before OGC review. If the decision is based on, or references, a completed OI investigation, OI concurrence is obtained on the decision prior to OGC review. The project manager will submit a complete decision to OGC for legal review, allowing 2-3 weeks for OGC to complete its review, depending on the length and complexity of the decision.

The project manager will revise the decision to address OGC's comments and submit the revised decision to the project director, assistant director, and OGC for final review. Allow a minimum of 1 week (2-3 weeks is not uncommon) for final OGC management review and OGC's "no legal objection" before signature by the NRR Office Director.

It is important to identify and resolve any differences between NRR and OGC regarding the scope, format, level of detail or other issues early in the process of preparing a decision. If the project manager and OGC case attorney cannot resolve a matter, it should be presented to NRR and OGC management for resolution.

D. Distribution

A denial under 10 CFR 2.206 consists of a letter to the petitioner, the Director's Decision, and the Federal Register notice. The lead project directorate will contact the OGC enforcement attorney's office at 504-1681 to obtain a Director's Decision number (e.g., DD-YEAR-00). This number is assigned to each Director's Decision in numerical sequence. This number is typed on the letter to the petitioner, the Director's Decision, and the Federal Register notice.

The lead project directorate licensing assistant will review the 10 CFR 2.206 package before it is sent to the NRR Mailroom and will properly distribute copies. The technical division staff are not to dispatch 10 CFR 2.206 packages.

The following requirements are to be performed on the day the Director's Decision is issued.

1. Telephone the following individual to advise them that the Director's Decision has been issued:

   The Docketing and Services Branch, SECY

2. The PD Secretary is to immediately HAND CARRY to the following:

   The Docketing and Services Branch, SECY
   5 copies of the Director's Decision
   2 courtesy copies of the entire decision package
   2 copies of the incoming request

Deputy Assistant General Counsel for Enforcement, OGC
1 copy of the Director's Decision

It is imperative that these requirements are followed promptly, because, after filing the Director's Decision with the Office of the Secretary, the Commission has 25 days from the date of issuance to determine whether or not the Director's Decision should be reviewed.

The final version of the Director's Decision is then copied onto a diskette in Word Perfect. This diskette, two paper copies of the Director's Decision after signature, and other documents referenced in the Decision are sent to NRCI Project Officer, Technical Publications Section, Publications Branch, Mail Stop P-211, along with a completed NRCI Transmission Record Form. Forms can be obtained from the Technical Publications Section, Publications Branch, ADM.

When writing opinions, footnotes, or partial information (errata) on the diskette, be sure to identify the opinion, the Director's Decision number, and the month of issuance at the beginning of the disk. Clearly identified information on the diskettes will help to avoid administrative delays and improve the technical production schedule for proofreading, editing, and composing the documents.

Although 10 CFR 2.206 actions are controlled as green tickets, use the following guidelines when distributing copies internally and externally.

The original 2.206 petition and any enclosure(s) will accompany the Docket/Central File copy of the first response (letter of acknowledgement). Copies are issued to the appropriate licensee and individuals on the service list. The distribution list should include the following individuals:

Distribution
Docket or Central Files (w/enclosures)
NRC PDR
Local PDR
EDO Reading File
EDO
Director, NRR
ADPR, NRR
NRR Mailroom (EDO#__)
PD Reading File
Division Director
Assistant Director
Project Director
Project Manager
Licensing Assistant
Regional Contact, DRP
OPA
OCA
EDO Mailroom (EDO#__)
Docketing and Services Branch, SECY*
Deputy General Counsel for Licensing and Regulations, OGC*
Deputy Assistant General Counsel for Enforcement, OGC-WF*
ASLBP
Director, OCAA
ACRS (10)
NRCI Project Officer, Technical Publications Section, ADM P-211 (w/2 cpys of Director's Decision and NRCI Transmittal Form)
Other individuals listed on concurrence

cc: Licensee and Service List

* Handcarry

EFFECTIVE DATE

This office letter is effective immediately.

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosures:
Samples: Letter of Acknowledgement and the Federal Register Notice
Director's Decision (granted in part)
Director's Decision (denied) and the Federal Register Notice
NRCI Transmittal Form
Request for Extension of Due Date

cc: See next page

ATTACHMENT D

S Foster
J. Goldberg

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 2, 1993

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: James M. Taylor
Executive Director
for Operations

SUBJECT: 2.206 PETITION DATA FOR RESPONSE TO STAFF REQUIREMENTS MEMORANDUM OF SEPTEMBER 29, 1993

In response to your request of October 5, 1993, the staff of the Office of Nuclear Reactor Regulation (NRR) has reviewed the petitions submitted to the agency under 10 CFR 2.206 (and any other submittals treated as such) from calendar year 1989 through the present. Your request was prompted by the staff requirements memorandum (SRM) of September 29, 1993, in which the Commission requested information on various aspects of the 2.206 process, including historical data. In conducting the effort, NRR was assisted by staff of the Office of Nuclear Materials Safety and Safeguards (NMSS) and the Office of Enforcement (OE). The results of our review and the responses to your specific questions follow.

Your memorandum of October 5, 1993 identified six questions to be answered in order for your office (the Office of the General Counsel, OGC) to respond to the SRM. You indicated that OGC will address the first two questions: (1) the number of submittals that were treated as 2.206 petitions that did not explicitly reference 2.206 and (2) the number of petitions that resulted in regulatory action that achieved, to some degree, the petitioner's objectives. You requested that staff from the program offices address the remaining four questions:

(3) the number of petitions that raised safety issues not previously known to the staff, or generic or multi-facility issues

(4) the number of petitions that submitted new information on already known safety issues

(5) the number of petitions raising issues that were evaluated during the 2.206 process by staff personnel who were not involved in earlier staff review or resolution of the issues

(6) the number of petitions that were denied but that raised issues that the staff continued to review after the denial

Although we have compiled numerical data in response to these questions, please recognize that many different staff members were asked to provide information and that the nature of the issues raised under 2.206 sometimes made it difficult to arrive at a clear yes or no answer to the questions posed. Consequently, we have attempted to interpret the collected data in general terms and suggest that you consider a similar approach in responding to the SRM.

The results of the survey are provided in the enclosed table. With regard to Question 3, only 4 of the 79 petitions reviewed raised safety issues that were not known to the staff. In several cases, previous allegations may have alerted the staff to new safety issues before the submittal of a 2.206 petition on the subject. This appears to be true for most of the 12 petitions alleging employee discrimination (the safety issues initially raised were addressed earlier through the NRC allegations process and the subsequent petitions focussed on the alleged discrimination).

The survey responses indicated that 13 of the 79 petitions raised generic issues, of which 11 were also considered to raise multi-facility issues. However, upon further evaluation of the responses, it would be more accurate to say that those petitions "addressed" rather than "raised" issues, since in no case did a petition raise a generic or multi-facility safety issue not previously known to the staff. In addition, only one petition truly addressed multi-facility issues, based on the assumption that "multi-facility" is considered to be a specifically defined subset of plants, such as "all Duke Power facilities" or "all BWR Mark III plants," as opposed to generic issues affecting a broad class of plants, such as "all plants" or "all PWRs."

The responses to Question 4 indicate that none of the 79 petitions provided new information on previously known safety issues. While it is probably accurate to conclude that most 2.206 petitions have not raised new safety issues (as indicated by the response to Question 3) and have not provided new information on previously known safety issues, the staff relied on new information in some cases where petitions were partially granted. Although the more severe actions requested in many petitions were not taken by the agency (such as plant shutdowns or suspensions of operating licenses), in a few instances the staff did take certain requested actions, including performing special inspections, holding public meetings, or taking enforcement action. Therefore, to a limited extent, it appears that the 2.206 process may have provided new information to the staff on previously known issues.

Question 5 was difficult to answer, in that the degree of independent review necessary for an affirmative response was not clear. In many cases, project management staff were responsible for evaluating and preparing a response to the 2.206 petitions related to their assigned facilities. In doing so, it was frequently necessary for them to consult with the regional inspection staff or the headquarters technical staff most familiar with the issues, or to rely on inspection reports, letters, or safety evaluations that previously addressed the subject issues. Different staff members from the same organizational unit were generally considered to be independent for the purposes of this question. Forty of the 79 petitions were determined to have been evaluated by staff who were not involved in earlier evaluation or resolution of the issues. For 35 petitions, that was not the case, and 4 responses were "not applicable," as no previous review was done.

For Question 6, the staff has taken (or anticipates) some followup action for 9 of the 79 petitions reviewed. This does not apply to staff initiatives that were under way or planned and that were merely identified in a petition. No additional action was taken in 54 cases, with 16 petitions still pending.

I trust that this information will assist you in preparing the response to the Commission's SRM of September 29, 1993. Please contact Mr. James R. Hall, NRR (504-1336) if you have any questions regarding this information. Mr. Hall has retained the survey data generated by the staff in response to your questions.

James M. Taylor
Executive Director
for Operations

Enclosure:
As stated

Enclosure

STAFF REQUIREMENTS MEMORANDUM ON 2.206 PROCESS
SURVEY TOTALS*

QUESTION	YES	NO	N/A
1. The number of letters or other submittals received that did not explicitly refer to 2.206 but which nevertheless were treated as petitions pursuant to 2.206	**		
2. The number of petitions that resulted in regulatory action which achieved, in whole or in part, the petitioner's objectives	**		
3a.*** The number of petitions that raised safety issues not previously known to the staff	4	75	-
3b. The number of petitions that raised generic issues	13	66	-
3c. The number of petitions that raised multi-facility issues	11	68	-
4. The number of petitions that submitted new information on already known safety issues	0	79	-
5. The number of petitions raising issues that were evaluated during the 2.206 process by staff who were not involved in earlier review or resolution of the issues	40	35	4
6. The number of petitions that were denied, but raised issues that the staff continued to review after the denial	9	54	16

* The historical listing of 2.206 petitions provided by OGC identified 79 petitions submitted since January 1, 1989. One item was duplicated on the list (dated 11/20/91, supplemented on 1/17/92, regarding Comanche Peak). Three petitions listed regarding Shoreham were treated as a single petition. Three additional unlisted petitions also were identified by the staff (dated 4/8/93 on Vermont Yankee, and 7/9/91 and 7/25/91 on the Department of Energy's Hanford site); these also were included in our survey. Therefore, a total of 79 petitions were considered by the staff in this effort. Of these 79, the staff determined that 6 were not subsequently treated as 2.206 petitions, but were still considered relevant; therefore, they were retained in the survey.

** To be answered by OGC

*** Question 3 was divided into three separate parts: the number of petitions that raised (a) safety issues not previously known to the staff, (b) generic safety issues or,(c) multi-facility issues.

I. Summary of 2.206 Petitions Resulting in Regulatory Action Which Achieved, in Whole or in Part, Petitioners' Objectives

Between 1974 and September 20, 1993, over 342 petitions have been filed pursuant to 10 C.F.R. § 2.206. Of these, approximately ten percent have been granted in whole or in part. Petitions have led to regulatory action including the issuance of a Notice of Violation and Proposed Imposition of Civil Penalty, or orders modifying, suspending or revoking licenses, or the initiation of further NRC inquiries into the safety issues raised in the petition. Even where the petition is denied, the petitioner may have an impact by triggering the NRC's review of a safety issue, or some other NRC action.

A recent and significant case in which a 2.206 petition resulted in regulatory action which achieved the petitioners' objective, at least in part, is *Yankee Rowe*. On June 4, 1991, the Union of Concerned Scientists and the New England Coalition on Nuclear Pollution filed a Petition for Emergency Enforcement Action and Request For Public Hearing with the Commission seeking the immediate shutdown of the Yankee Rowe Nuclear Power Plant, asserting that the Yankee Rowe reactor violates the Commission's requirements for pressure vessel integrity and that, therefore, the Commission cannot have reasonable assurance that the facility poses no undue risk to public health and safety. On June 25, 1991, the Director of the Office of Nuclear Reactor Regulation issued a letter to Petitioners denying the request for emergency relief; because the petition presented an enforcement question of sufficient public importance, however, the Commission concluded that it should make the decision on the safety of continued operation of Yankee Rowe. On July 31, 1991, the Commission issued a Memorandum and Order, CLI-91-11, in response to the Petition. The Commission determined that, while there is no safety or other regulatory requirement for an immediate plant shutdown, the soundest interpretation of the Pressurized Thermal Shock (PTS) regulation, 10 CFR 50.61, is that uncertainties such as those identified by the Staff should be resolved as soon as possible to move in the direction of the overall risk goal from a PTS event contemplated by the Commission when it adopted 10 CFR 50.61. The Commission also found that it was unable to determine at that time whether plant shutdown at any date much earlier than the end of the current cycle, cycle 21, would permit commencement of the testing programs needed to resolve the uncertainties; it instructed Licensee to inform the Commission if testing programs can be commenced at a time prior to the scheduled end of cycle 21. In keeping with the Commission's belief that any additional action that proves to be feasible to further increase the margins against vessel failure should be undertaken, the Commission instructed the Licensee to investigate such additional measures and ordered the Licensee to submit to the NRC on or before August 26, 1991, its evaluation of and its plans for modifications to its operating conditions that would provide additional margin against reactor vessel failure from a PTS challenge.

In another recent case, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-90-3, 31 NRC 595 (1990), the petitioner, Northern

California Power Agency (NCPA), filed petitions dated December 4, 1981 and August 1984, and a filing dated March 19, 1985, clarifying these petitions, requesting the Director of the Office of Nuclear Reactor Regulation (NRR) to take certain remedial enforcement actions against Pacific Gas and Electric Company (PG&E) for allegedly violating certain antitrust license conditions. After considering the issues raised in these petitions, the Director of NRR determined that PG&E had violated certain of its Diablo Canyon antitrust license conditions, issued a Notice of Violation, and required that PG&E inform the NRC of the steps PG&E had taken and intends to take to comply with its licensed conditions. (The District Court of the Northern District of California had issued a ruling in connection with an action brought by the United States against PG&E that dealt with many of the same issues raised in the petitions. This ruling provided necessary remedial action that required PG&E to comply with some of the Diablo Canyon antitrust license conditions at issue.) PG&E filed its response September 28, 1990, and denied it had violated its license conditions. As a result, by a petition filed on November 30, 1990, NCPA requested pursuant to § 2.206 that the Commission take appropriate action to ensure compliance. Based on a settlement agreement between PG&E and NCPA and the NRC staff's conclusion that PG&E had satisfactorily responded to the Notice of Violation, NCPA withdrew its petition.

In another case, *General Electric Co.* (Wilmington, North Carolina, facility), DD-89-01, 29 NRC 325 (1989), Anthony Z. Roisman and Mozart G. Ratner, as counsel for Vera M. English (petitioner), filed a petition requesting that the NRC take appropriate action against General Electric Company (GE) for its deliberate retaliatory discharge of Mrs. English. The petition sought imposition of a civil penalty and imposition of a license condition requiring GE to fully compensate Mrs. English for her economic losses, medical expenses, and other expenses allegedly incurred in connection with GE's alleged discrimination. The Director of NRR granted the petitioner's request that enforcement action be taken against GE, and issued a Notice of Violation and Proposed Imposition of Civil Penalty. (However, he declined to impose the civil penalty requested by the petitioner in the amount of $40,635,000 plus $37,500 per day for every day after April 6, 1987, that GE did not take corrective action, and applied the guidance provided in the Enforcement Policy applicable at the time of the violation and set out in 10 C.F.R. Part 2, Appendix C, 49 *Fed. Reg.* 8583 (March 8, 1984) in assessing a civil penalty of $20,000. The Director also declined to impose a license condition upon GE requiring GE to compensate Mrs. English for her alleged losses, stating that in Section 210 of the Energy Reorganization Act, Congress explicitly gave to the Department of Labor (DOL) the authority and responsibility to order individual compensation, and that the NRC lacked such authority.)

In addition to these examples, many other petitions have triggered regulatory action which achieved , at least in part, the petitioners' objectives. The following cases illustrate the type of regulatory action which has been taken in response to 2.206 petitions:

A. Issuance of NOV

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant Units 1 & 2), DD-83-17, 18 NRC 1289 (1983) (Petitioner's request that a license application be dismissed, construction permit be revoked or civil penalty be assessed was denied, but Director determined that a violation *had* occurred and Notice of Violation should be issued.)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 NRC 1759 (1985) (Petitioners' request that the Director find violations of NRC requirements was granted, but requests that show-cause proceedings be initiated and civil penalty of $250,000 be assessed were denied. The Director instead proposed a Notice of Violation and a $64,000 civil penalty.)

B. Issuance of Order Modifying, Suspending or Revoking Licenses

Cincinnati Gas & Electric Co. (W.H. Zimmer Nuclear Power Station), DD-83-2, 17 NRC 323 (1983) & CLI-82-33, 16 NRC 1489 (1982);

Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1 and 2); *Power Authority of the State of New York* (Indian Point Unit 3), DD-80-5, 11 NRC 351 (1980).

C. Initiation of Further NRC Inquiries into Safety Issues Raised in Petitions

Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), DD-83-15, 18 NRC 738 (1983);

Rochester Gas & Electric Co. (R.E. Ginna Nuclear Power Plant), DD-82-3, 15 NRC 1348, 1349 (1982);

Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), DD-80-9, 11 NRC 392, 402-03 (1980);

Catholic University of America, DD-80-8, 11 NRC 389 (1980);

Philadelphia Electric Co. (Limerick Nuclear Generating Station, Units 1 & 2), DD-79-16, 10 NRC 609, 610 (1979).

In two other cases, one of which involved Commission reversal of three staff denials under § 2.206, the NRC granted petitions asking for preparation of an environmental impact statement. *See Virginia Electric Power Co.* (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980); *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), DD-80-24, 11 NRC 951 (1980).

D. Initiation of Other NRC Action

Shipments of High Level Nuclear Power Plant Waste, DD-84-9, 19 NRC 1087 (1984) (Petition denied; however, NRC changed conditions under which certain shipping casks could be used for transport of spent reactor fuel, in response to a petition which had claimed that insufficient attention had been paid to the implications of an accident using such casks.)

GPU Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), DD-84-22, 20 NRC 1033 (1984) (Petition denied; however, NRC review largely substantiated petitioner's claim that licensee had serious deficiencies in its environmental qualification program for safety-related equipment.)

II. List of 2.206 Petitions Resulting in Regulatory Action, Which Achieved, in Whole or in Part, Petitioners' Objectives

1. On 6/11/92, the National Whistleblower Center, Joseph J. Macktal and S.M.A. Hasan requested a number of actions concerning settlement agreements entered into by the Texas Utilities Electric Company and disclosure of safety information regarding the Comanche Peak Steam Electric Station (CPSES) Units 1 and 2. DD-93-12 (6/04/93) indicated that certain of the petitioner's requests have been granted. Petitioners sought that the NRC notify TU Electric and the former co-owners that no settlement agreement can preclude individuals and organizations from bringing safety information to the NRC. This has been done. Petitioners also sought that copies of the three settlement agreements be made public. This has been done. Finally, Petitioners requested that counsel for Tex-La be notified that he is free to disclose safety information to the NRC. The NRC has caused this to happen. The other relief sought by Petitioners, including the request that orders be issued suspending operation of (CPSES) Unit 1 and construction of Unit 2 and that the construction permit expiration date for Unit 2 not be extended, has been denied.

2. On 10/27/92, Mr. Ben L. Ridings filed a petition requesting the issuance of an immediately effective order directing Niagara Mohawk Power Corporation to cease power operation of Nine Mile Point Station Unit No. 1 (NMP-1) and place the reactor in a cold-shutdown condition. The Petitioner also requested the Commission to hold a public hearing before authorizing resumption of plant operation. In DD-93-10 (5/09/93), these requests were denied. The NRC staff, however, issued License Amendment No. 140 to the NMP-1 Facility Operating License DRP-63, correcting the NMP-1 Technical Specification tables which list the containment isolation valves, their initiating signals, and their stroke times.

3. On 6/29/92, Indian Orchard Citizens Council(IOCC) filed a petition against Interstate Nuclear Services requesting a number of actions relating to reduction in radiation levels, waste, use of streets and storage of waste. In DD-93-09 (5/7/93) the petition granted eight of requests. The petition was denied with respect to IOCC's requests to check homes in the area for radioactive contamination and possible illegal dumping of waste material.

4. On 7/21/92, NIRS filed a petition requesting immediate suspension of operating licenses pending a demonstration that facilities meet fire protection requirements due to use of Thermo-Lag fire barriers. In DD-93-03 (2/1/93) the petition, to the extent that it requested the Staff to study and review the matter and issue a generic letter was granted; the other requests were found to be without merit and were denied. In DD-93-11 (5/23/93) the remaining issue regarding shut down of certain facilities using Thermo-Lag fire barrier material was denied and not seen as a substantial health and safety risk.

5. On 11/27/91, NACE filed an emergency petition requesting immediate revocation of the operating license of Sequoyah Fuels Corporation (SFC) or in the alternative that the NRC withhold authorization to restart. In DD-92-03, 35 NRC 211 (1992), the petition was denied, except insofar as a Notice of Violation will be issued citing SFC for violating 10 CFR 40.9 and

has decided to grant the Petition insofar as the staff will publish in the Federal Register, notice of all SFC's license amendment applications until the staff takes final action on the license renewal application.

6. On 6/4/91, UCS and NECNP filed a petition requesting the shutdown of Yankee Rowe based on allegations that the facility is operating in violation of NRC requirements for reactor pressure vessel integrity. In CLI-91-11 (7/31/91), the Commission issued a Memorandum and Order requiring the Licensee to submit to the NRC its evaluation of and its plan for modifications to its operating conditions that would provide additional margin against reactor vessel failure, and to submit its plan and a monthly progress report to resolve uncertainties in the chemical and metallurgical characteristics, and, in other respects, denied the petition.

7. On 7/14/89 and in supplements, Shoreham-Wading River Central School District, and on 7/26/89 and in supplements, Scientists and Engineers for Secure Energy, Inc., filed petitions to request issuance of an immediately effective order to licensee to cease defueling and destaffing of Shoreham Unit 1 and return to "*status quo ante*" pending consideration by the Commission. In DD-91-3 (5/15/91), the petition was granted to the extent that it requested NRC action to prevent the licensee from shipping certain fuel support components for burial, and was denied concerning its request that the Commission issue a NOV and Order the licensee to implement a remedial plan.

8. On 5/1/87, GAP filed a petition requesting suspension of further licensing of all facilities pending study and a report on the Chernobyl accident. In DD-87-21, 26 NRC 520 (1987), the petition, to the extent that it requested the Staff to undertake a study and review, was granted; the other requests were found to be without merit and were denied.

9. On 4/6/87, Vera English filed a petition requesting that enforcement action be taken against the licensee of the Wilmington facility for illegal discrimination. In DD-89-01, 29 NRC 325 (1989), the petition was granted with respect to the NRC taking enforcement action against the licensee for discrimination against Mrs. English, a Notice of Violation and a civil penalty was issued; but the petition was denied with respect to the request that NRC impose a civil penalty in the amount stated and that the NRC impose a license condition upon the licensee to fully compensate Mrs. English.

10. On 3/13/86, the Commission in *Texas Utilities Electric Company*, (Comanche Peak Steam Electric Station, Unit 1), CLI-86-04, 23 NRC 113 (1986), referred a request from Citizens Association for Sound Energy (CASE) dated 1/31/86 that the Commission assess a civil penalty for unauthorized construction. On 8/8/88, CASE withdrew a portion of its request except its request for some type of escalated enforcement action. On 2/28/89, the NRC Staff issued a NOV for Severity Level III violation with no civil penalty proposed.

11. On 9/11/85, the Commission referred a petition filed by the Oil, Chemical & Atomic Workers International Union, AFL-CIO, dated 9/3/85, which requested that the Commission order an investigation of 20 specific allegations raised in the letter, require a formal hearing with

notice prior to granting any future request to operate the Erwin facility, and hold a public hearing in the area to establish that reduced operations can be conducted at the facility without adversely affecting the public health, safety, and interest. In DD-86-03, 23 NRC 191 (1986), the Director determined that with the exception of petitioner's request for an investigation of the specific allegations raised in the petition, the petition should be denied. The Staff conducted an extensive investigation of these allegations.

12. On 6/27/84, Palmetto Alliance and on 9/27/84, GAP filed petitions for enforcement action against Duke Power Co. (Catawba) on the basis of violations of NRC regulations and alleged harassment and intimidation of quality control inspectors. In DD-85-09, 21 NRC 1759 (1985), the Director determined that a NOV and Proposed Imposition of Civil Penalty should be issued for the violation and that no further enforcement action was warranted.

13. On 8/1/84 and in supplements, Northern California Power Agency filed a petition requesting that the NRC take certain enforcement actions against PG&E (Diablo Canyon) for allegedly violating the antitrust license conditions. In DD-90-03, 31 NRC 595 (1990), the Director found that the licensee had violated certain antitrust conditions, determined that a NOV should be issued, required that the licensee provide information to the Staff within 30 days of its receipt to this Decision, and determined that no other enforcement action was necessary because the June 8, 1989 District Court Decision provided the necessary remedial action that required the licensee to comply with the antitrust license conditions.

14. On 6/29/84, Alabama Electric Cooperative, Inc., filed a petition requesting action to enforce the antitrust conditions for Farley Nuclear Plant. In DD-86-07, 23 NRC 875 (1986), the Director declined to initiate enforcement action on certain allegations but issued a NOV requiring the licensee to respond to the remaining alleged violations and to take timely steps to achieve compliance.

15. On 3/19/84, GAP and Citizens Association for Sound Energy, filed a petition requesting the NRC take certain actions with respect to alleged serious construction and documentation deficiencies at Comanche Peak. In DD-87-17, 26 NRC 323 (1987), the petition was granted with respect to the request for special NRC inspections of the facility but was denied with respect to suspending construction and initiating an independent management audit and independent design and construction verification program.

16. On 10/20/83, joint intervenors in the Diablo Canyon OL proceeding filed a petition requesting that the low-power license for Diablo Canyon Unit 1 should be revoked or at least remain suspended on the basis of the licensee's failure to report a 1977 audit of the QA program to the licensee's prime piping contractor. In DD-84-08, 19 NRC 924 (1984), the Director found that the failure to report the audit constituted a material false statement under the Atomic Energy Act but did not find revocation or suspension of the license to be an appropriate remedy for the reporting failure. On 8/20/84, the Commission issued an Order directing the Staff to issue a Severity Level III NOV, rather than the Staff proposed Level IV.

17. On 7/20/83, MASSPIRG filed a petition requesting that the NRC take action with respect to the state of emergency planning at the Pilgrim facility, specifically, to initiate the 4-month period specified by the Commission's regulations within which to correct the alleged deficiencies at the Pilgrim facility and consideration by the Commission as to whether the state of emergency preparedness in conjunction with the alleged poor safety record at the facility warrants immediate shutdown or operation of the facility at reduced power. In DD-84-05, 19 NRC 542 (1984), the Staff determined that the Evacuation Time Estimates should be reviewed by FEMA for potential bottlenecks to effective evacuation of the EPZ on the periphery of the EPZ; therefore, the Director deferred resolution of this issue until after FEMA submitted its response. In DD-84-15, 20 NRC 157 (1984), the Director denied the remainder of the petition based on FEMA's evaluation that traffic management issues have been adequately addressed by the Commonwealth of Massachusetts.

18. On 6/13/83, Lone Tree Council and GAP filed a petition requesting that the NRC take certain action with regard to the Midland project. In DD-83-16, 18 NRC 1123 (1983), the Director found that the petitioners' relief was satisfied by previous action of the Commission with respect to the hold points and determined that a management audit was not necessary at this time as a condition for going forward with the construction completion plan but that the Staff would continue to review information concerning the licensee's performance in other areas to determine whether an audit is required. The Director denied the remainder of the request. In DD-84-02, 19 NRC 478 (1984), the Director determined that an appraisal of the licensee's management of the Midland project was required and required the licensee to submit to the Region III Administrator for review and approval a plan for an independent appraisal of site and corporate management organizations and functions.

19. On 5/9/83, the ASLB referred to the Staff a petition from Ohio Citizens for Responsible Energy (OCRE) requesting dismissal of the Perry license application on the basis that the Licensee had made material false statements in its application concerning the use of herbicides to control vegetation along transmission lines, revocation of its construction permit, or assessment of civil penalty. In DD-83-17, 18 NRC 1289 (1983), the Director determined that the licensee had made a material false statement, that the violation should be categorized as a Severity Level IV, issued a Notice of Violation requiring the licensee to respond and describe its corrective actions to prevent similar occurrences in the future, and denied petitioner's request for other enforcement actions.

20. On 4/8/83, Miller, Tupper, Flanagan and Sensible Maine Power filed a petition requesting an initiation of a proceeding to modify, suspend or revoke Maine Yankee's license based on FEMA's identification of significant deficiencies in emergency planning and preparedness. In DD-83-15, 18 NRC 738 (1983), the Director determined that the Staff has partially granted the relief sought by taking action to obtain correction of the deficiencies identified by FEMA, that petitioners' request that operation of the plant be suspended was denied, and that the issue of whether State Route 27 is an adequate evacuation route will be resolved pending FEMA's evaluation. IN DD-85-06, 21 NRC 1547 (1985), the Director denied the remaining portion of petitioners' request.

21. On 8/4/82, UCS and NYPIRG filed a petition requesting immediate shutdown of Indian Point Units 2 and 3 because of deficiencies in emergency preparedness identified by FEMA in a letter to the NRC Staff dated 8/2/82. In DD-82-12, 16 NRC 1685 (1982), the Director denied the request. In CLI-82-38, 16 NRC 1698 (1982) and Commission Order dated 2/3/83 (unpublished), the Commission superseded DD-82-12 and determined that, even though no enforcement action was required at that time, the Commission would continue to monitor the progress made and asked FEMA to present the Commission monthly reports on the status of Rockland county planning and training on the plans being developed, the status of resolution of the bus driver issue in Westchester County, and any other emergency preparedness issues that arise as work continued.

22. On 8/20/82 and supplemented on 10/18/82, Miami Valley Power Project and GAP filed a petition requesting suspension of construction of Zimmer Station and argued that the licensee should be removed from any responsibility for reinspection of construction work. In CLI-82-33, 16 NRC 1489 (1982), the Commission issued an immediately effective order suspending licensee's safety-related construction activities, including rework of previously-identified deficient construction, and required the licensee to show cause why the suspension should not continue pending review and implementation of proposals to improve the licensee's management of the project, to verify the quality of construction work, and to ensure that any future construction conforms to the Commission's requirements. In DD-83-02, 17 NRC 323 (1983), the Director determined that the Commission's order satisfied substantially all the requests for action and finds no basis for the argument that the licensee be removed from any responsibility for reinspection of construction work.

23. On 3/11/82, the Sierra Club filed a petition requesting that a review be conducted of matters pertaining to the ability of the licensee to safely operate the Ginna plant so as to protect the public health and safety in light of the steam generator tube rupture at the Ginna plant. In DD-82-03, 15 NRC 1348 (1982), the petition was granted insofar as it requested a review of various safety issues to ensure that necessary actions to protect public health and safety were taken prior to resumed operation of the reactor and denied the request for a formal order to require such a review and to prevent restart of the reactor.

24. By petition dated 3/19/79, Ms. Kay Drey requested the NRC to prepare an EIS on the proposed chemical decontamination of Dresden. By petition dated 9/20/79, Illinois Safe Energy Alliance requested public hearing on the decontamination based on the lack of assurance that the NRC would issue an EIS. By petition dated 3/13/80, Citizens for Better Environment and Prairie Alliance supported Ms. Drey's petition. In DD-80-24, 11 NRC 951 (1980), the Director determined that an EIS should be prepared for Dresden Unit 1 decontamination but determined that a public hearing was not necessary.

25. On 5/23/80, the Commission referred an undated petition by Save The Valley which alleged that the New Madrid fault zone extends in a northeasterly direction towards the Marble Hill site, which expressed concern over accidental releases of radioactive liquids, and which concerned construction practices at Marble Hill. In DD-80-27, 12 NRC 381 (1980), the

Director of NRR found that no further action regarding site suitability issues was warranted. In a letter dated 3/18/81, the Director of IE determined that the actions requested in the petition concerning the construction practices at Marble Hill had essentially been taken through an Order dated 8/15/79 and a "Graduated Rescission of Order dated August 15, 1979," dated 5/15/80.

26. On 9/17/79, UCS filed a petition requesting the NRC to revoke the provisional operating license for Indian Point Station Unit 1, order the licensee to submit a plan to decommission Unit 1, and suspend operation of Units 2 and 3 pending resolution of various safety-related issues. In DD-80-05, 11 NRC 351 (1980), the petition was granted with respect to Unit 1 by issuing an Order to Show Cause why the operating license should not be revoked and why a decommission plan should not be submitted. The Director determined not to order the shutdown of Units 2 and 3 because he found that Units 2 and 3 both had been significantly modified to meet NRC safety and security requirements, that a NRC task force will determine what design changes should be made to further reduce the probability and/or consequences of a severe reactor accident, and issued a Confirmatory Order imposing interim measures to provide additional assurance of safe operation of these facilities.

27. On 3/19/79, the Appeal Board referred a petition from Save the Valley (STV) which requested that the safety hearing held in connection with the application for construction permits for the two-unit Marble Hill facility be reopened, and subsequently requested in additional letters of 4/4/79 and 4/19/79 that certain other information be considered by the Director as a basis for either reopening the safety hearings or for issuance of an order to show cause to revoke or suspend the Marble Hill construction permits. By petition dated 6/29/79, and in supplements, Sassafras Audubon Society (SAS) requested that the Director suspend or revoke the construction permits for the Marble Hill Station and reopen safety hearings on that facility. In DD-79-10, 10 NRC 129 (1979), the Director determined that there was no adequate basis for instituting a proceeding to suspend or revoke the Marble Hill construction permits or to take any further action to supplement the record in the proceeding with respect to the matters raised by STV and thereby denied the request. By Order dated 8/15/79, a portion of the petitions had been granted to the extent that it suspended construction on the basis of alleged construction deficiencies until the Director has confirmed that reasonable assurance exists that safety-related construction activities will be conducted in accordance with NRC requirements. In DD-79-21, 10 NRC 717 (1979), the Director denied the SAS petition to suspend or revoke the Marble Hill construction permits or to reopen the safety hearings.

28. On 8/15/79, Badger Safe Energy Alliance filed a petition requesting revocation of the Tyrone construction permit because of licensees' announced decision to cancel the project. The Director on 6/16/80 granted the petition by issuance of a show cause order to revoke the construction permit.

29. On 4/27/79, and in a supplement dated 5/16/79, the Environmental Coalition on Nuclear Power (ECNP) requested that the Director institute public hearings prior to any alteration of the "experimental and operation status" of the TMI-2 reactor. In DD-80-16, 11 NRC 588 (198), the Director partially granted the petition because it found that the Commission had already

taken action along the course requested by ECNP concerning the emergency action to prevent the unassessed release of contaminated water, and denied the remainder of the petitioner's request.

30. On 10/3/79, P. Kelly Fitzpatrick filed a petition requesting that the license issued to Catholic University for operation of a reactor be suspended, that inspection and investigation of alleged violations of the operating license be conducted, and that an order be issued to Catholic University to show cause why the license should not remain suspended pending a thorough review of the licensee's operations. In DD-80-08, 11 NRC 389 (1980), the petition was granted in part by conducting an investigation into the alleged safety violations and deficiencies but denied the request to suspend the operating license or issue a show cause order as to why its license should not remain suspended.

31. On 11/02/79, Critical Mass filed a petition requesting an investigation to determine if grounds exist to suspend or otherwise amend the operating licenses of all U.S. light water reactors which base their ECCS upon "faulty analytical codes" for fuel cladding performance under LOCA conditions. On 3/03/80, the Director granted the petition by investigating the significance for ECCS of faulty codes in analyzing fuel cladding performance under LOCA conditions.

32. Three petitions were filed involving the steam generator repair at the Surry Nuclear Power Station. They are from the North Anna Environmental Coalition (filed 12/29/78; denied in DD-79-01, 9 NRC 199 (1979)); the Environmental Policy Institute (filed 2/20/79, denied in DD-79-3, 9 NRC 577 (1979)); and the Potomac Alliance, Citizens Energy Forum, Inc., Truth in Power, Inc., and the Virginia Sunshine Alliance (filed 4/18/79, denied in DD-79-19, 10 NRC 625 (1979)). In CLI-80-04, 11 NRC 405 (1980), the Commission reviewed these three petitions, *sua sponte*, on the issue of the need for an EIS regarding the proposed repair and directed the Staff to expeditiously prepare and issue the EIS.

33. On 4/12/79, and in supplements, Frank Romano filed a petition requesting that the Commission investigate whether blasting at a quarry near Limerick had a deleterious effect on that site and requesting further investigation of alleged construction deficiencies at the site. In DD-79-16, 10 NRC 609 (1979), the Director granted the petition with respect to investigating the effects of blasting on the Limerick site, but denied the remainder of the petition.

34. On 5/21/79, Ms. Anne K. Morse filed a petition requesting the NRC to order suspension of the provisional license for LaCrosse BWR. In DD-80-09, 11 NRC 392 (1980), the Director determined that the petition did not provide an adequate basis to suspend the license at that time but the Staff supported petitioner's concern about liquefaction and issued an order to show cause to resolve that issue.

35. On ' 29/78, J. Honicker filed a petition regarding all fuel cycle licenses requesting the revocation of all licenses, the decommission and dismantling of all facilities, and the isolation of hazardous radioactive materials from the biosphere. On 8/4/81, the Commission denied the

petition but invited the petitioner to participate in the ongoing proceeding to analyze the health effects of low-level radiation as related to current occupational exposure standards (46 FR 39573).

36. On 12/29/78, Citizens United for Responsible Energy filed a petition requesting a proceeding to suspend the license for the Duane Arnold facility pending modification of the license to include an augmented inservice inspection program of safe-end assemblies. On 3/5/79, the Director granted the petition by amending the technical specifications to require such a program.

37. On 1/4/78, the City of Cleveland filed a petition requesting the NRC to take enforcement action against the licensee for violations of antitrust license conditions for the Perry and Davis-Besse facilities. On 6/25/79, the Director granted the petitions by issuance of an Order enforcing antitrust license conditions.

38. On 2/6/76, NYPIRG filed a petition requesting that the Commission require the licensee to show cause why the Indian Point license should not be suspended until emergency planning deficiencies are corrected and why civil penalties should not be imposed for alleged misrepresentation to the Commission. On 8/19/76, the Director granted the petition by requiring that licensees demonstrate compliance with emergency preparedness requirements for offsite participation in emergency drills and denied the remainder of the request.

39. On 8/25/75, T. Collins filed a petition requesting that Humbolt Bay's license be suspended or revoked because of poor site conditions for seismic safety. On 5/21/76, the Director granted the petition by issuance of an Order for Modification which prevented restart pending seismic re-evaluation.

40. In 1975, Business and Professional People for the Public Interest (BPI) filed a petition for Indian Point 1 and Dresden. On 6/23/76, the Director granted the petition in part by issuance of an Order to Dresden to require demonstration of compliance with IEEE-279. Indian Point had already been requested to make a similar demonstration and was shut down at the time the petition was filed.

41. On 1/29/75, D. Stewart, et al., filed a petition requesting and amendment to the Brunswick licenses to require a reevaluation of the plant's seismic safety. On 4/10/75, the Director granted the petition in part by issuance of a show cause order to require seismic monitoring and evaluation of seismic data.

2.206 PETITION DATA

Set forth below for the years 1989 - to present, are the number of letters or other submittals received for each year as well as the number of those letters and submittals which did not explicitly refer to 2.206, but which nevertheless were treated as petitions pursuant to 2.206:

NUMBER OF REQUESTS RECEIVED		NUMBER OF REQUESTS NOT REFERENCING 2.206
1989	14	4
1990	11	4
1991	14	5
1992	28	9
1993	21	6

2.206 PETITIONS WHICH RESULTED IN REGULATORY ACTION WHICH ACHIEVED, IN WHOLE OR IN PART, THE PETITIONER'S OBJECTIVES

Set forth below for the years 1989 - to present, are the number of requests treated as 2.206 petitions for each year as well as the number of those petitions which resulted in regulatory action which achieved, in whole or in part, the petitioner's objectives.

NUMBER OF PETITIONS RECEIVED	NUMBER OF PETITIONS WHICH RESULTED IN REGULATORY ACTION WHICH ACHIEVED, IN WHOLE OR IN PART, THE PETITIONER'S OBJECTIVE
1989 14	1
1990 11	0
1991 14	2
1992 28	4
1993 21	To date, no Director's Decisions have been issued addressing Petitions received in 1993

ATTACHMENT E

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

JUL 19 1993

MEMORANDUM FOR: William C. Parler
General Counsel

FROM: Martin G. Malsch
Deputy General Counsel for
Licensing and Regulations
Office of the General Counsel

SUBJECT: CITIZEN SUIT PROVISIONS IN EPA STATUTES

I. INTRODUCTION:

Pursuant to your request, we have examined the citizen suit provisions of various EPA-administered statutes, namely Section 304 of the Clean Air Act, as amended ("CAA")[1], Section 505 of the Federal Water Pollution Control Act, as amended, commonly known as the Clean Water Act ("CWA")[2], Section 7002 of the Solid Waste Disposal Act, as amended (commonly known as the Resource Conservation and Recovery Act, "RCRA")[3], and Section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA")[4]. With the exception of the Federal Insecticide, Fungicide, and Rodenticide Act, every Federal environmental statute passed since 1970 has included a "citizen suit" provision.[5] Most of the provisions were modeled after Section 304 of the CAA. However, since Section 505 of the CWA has been far more widely employed,[6] our analysis will begin with, and

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[1] 42 U.S.C. Section 7604.

[2] 33 U.S.C. Section 1365.

[3] 42 U.S.C. Section 6972.

[4] 42 U.S.C. Section 9659.

[5] Miller, Private Enforcement of Federal Pollution Control Laws, 13 Environmental Law Reporter News & Analysis 10309, 10311 (1983).

[6] The reasons for this are twofold. First, the CWA contains a permitting scheme with a requirement to report routine pollutant discharges. Second, the CWA provides civil penalties for violations. Contrast the pre-1990 CAA which did not require all emitting sources to be permitted, did not possess a mandatory self-

(continued...)

largely be based on this statutory provision, with a subsequent discussion of the unique features of the CAA, RCRA, and CERCLA provisions.

In a nutshell, citizen suit provisions were designed "to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."[7] Thus, citizens are authorized to compel enforcement of most requirements in a given statute. However, in order to prevent the federal courts from being deluged with such suits, the provisions are structured with a number of procedural requirements. For example, plaintiffs must overcome a standing requirement. Generally, notice must be afforded to the polluter and the government agency, allowing the polluter the opportunity to cure the violation, or the agency a chance to initiate its own enforcement action. In addition, citizens may only sue for statutory or regulatory violations, or to compel the agency head to perform nondiscretionary duties under the statute. Citizen plaintiffs cannot sue for money damages for themselves, although they can sue polluters to collect civil

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[6](...continued)
monitoring and reporting requirement, and only allowed for civil penalties to be imposed in an enforcement suit by the government.

Thus, citizens wishing to prove violations of the CAA could not rely on self-reporting (in actuality "self-incriminating") data to build their case. Further compounding the dilemma prior to 1990 were court cases (cites omitted) holding that violations of the CAA could only be demonstrated by evidence gathered in accordance with EPA regulatory testing protocol, and not by circumstantial evidence, i.e., expert opinion. EPA's standard testing protocol is too complex and costly for most citizen's groups to employ. See, Buente, A Review of Major Provisions: Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop, 21 Envtl. L. 2233, 2240 (1991). Compare 123 suits brought under Section 505 of the CWA from 1978 to 1984 with 31 brought under the CAA. See, William H. Rodgers, Environmental Law- Hazardous Wastes and Substances, (hereinafter Rodgers), Volume 5, at p.213, n.19., West Publishing Co. 1992.

[7] Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979) (citing S.Rep. No. 1196, 91st Cong. 2d Sess. 2, 35-36 (1970)), cert. denied, 441 U.S. 961 (1979).

penalties payable to the United States Treasury.[8] These issues are developed more fully below.

II. CLEAN WATER ACT: SECTION 505:

A. TEXT OF THE CITIZEN SUIT PROVISION:

Section 505(a) of the CWA states that:

> any **citizen** may commence a civil action on his own behalf- (1) against any person ... who is alleged to be in violation of (A) an **effluent standard** or **limitation** under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is **not discretionary** with the Administrator. (emphasis added).

Section 505(a)(2) provides as well for the imposition of civil penalties under Section 309 of the CWA.

Section 505(b) states that:

> No action may be commenced-- (1) under subsection (a)(1) of this section (A) prior to **sixty days notice** of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or (B) if the Administrator or state has commenced and is **diligently prosecuting** a civil or criminal action in a **court** of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right. (emphasis added).

In the Water Quality Act of 1987, Congress amended the CWA by adding Section 309(g)(6), which provides for a limited form of administrative preclusion along with "court" preclusion under Section 505(b). Under this section of the CWA citizens may not bring a Section 505 action for civil penalties for:

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[8] The impact of citizen suits cannot be underestimated if one looks at the size of some of the penalty awards obtained. Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64 (3d Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991) (Upholding a 3.205 million dollar penalty under the CWA.)

> any violation-- (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an [administrative] action [for civil penalties] under this subsection, (ii) with respect to which a State has commenced and is diligently prosecuting an [administrative] action [for civil penalties] under this subsection, or (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law.

The prohibition against bringing a Section 505 suit does not apply when the citizen suit is filed prior to commencement of a State, or Federal administrative penalty proceeding, or when proper notice has been given in accordance with Section 505(b)(1)(A) and the suit is filed before the 120th day after the date of notice.

Other noteworthy subsections include Section 505(c)(1), a venue provision forcing the plaintiff to bring suit against the violator only in the judicial district where the discharge source causing the violation is located, and Section 505(d), allowing for an award of attorneys fees and costs to "any prevailing or substantially prevailing party."

B. STANDING:

Section 505(g) of the CWA defines a "citizen" who may sue under Section 505(a) as "a person or persons having an interest which is or may be adversely affected" by the alleged polluter. As construed by the Supreme Court[9], this provision was initially intended by Congress to allow suits by all persons possessing standing under the Supreme Court's decision in Sierra Club v. Morton.[10] In Morton, standing could be based upon an injury to "aesthetic, conservational, and recreational, as well as economic values."[11] Since Supreme Court jurisprudence on standing has evolved following Morton, the standing inquiry has become somewhat muddied. For the purposes of this memorandum, it suffices to say that upon a review of the caselaw on Section 505, few citizen suits

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[9] Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., 453 U.S. 1, 16 (1981).

[10] 405 U.S. 727 (1972).

[11] Id. at 738.

are derailed by this requirement.[12] However, it should be noted that citizen suits which do not survive the standing inquiry may be those less likely to be the subject of written opinions in the official court reporters.

C. "EFFLUENT STANDARD OR LIMITATION":

The term "effluent standard or limitation" is defined in great detail in Section 505(f) with the main goal being to confine citizen suit enforcement to matters involving "clear-cut violations."[13] Thus, citizen suits can be brought to challenge discharges in violation of NPDES permit conditions, as well as discharges without a proper permit. Failure to comply with discharge-monitoring requirements would also be fair game for citizen enforcement. The test of whether citizen enforcement is possible under this subsection is basically objective. To quote the Senate Report on this subsection:

> An alleged violation of an effluent control limitation ... would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.[14]

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[12] See Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985) (Standing granted to an organization on the basis of affidavits from a member that "his children swim in the river, his son occasionally fishes in the river, and his family has and will continue to picnic along the river."); Public Interest Research Group of New Jersey v. Yates Industries, Inc., 757 F.Supp. 438, 442-44 (D.N.J. 1991) (Court holds sufficient the allegation that member plaintiffs live downstream from the discharge source and that plaintiffs would use the waterway more often were it not for the upstream pollution); But cf., Ass'n of Significantly Impacted Neighbors v. City of Livonia, 765 F.Supp. 389, 391 (E.D.Mich. 1991) (Neighbors held to lack standing to challenge the construction of an underground sewage retention basin; injury in fact is "highly speculative.")

[13] NRDC v. Train 510 F.2d 692, 700 (D.C. Cir. 1974).

[14] Rodgers, citing to S.Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971).

In Gwaltney of Smithfield v. Chesapeake Bay Foundation,[15] the Supreme Court addressed the language "in violation of" in Section 505(a) and held that citizen-plaintiffs must allege a "state of either continuous or intermittent violation- that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Thus, Gwaltney prevents the initiation of a citizen suit under Section 505 for wholly past violations, i.e., one-time only spills, or retribution for a facility closed and non-operable. The 1990 CAA amendments attempted to address the Gwaltney issue by amending Section 304 of the CAA to allow for citizen suits "against any person ... who is alleged to have violated (if there is evidence that the alleged violation has been repeated) ..." (emphasis added). The amendment went into effect two years after the date of enactment of the 1990 CAA amendments. When the CWA is revisited by Congress in the future, Section 505 may well be amended in similar fashion.

D. NONDISCRETIONARY ACT OR DUTY:

Citizens can bring suit against the EPA Administrator under Section 505 for failure to "perform any act or duty under this Act which is not discretionary." The resulting caselaw has served to establish the polar extremes separating nondiscretionary duties under the statute from those which are committed to agency discretion. As citizen suit jurisprudence evolves, the distinction between discretionary and nondiscretionary duties may be clarified.

Examples of nondiscretionary acts include the: 1) publication of standards, guidelines and reports pursuant to mandatory statutory deadlines;[16] 2) promulgation of regulations as directed by the CWA;[17] and 3) duty to allot authorized funds under Sections 205 and 207 of the CWA.[18]

Perhaps the most significant category of duties committed to agency discretion is the duty to investigate and enforce. In Dubois v.

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[15] 484 U.S. 49, 57 (1987).

[16] Alaska Center for the Environment v. Reilly, 762 F.Supp. 1422 (W.D.Wash. 1991) (EPA had a nondiscretionary duty to promulgate water quality-based limitations.); NRDC v. Reilly, 32 ERC 1969 (D.D.C. 1991) (Nondiscretionary duty to publish plan pursuant to Section 304(m)(1).)

[17] NRDC v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) (Duty to adopt definition of "navigable waters.")

[18] Train v. City of New York, 420 U.S. 35 (1975).

Thomas,[19] a citizen suit was filed to compel the EPA to take enforcement action against a polluter pursuant to Section 309(a)(3) of the CWA.[20] After deciding that no duty existed to investigate and make findings, the Court addressed the language "shall issue an order ... or ... shall bring a civil action." Under the Supreme Court decision in Heckler v. Chaney[21], the court held that despite Congress' use of the word "shall," EPA maintains its prosecutorial discretion. In commenting on the role of the citizen under Section 505 the Court noted:

> By creating a private right of action, section 505(a)(1) suggests that, contrary to the holding of the district court in the instant case, the [CWA] was not intended to enable citizens to commandeer the federal enforcement machinery. Rather than giving the "little guy" access to enforcement power of the federal government, as the district court suggested, ... the [CWA] allows citizens to supplement that power by bringing actions directly against violators.[22]

Other examples of discretionary duties include the: 1) refusal to veto a state-issued permit;[23] and 2) duty to approve funding grants.[24]

E. NOTICE REQUIREMENTS:

As mentioned before, the purpose of notice is to allow the alleged violator the opportunity to address the violations, and the EPA to institute enforcement action of its own, if necessary. Thus, even

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[19] 820 F.2d 943 (8th Cir. 1987)

[20] Section 309(a)(3) reads in relevant part: "Whenever on the basis of any information available to him, the Administrator finds that any person is in violation of Section 1311 [permits] ... he shall issue an order requiring such person to comply with such section ..., or he shall bring a civil action in accordance with subsection (b) of this section."

[21] 470 U.S. 821, 831 (1985).

[22] Id. at 949.

[23] District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980).

[24] Atlantic City Municipal Utilities Authority v. EPA, 803 F.2d 96 (3d Cir. 1986).

if a citizen suit has commenced, it can be barred by a subsequently filed EPA court action.

Although the case fell under RCRA, the Supreme Court decision in Hallstrom v. Tillamook County[25] has served to set the judicial precedent that the 60-day notice provision is jurisdictional, and cannot be waived by the courts for extenuating circumstances. The RCRA language at issue in Hallstrom was nearly identical to that in the CWA, CAA, and other statutes: "No action may be commenced ... prior to sixty days after the plaintiff has given notice of the violation ..." Although the Court did not explicitly hold that the requirement is jurisdictional, the opinion suggests otherwise: "Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit."[26] The courts which have dealt with this issue subsequent to Hallstrom have generally construed the requirement as jurisdictional for all EPA statutes with similar language (i.e., the CWA, CAA, and CERCLA).[27]

F. "DILIGENT PROSECUTION" ... IN A "COURT":

The issue of whether EPA or the State is "diligently prosecuting" a civil or criminal action is highly fact-specific, with the courts taking a hard look at the history of the litigation, negotiations, etc. In such cases, the burden which must be met by the State or EPA in order to bar the citizen suit is usually difficult to achieve, with highly delinquent behavior by the governmental authorities certain to be chastised by the courts.[28]

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[25] 493 U.S. 20 (1989).

[26] Id. at 26.

[27] See Susan M. Cooke, The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation, Volume 3, Chapter 16, p.16-94, Matthew Bender, 1992.

[28] Perhaps another reason that this requirement poses little difficulty for citizens is a practical one. Since the citizen suit provisions provide for intervention as of right in governmental judicial enforcement actions, citizens may be less likely to go to the expense of filing suit when a "diligent prosecution" is underway, and they possess intervention rights. The risk of dismissal would be too costly. However, if the behavior of the governmental authority is particularly dilatory, citizens may be forced to initiate suit as the only resort to compel action. Under these conditions, courts will be unlikely to dismiss the citizen suit. See, New York Coastal Fisherman's Ass'n. v. New York City Dept. of Sanitation, 772 F.Supp. 162, 169 (S.D.N.Y. 1991) (Claim of

(continued...)

The more interesting issues have developed with respect to the word "court." Prior to the 1987 Water Quality Act amendments, several courts grappled with the issue of whether the requirement of a "court" could be satisfied by a State or Federal administrative proceeding. Although the 1987 amendments added some provisions respecting when administrative proceedings could serve as bars to citizen suits, the problem has not been completely resolved. In addition, CERCLA and RCRA have not been amended in like fashion, and the 1990 CAA amendments did not include similar language. The second issue, which has been more clearly resolved, deals with the extent to which a citizen can attack the adequacy of the outcome reached in the governmental "court" or administrative action.

The Federal appellate courts have diverged in their approach to deciding whether governmental administrative proceedings can be considered equivalent to "court" proceedings. The Third Circuit has adopted a two-part functional approach.[29] First, the court looked to whether the adminstrative agency possessed the coercive powers necessary to compel compliance and accord relief which is substantially equivalent to that available from a Federal court. The second inquiry focused on whether the agency proceeding possessed procedural similarities to the Federal court. The Third Circuit found EPA's enforcement action lacking. Although EPA could issue an order requiring a permittee to comply with a permit condition or limitation,[30] these "administrative enforcement orders are not self-executing. If a discharger fails to comply with an order, a separate enforcement action must be filed and litigated in district court.[31] Thus, the EPA itself is without power to enforce its compliance orders or its consent decrees."[32]

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[28](...continued)
"diligent prosecution" cannot be taken seriously in light of the fact that relief is not in sight until at least 1995.); Tobyhanna Conservation Ass'n. v. Country Place Waste Treatment Co., 734 F.Supp. 667, 669-670 (M.D. Pa. 1989) (No "diligent prosecution" where there was an unsigned letter by state authorities calling for an administrative conference, no order, no civil penalty, no hearing, no public notice.)

[29] Student Public Interest Research Group v. Fritzshe, 759 F.2d 1131, 1135 (3d Cir. 1985). This approach was initially formulated in Baughman v. Bradford Coal Co., 592 F.2d 215 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979) applying the equivalent provision in Section 304 of the CAA.

[30] 33 U.S.C. Section 1319(a)(1), (2).

[31] 33 U.S.C. Section 1319(b), (d).

[32] Fritzshe, 759 F.2d at 1138.

The Second Circuit took a more direct approach. The court tersely stated in Friends of the Earth v. Consolidated Rail Corp.[33]:

> The Clean Water Act citizen suit provision unambiguously and without qualification refers to an "action in a court of the United States, or a State." Section 505(b)(1)(B). It would be inappropriate to expand this language to include administrative enforcement actions.

The distinction between the circuits may be more imaginary than real in that our research of the caselaw has failed to uncover any administrative proceedings found to possess all the necessary "court-like" procedures. The two most common drawbacks of agency proceedings are the lack of an effective means for compelling compliance (e.g., lack of self-executing administrative orders), and insufficient public involvement procedures (e.g., no intervention as of right for citizens).

The 1987 Water Quality Act amendments provide that citizens may not seek civil penalties for a violation for which the EPA Administrator or the State has commenced and is diligently prosecuting an administrative penalty. This does not bar citizen suits in two important respects. First, citizen suits filed in court are not barred by a subsequently-filed administrative proceeding. Second, citizens who have served the proper notice are not barred by subsequently-filed administrative proceedings, even if such proceedings commence before the citizen has filed suit in court. However, citizens must file suit in court within 120 days of the notice to the parties. Third, the Water Quality Act amendments do not provide preclude citizen suits brought for injunctive relief. State proceedings must be "comparable" to EPA proceedings. Note, the amendments do not prevent the commencement of a Federal or State court enforcement action from barring the citizen action.

The courts are generally uniform in holding that citizens lack the power to use the Section 505 provisions to attack the adequacy of settlements or consent decrees reached in subsequently-filed governmental enforcement actions, without regard to the probability of a continuation of the violations. In Atlantic States Legal Foundation v. Eastman Kodak Co.[34], the polluter entered into negotiations with the State and EPA after the citizens' group had filed suit, negotiations which led to a cessation of the violations alleged in the suit. In holding that the citizens' group could not attack the adequacy of the settlement, the court stated:

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[33] 768 F.2d 57, 62 (2d Cir. 1985).

[34] 933 F.2d 124 (2d Cir. 1991)

> [W]e do not believe the Clean Water Act can or should be read to discourage a governmental enforcement action once a citizen suit has been commenced nor to prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. ... A citizen suing pursuant to Section 505 of the Act thus may not revisit the terms of the settlement reached by competent state authorities without regard to the probability of a continuation of the violation. ... Nor may the citizen suit proceed merely for the purpose of further investigating and monitoring the state compromise absent some realistic prospect of the alleged violations continuing.[35]

Other courts have held likewise.[36] This result follows from the statutory language. If a settlement cures the violation, a citizen cannot invoke Section 505 absent proof that an alleged violation continues.

III. CLEAN AIR ACT: SECTION 304:

The CAA citizen suit provision, Section 304, was the general forerunner for all subsequent citizen suit provisions. Thus, the discussion of the major elements of Section 505 of the CWA holds for CAA Section 304. However, the 1990 CAA introduced several key changes that will likely increase activity under Section 304.[37] First, the scope of the citizen suit provisions has been broadened allowing citizens to sue to enforce provisions of the new general permit scheme of Title V, or any EPA-approved state implementation plan (SIP). Second, the terms "emission limitation" and "emission standard" were expanded to cover more potentially enforceable

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[35] Id. at 127.

[36] See, EPA v. City of Green Forest, 921 F.2d 1394, 1404 (8th Cir. 1990), cert. denied, 112 S.Ct. 414 (1991) ("While the citizens might have preferred more stringent terms than those worked out by the EPA, such citizens are no more aggrieved than citizens who are precluded from commencing an action in the first instance because of pending agency action."); Connecticut Fund for the Environment v. Contract Plating Co., 631 F.Supp. 1291 (D.Conn. 1986) ("The mere fact that the settlement reached in the state action was less burdensome to the defendant than the remedy sought in the instant action is not sufficient. ... [T]he plaintiffs or their members could have moved to intervene in the state action ... which authorizes intervention as of right.")

[37] The reasons for sluggish CAA citizen suit enforcement compared to the CWA were discussed earlier in footnote 6.

obligations. Third, the Gwaltney decision was addressed allowing Section 304 actions to be based on repeated past violations. Fourth, under Title V of the CAA, regulated major sources will be subject to a mandatory permit requirement, with EPA required to promulgate various monitoring and reporting requirements. Finally, for purposes of penalty assessment, Section 113 was modified to allow "any credible evidence" to be used to establish the duration of a violation. This will allow for expert opinion to be employed by citizen-plaintiffs. Prior to 1990 most courts held (cites omitted) that violations of the CAA could only be demonstrated by evidence gathered in accordance with EPA regulatory testing protocol, and not by circumstantial evidence, i.e., expert opinion. EPA's standard testing protocol is too complex and costly for most citizen's groups to employ.[38]

Noteworthy in the 1990 amendments was the absence of a provision allowing for limited adminstrative preclusion of citizen suits brought for civil penalties, similar to the amendment to the CWA in the 1987 Water Quality Act. Also, the Congress declined to address or modify the impact of the 60-day jurisdictional notice decision in Hallstrom.

It is still too early to appreciate the significance of the 1990 revisions to the CAA citizen suit provisions. At least one commentator has hailed the provisions as a "significant strengthening" of the citizen suit section:[39] "the 1990 Amendments create powerful new citizen enforcement tools that will probably increase citizen suits under the CAA."

IV. RESOURCE CONSERVATION & RECOVERY ACT: SECTION 7002:

RCRA Section 7002 is similar to the CWA and CAA provisions with respect to judicial interpretation of significant statutory elements, e.g., standing, notice, diligent prosecution in a court, and availability of civil penalties against polluters. However,

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[38] See, Buente, A Review of Major Provisions: Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop, 21 Envtl. L. 2233, 2240 (1991).

[39] See, Buente, 21 Envtl. L. at 2251. David T. Buente is uniquely qualified to comment on the potential impact of the CAA amendments with respect to enforcement issues. He was the Section Chief to 100-plus attorneys in the Environmental Enforcement Section of the Land & Natural Resources Division (now referred to as the Environment & Natural Resources Division) within the Department of Justice during the late 1980's. The primary duty of that Section was to bring enforcement actions under the CAA, CWA, etc. in Federal court on behalf of the FPA.

Section 7002 does contain some unique provisions. First, the 60-day notice requirements are dispensed with, and an action may be brought immediately after notice, if the violation is with respect to Subtitle C of the Act. Since Subtitle C is the hazardous waste subchapter, and perhaps the core of RCRA, this exception is noteworthy. However, as with the CWA and CAA, the citizen suits are barred if the EPA or State has taken "court" action.[40]

Second, Section 7002(a)(1)(B) permits "any person" to bring suit against 'any person ... who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Thus, to the extent authorized by this language, citizens can sue for "past" violations. In other respects, Section 7002 is similar in operation to the other statutory provisions, with unique caselaw as to the specific statutory nondiscretionary duties that citizens can compel the Administrator to perform,[41] and standards that polluters can be alleged to have violated or are violating.[42]

One very recent case that may have important ramifications in terms of increased citizen suit activity is United States v. State of Colorado.[43] In the backdrop of the continuing Rocky Mountain Arsenal saga, the Tenth Circuit held that a CERCLA response action at a site does not bar a RCRA citizen suit enforcement action. The court reasoned that the State is not "challenging the Army's CERCLA remedial action, ... but is attempting to enforce the requirements of its federally authorized hazardous waste laws and regulations,

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[40] As with the CWA and CAA provisions, the Federal courts are placing a heavy burden on defendants seeking to bar citizen-plaintiffs by arguing that administrative proceedings are the equivalent of "court" actions. See, Sierra Club v. Department of Energy (DOE), 734 F.Supp. 946, 951 (D.Colo. 1990) (Negotiations between DOE and State of Colorado on the proper handling of hazardous wastes were not sufficient to bar prosecution of a citizen suit.)

[41] Professor Rodgers has estimated the number of nondiscretionary duties in RCRA as 170, Rodgers, Volume 4, p.18, n.81.

[42] As a practical matter, citizens encounter more difficult proof problems under RCRA. "The paper trails under RCRA, although they yield useful information, do not generate smoking-gun evidence of per se RCRA violations like the famous discharge monitoring reports of the CWA." Id. at p.5.

[43] 990 F.2d 1565 (10th Cir. 1993).

consistent with its ongoing duty to protect the health and environment of its citizens."[44]

V. CERCLA: SECTION 310:

Section 310 of CERCLA was added by the 1986 Superfund amendments, and is modelled after Section 505 of the CWA. However, unlike Section 505, which plaintiffs have successfully exploited, CERCLA Section 310 is not viewed similarly. To quote Professor Rodgers: "The citizen suit provision of CERCLA is one of the crueler farces of contemporary environmental lawmaking. Winning a citizen's suit is about as easy as cleaning up the Hanford Reservation."[45]

Section 310 of CERCLA contains all the standard provisions found in the CWA, but adds some important caveats. First, although the statutory language is unclear, both the courts and the legislative history to the 1986 Superfund amendments have made clear that citizen suits brought to challenge EPA response actions prior to implementation are barred by Section 113(h) of CERCLA. Once EPA has selected a remedy, no challenge to the cleanup can take place before completion of the remedy or a "distinct and separate phase" of the cleanup.[46] However, as pointed out by Rodgers, this will amount to a "small window of opportunity" in actual practice:

> Thus, a citizen's challenge to the agency's failure to prepare an impact statement or conduct an adequate [Remedial Investigation/Feasibility Study] is clearly premature. (cites omitted). The citizen who waits a bit longer until the bulldozers are on the scene is still too early because no "distinct and separate phase" has been completed. The citizen who waits longer yet until the

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[44] Id. at 1578.

[45] Rodgers, Volume 4 at p. 534.

[46] See H.Rep. No. 99-962, 99th Cong., 2d Sess. 224 (1986), incorporated in the SARA Conference Report:

> [A]n action under Section 310 would lie following completion of each distinct and separate phase of the cleanup. For example, a surface cleanup could be challenged once all the activities set forth in the Record of Decision for the surface cleanup phase have been completed. This is contemplated even though other separate and distinct phases of the cleanup, such as subsurface cleanup, remain to be undertaken as part of the total response action.

> bulldozers go home is still a loser, not because the suit is premature but because it is probably now tardy; with the cleanup action complete, is there an equity court in the land that would intervene to undo what has been wrought? ... Indeed, if the citizen waits a bit longer, the EPA may declare the "case closed," and suddenly the court will be divested of jurisdiction because it can no longer find a "standard," "regulation," or "requirement" to enforce. (cite omitted).[47]

Second, the Rodgers treatise has noted that "finding an enforceable standard under Section 310 isn't that easy, ... [and] five years of litigation have uncovered not a single nondiscretionary duty" which the EPA Administrator could be compelled to perform.[48] Our follow-up review of the subsequent caselaw reaffirms that conclusion.

In conclusion, CERCLA 310 may be structured along the lines of Section 505 of the CWA, but in actual practice, citizens have had little success in attempting to utilize the provisions of the CERCLA citizen suit section.

VI. CONCLUSION:

To understand in simple terms the operation of the citizen suit provisions, the following outline illustrates the step-by-step nature of the process:

1. WHO MAY SUE: CITIZEN OR PERSON: **Standing Test**: Does the person possess standing under the most recent Supreme Court inquiry: is there an "injury-in-fact which can be fairly traced to the challenged action, and is the injury likely to be redressed by a favorable decision?"[49]

If standing is satisfied the proc[illegible]ontinues--- if not-- citizen suit dismissed.

2. WHO MAY BE SUED: ANY PERSON: Including the United States.

WHAT CAUSE OF ACTION: Person alleged to be **in violation** of a permit, standard or limitation under the particular

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[47] Id. at 535-536.

[48] Id. at 537.

[49] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Act (includes repeated past violations under CAA). Must be provable by objective evidence.

WHO MAY BE SUED: EPA ADMINISTRATOR

WHAT CAUSE OF ACTION: EPA Administrator alleged to have failed to perform a nondiscretionary act or duty. Nondiscretionary duties: statutory "shalls" such as promulgating regulations by a date certain, establishing guidelines, preparing reports, etc.

3. WHEN CAN SUIT COMMENCE: CONSULT SPECIFIC NOTICE PROVISIONS: Generally 60-days notice to alleged polluter, EPA Administrator (or appropriate State agency), State where violation occurred. Supreme Court and lower courts consider requirement to be jurisdictional: i.e., constructive notice insufficient, formalities important. If violation is with respect to "hazardous waste" subchapter in RCRA, no notice period may be required.

4. WHEN CAN SUIT BE BARRED: EPA OR STATE DILIGENTLY PROSECUTING ACTION IN A COURT: Administrative proceeding which lacks the full range of Federal court powers and procedures will not satisfy "court" requirement. Under CWA, an administrative proceeding can, in limited situations, bar the citizen suit.

5. IF SUIT IS BARRED, WHAT RIGHTS DO CITIZENS' POSSESS: INTERVENTION AS OF RIGHT IN THE CIVIL ACTION: Citizens can intervene in the court action to attempt to shape their desired remedy. Citizens generally cannot attack sufficiency of any settlements reached by EPA, State and polluter without regard to proof that violations are continuing despite the settlement.

Citizen suits appear to be an important mechanism to compel "would be" polluters to comply with permits and statutory standards, and equally significant as a means to compel EPA to carry out its statutory mandates. If the 1990 CAA amendments are an accurate barometer, Congress views the citizen suit provision to be an important enforcement tool. Thus, citizen suit provisions are sure to be more readily exploited in the years ahead. The magnitude of some recent civil penalties obtained via Section 505 of the CWA (see footnote 8) graphically demonstrate the significance to polluters, EPA and society in general of the CWA provisions. The CAA provision, Section 304, is likely to see increased usage now that citizens can sue to compel civil penalties on the basis of expert opinion. Once the RCRA permitting scheme has been completed, legal practitioners become more comfortable with the subtleties of the RCRA scheme, and the relationship of RCRA with CERCLA becomes clear (see the 1993 Federal appellate court decision

on the Rocky Mountain Arsenal discussed within), RCRA Section 7002 should see increased activity. Finally, when CERCLA comes up for reauthorization in the near future, Congress may see fit to address some of the thornier aspects of CERCLA 310 to make the provision more plaintiff-friendly.

Finally, the citizen suit provisions provide for interesting comparisons with 10 CFR 2.206. First, citizens fare no better under the EPA-administered statutes versus 10 CFR 2.206 in compelling the agency to take enforcement action, due to the Heckler v. Chaney restrictions. Second, if citizens were authorized under a citizen suit provision, similar to those discussed above, to take direct enforcement action against NRC-licensees, the only types of violations which would be addressed are ones involving "clear-cut" objective criteria; i.e., similar to the effluent limitation or standards restrictions under the EPA statutes. In this regard, 10 CFR 2.206 is more generous to the citizen, allowing a petition to be brought with respect to any type of safety issue, including those not definable by clear-cut objective numbers or standards. For those alleged violations that do involve clear-cut standards, it is unlikely that a citizen suit provision would be necessary to force Commission enforcement action. Finally, the agency's organic statute, the Atomic Energy Act of 1954, as amended, is not sprinkled with a host of "shalls" which are nondiscretionary with respect to Commission action, i.e., the statute does not contain mandatory deadlines for promulgating regulations, awarding grant monies and filing reports. We will follow up on the cross-cutting issues with respect to citizen suits and 10 CFR 2.206.

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ATTACHMENT F

Memorandum to: Chip Cameron

From: Grace Kim

Re: Summary of the Citizen Petition Provisions and Procedures in the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Food, Drug, and Cosmetic Act

Date: December 17, 1993

I. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

a. Relevant Statutory Provisions.

FIFRA, 7 U.S.C. §§ 136y, generally requires that pesticides be registered with the Environmental Protection Agency (EPA) before entering the stream of commerce. Under FIFRA, the issuance of a "notice of intent" by the Administrator "sets in motion the administrative process" for formal agency enforcement proceedings.[1] Specifically, FIFRA provides that, if it "appears to the Administrator" that the widespread and common use of a registered pesticide "generally causes unreasonable adverse effects on the environment" or otherwise fails to comply with statutory requirements, the Administrator "may [inter alia] issue a [public] notice of... intent" to "cancel" the pesticide's registration, along with a statement of the reasons for such action. 7 U.S.C. § 136d(b).[2] The registrant subject to a notice of intent to cancel must be granted a formal evidentiary public hearing before the EPA if a hearing request is made by the registrant within a certain number of days after receipt or publication of the notice of intent. If the registrant neither

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[1] See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 592 (D.C.Cir. 1971).

[2] The statute also authorizes the Administrator to take other enforcement actions, such as immediate "suspension" of a registration (in cases posing an "imminent hazard") or changing the "classification" of a pesticide. For the sake of simplicity, it is sufficient for the purposes of this discussion of FIFRA to reference only the Administrator's authority to "cancel."

While FIFRA's provision regarding the Administrator's enforcement authority may initially appear to be permissive (e.g., the Administrator "may" initiate a proceeding seeking to cancel a pesticide registration if "it appears to the Administrator that a pesticide...generally causes unreasonable adverse effects"), FIFRA later makes clear in the judicial review provision that the decision of whether to initiate a formal cancellation proceeding is "not committed to the discretion of the Administrator by law." See judicial review discussion infra.

requests a hearing nor takes appropriate corrective measures within the statutory time period, the action proposed in the notice of intent becomes final and effective at the end of that period. Id.

Court of appeals review is provided under FIFRA for all final decisions of the Administrator rendered after a public evidentiary hearing. 7 U.S.C. § 136n(b). FIFRA also includes a separate judicial review provision which provides for district court review of any "refusal" of the Administrator to initiate a formal proceeding seeking to cancel a pesticide registration (i.e., any refusal to issue a "notice of intent" to cancel). 7 U.S.C. § 136n(a). The judicial review provision expressly makes clear that the decision of whether or not to cancel a registration is not one that is "committed to agency discretion by law." Specifically, FIFRA provides that "the refusal of the Administrator to cancel...a registration...not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law are judicially reviewable by the district courts of the United States." Id.

b. Relevant Regulatory Provisions.

In regulations promulgated under FIFRA, the EPA has established a special administrative review process (called the "Special Review" process) which appears to be specifically designed to enable the agency to develop an extensive and exceedingly thorough record for judicial review of any decision refusing to initiate a formal proceeding seeking to cancel (or take other appropriate enforcement type of action with respect to) a pesticide registration. Since the Special Review process may be initiated by a citizen petition, the process may be of some interest to the Commission in considering revisions to Section 2.206.

The EPA's regulations describe the purpose and scope of the Special Review process, in part, as follows:

> The purpose of the Special Review process is to help the Agency determine whether to initiate procedures to cancel [or take other appropriate enforcement type of action with respect to] registration of a pesticide product because uses of that product may cause unreasonable adverse effects on the environment....The process is intended to ensure that the Agency assesses risks that may be posed by pesticides, and the benefits of use of those pesticides, in an open and responsive manner. The issuance of a Notice of Special Review [which initiates a Special Review process] means that the Agency has determined that one or more uses of a pesticide may pose significant risks and that,

> following completion of the Special Review process, the Agency expects to initiate formal proceedings seeking to cancel [or take other appropriate action with respect to] the registration of the product(s) in question unless it has been shown during the Special Review that the Agency's initial determination was erroneous, that the risks can be reduced to acceptable levels without the need for formal proceedings, or that the benefits of the pesticide's use outweigh the risks.

40 C.F.R. § 154.1.

Before summarizing the basic procedures of the Special Review process, there are a couple of general observations that may be helpful to an understanding of the process. First, nothing in the process is left to chance -- EPA's regulations provide for extensive written documentation (placed in the public docket) of virtually every contact made by EPA employees with interested persons during the Special Review process that could possibly affect the agency's final decision regarding the initiation of a formal enforcement proceeding. See 40 C.F.R. § 154.15 ("Docket for the Special Review"); 40 C.F.R. § 154.27 ("Meetings with interested persons"). This would appear to serve two purposes: 1) preserving a record of its decision for judicial review; and 2) showing the general public that its process is open and unbiased. Similarly, in keeping with the themes of creating a record for review and openness/ unbiased decisionmaking, the regulations convey an impression that every milestone in agency decisionmaking leading to the ultimate decision of whether to initiate a formal proceeding will be put in writing and publicly noticed for comment -- for example, each significant decision made during the process is preceded by a "proposed" or "preliminary" decision on which the public is given an opportunity to comment.

Turning now to the general procedures of the Special Review process, it should be noted at the outset that the EPA places the burden of persuasion that a pesticide product is entitled to continued registration "always on the proponent(s) of registration." 40 C.F.R. § 154.5. The Special Review process may be initiated by the EPA's own initiative or, as noted above, by a citizen petition. 40 C.F.R. § 154.10. The EPA's regulations provide that the Administrator may conduct a Special Review of a registered pesticide if he determines, "based on a validated test or other significant evidence," that the use of the pesticide may pose one or more of the specifically listed risks to human health or animals. See 40 C.F.C. § 154.7 ("Criteria for initiation of Special Review").

Before publicly announcing the initiation of a Special Review process, the EPA is required to give the affected registrant a written "preliminary notification" of its decision

to conduct a review of a registered pesticide, along with a general description of the supporting information, and an opportunity to dispute the validity of the decision to review. 40 C.F.R. § 154.21. After receipt of comments on the preliminary notification, the EPA will decide either to initiate the Special Review process (in which case it issues public notice of the initiation of the process, including an identification of the risk criteria posed by the pesticide, a brief discussion of the agency's reasons for determining that the criteria have been satisfied, and an invitation to all interested persons to submit further relevant information [3] (id.)), or not initiate the process (a decision which must be preceded by public notice of and comment upon a "proposed decision not to initiate a Special Review" (40 C.F.R. § 154.23)).

An informal public hearing (preceded by public notice of the date, time, and place of the hearing, a description of the procedures governing participation by interested persons, and the issues to be considered) may be conducted by the EPA at any time after the initiation of a Special Review process. 40 C.F.R § 154.29. A "verbatim" transcript is prepared of all public hearings and placed in the public docket. Id.

After the close of the comment period for Special Review proceedings that have been initiated, the EPA issues for public notice and comment a preliminary determination as to whether it intends to initiate formal proceedings seeking to cancel (or take other enforcement action with respect to) the registration of the pesticide being reviewed, along with a discussion of the reasons for the proposed determination. 40 C.F.R. § 154.31. The EPA's regulations clearly set forth the basic factors that the agency must weigh (and discuss in the published preliminary determination) in deciding whether to initiate a formal proceeding to cancel a registration. See id. In sum, as reflected in the regulations, the agency will first determine whether the intended use of the pesticide in question poses one of the listed risks to human health or animals (see 40 C.F.R. § 154.7); if the agency determines that use of the pesticide satisfies any of the listed risk criteria, it then determines whether the "adverse effects" posed by the use are "unreasonable" when taking into account the economic and other non-health factors that FIFRA requires it to consider (see 7 U.S.C. § 136d(b)); if the agency concludes after weighing all of the relevant factors that the use of the pesticide does pose an "unreasonable adverse effect," it is required by statute (id.) to

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[3] The Special Review regulations include a generic invitation to the public to comment upon the various issues listed whenever a notice of Special Review is issued. See 40 C.F.R. § 154.26.

initiate a formal proceeding seeking to cancel (or take other appropriate action with respect to) the registration of the pesticide.

If the EPA proposes to initiate formal proceedings in its preliminary determination, it requests and makes publicly available comments from the Secretary of Agriculture and the Scientific Advisory Panel regarding the preliminary determination. 40 C.F.R. § 154.29(5). After the close of the comment period for the preliminary determination, the EPA publishes notice of its final determination as to whether to initiate formal proceedings, including in the notice any comments submitted by the Secretary of Agriculture and the Scientific Advisory Panel. 40 C.F.R. § 154.33.

II. Federal Food, Drug, and Cosmetic Act (FFDCA)

a. Relevant Statutory Provisions.

The FFDCA generally requires that an agency "regulation" prescribing the conditions under which a particular "food additive" can be safely used must be in effect in order for a food additive to be deemed "safe." 21 U.S.C. § 348(a). [4] The FFDCA sets forth general substantive criteria for determining whether and/or how a food additive may be used safely (including criteria for determining when use of a food additive would not be "safe"). 21 U.S.C. § 348(c)(3). Any member of the public may petition the appropriate agency proposing that a food additive regulation be amended or repealed because use of the food additive would not be safe under statutory standards. See id.; 21 U.S.C. § 348(h). [5] Upon the filing of a petition proposing that the a food additive regulation be issued, amended, or repealed, the agency is required to issue a substantive order on the petition (i.e., an order issuing, repealing, or amending a food additive regulation) based upon a "fair evaluation" of the

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[4] Agency administration of the food additive provisions of the FFDCA is bifurcated. Pursuant to the Reorganization Plan No. 3 of 1970, 84 Stat. 2086, the EPA is responsible for the regulation of pesticide residues in processed foods (which are considered to be a "food additive") , while the Food and Drug Administration is responsible for the regulation of all other types of food additives.

[5] In actuality, the FFDCA prescribes a petition process for the "issuance" of food additive regulations (21 U.S.C. § 348(a)-(f), but directs the EPA to promulgate regulations for the amendment or repeal of food additive regulations which "conform to the procedure provided...for the promulgation of such regulations." 21 U.S.C. § 348(h).

relevant data not more than 180 days after the date of filing of the petition. 21 U.S.C. § 348(c)(2). Any person "adversely affected" by the agency's order on a petition who files objections specified "with particularity" and based upon "reasonable grounds" is entitled to a formal evidentiary public hearing on the order if one is requested. 21 U.S.C. § 348(f). All final decisions of the agency rendered upon the completion of such a hearing, "including any order...with respect to amendment or repeal of a [food additive] regulation," are subject to judicial review in the courts of appeals. 21 U.S.C. § 348(g).

b. Relevant Regulatory Provisions.

The regulations in 40 C.F.R. Parts 177 and 178 were promulgated by the EPA under the FFDCA in fulfillment of its reponsibilities with respect to the pesticide residue type of food additive. The EPA's regulations essentially reflect a straight-forward implementation of the FFDCA's provisions discussed above. In sum, the regulations establish technical requirements for filing a petition to amend or repeal a food additive regulation, and procedures for requesting and obtaining a formal evidentiary hearing (somewhat analogous to the NRC's procedures under 10 C.F.R. Subpart G) with respect to the EPA's ruling on such a petition. There is nothing particularly significant about these regulations that merits further discussion for the purposes of the Commission's Section 2.206 revisions (e.g., unlike the FIFRA process, there is no provision for informal public hearings).

ATTACHMENT G

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

June 6, 1993

MEMORANDUM FOR: NRR Staff

FROM: Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

SUBJECT: PRIORITY DETERMINATION FOR NRR REVIEW EFFORTS

On April 29, 1988, and March 24, 1989, I issued procedures for a priority ranking system for NRR review tasks so that license actions and other office work efforts would be appropriately considered within the broad scope of all demands on office resources. The workload within NRR has changed with increased emphasis on the licensing of future reactors and license renewal. These changes require revisions to previously established priorities. Major NRR work activities fall within the categories of operating reactors, future reactors, and license renewal; review tasks will be assigned a priority within each of these categories. This memorandum provides the general framework for defining the priority of review activities within NRR and gives examples of review tasks within each priority for operating reactors. Because specific NRR staff has been dedicated to address the licensing of future reactors and license renewal, lists of examples of new tasks and their priority for future reactors and license renewal will be issued separately.

Basis for Determining Priority

The priority of a review task is determined primarily on the basis of safety significance, risk considerations, and operational impact. Four levels of priority are broadly defined in this memorandum. As a general rule, the safety significance of an issue should be guided by an assessment of its risk significance. Issues that affect components or systems that play a major role in accident scenarios should be considered high-priority issues. Significant contributors to initiating events that may result in challenges to the plant are high-priority assignments and should have appropriate resolution dates. However, identifying components and systems as safety or non-safety items is not, in itself, sufficient justification for assignment of priorities.

In some situations, priority is dictated by Commission or EDO directive resulting from policy considerations, or by statutory requirements such as deadlines imposed by rule or regulation. For example, policy considerations will have a significant bearing on the pricrity assigned to review tasks for future reactors and license renewal. All these factors must be considered in defining the priority of a particular review task.

Contact: Armando Masciantonio, PMAS
504-1290

Definitions

PRIORITY 1:

- Highly risk-significant safety concerns that require firm commitment of resources
- Actions needed to prevent or require plant shutdown, allow restart, or prevent significant derate
- Issues for which immediate action is needed for compliance with statutory requirements or Commission and EDO directives

PRIORITY 2:

- Significant safety issues that do not rise to the level of immediate action but require near-term staff evaluation
- Activities needed to determine the safety significance/generic implications of an operating event
- Activities needed to support continued safe plant operation, reload analyses, or evaluation of necessary modifications or enhancements
- Topical report reviews that will have extensive application in the short to mid-term, and whose application results in a significant safety benefit
- Licensing reviews for which safety evaluation reports must be prepared within six months for construction permit, operating license, preliminary design approval, or final design approval

PRIORITY 3:

- Issues of moderate to low safety significance that do not directly impact plant safety
- Support for generic issue resolution and multiplant actions
- Plant specific and topical report reviews with limited safety benefit but whose application offers operational or economic benefit

PRIORITY 4:

- Items to be deferred or closed out without further staff review

Examples of review activities related to operating reactors that fall into each priority category are enclosed. This priority scheme is not meant to be a rigid framework. Some assignments may not fall into the categories described. Allocation of resources will be guided by the principle that issues of greatest safety significance and most operational impact, as well as those areas that the Commission has identified as important, will be

given a high priority and will have predictable review schedules. However, unlike past priority ranking systems, there is not necessarily a direct correlation between the assigned priority and the review completion date. A review of lower safety significance could be completed on a shorter schedule than a review that has more safety significance. Additionally, the Priority 4 category has been redefined for issues that management decides should be deferred or staff work discontinued.

A recent review of plant-specific licensing tasks shows that there are a significant number of current reviews for which there are no immediate safety benefits or detriments associated with their approval; however, there may be significant economic benefits to these actions. In the past, these reviews have been assigned a low priority on a resource-available basis. The result of the assigned low priority is that possible economic benefits may not be made available to some licensees on a timely basis. The management of NRR is currently evaluating this policy and has formed a study group to provide a systematic, logical approach in scheduling these reviews and assigning staff resources.

Semiannual Review

The priority determinations will be reviewed semiannually at the NRR management meeting to determine how well the process meets the needs of this office. During the semiannual review, NRR managers will review discrepancies between work planned and work performed, and will assess the need for adjusting priority determinations.

This guidance applies to all NRR review efforts with a focus on issues related to operating reactors, and is effective immediately. Project managers and others who originated review activity are requested, therefore, to review existing priority classifications for all ongoing review tasks to assure that they are properly classified in accordance with this guidance.

As stated above, additional guidance for review of work activities for future reactors, license renewal, and operating reactor issues with low safety impact but significant economic benefit will be provided in the near future. Staff guidance for all priority determinations will be finalized in an NRR Office Letter following the completion of these separate efforts.

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosure:
As stated

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Original signed by
Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosure:
As stated

DISTRIBUTION: [PRIORITY.3]

Central File	W. Russell	W. Travers	*See previous
RCTS/ILPB r/f	J. Partlow	M. Slosson	concurrence
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F. Miraglia	D. Crutchfield	A. Masciantonio	

ILPB:PMAS*	ILPB:PMAS*	ILPB:PMAS*	PMAS:ILPB	DADAR:NRR	ADAR:NRR
AMasciantonio et	AVietti-Cook	MSlosson	AGody	WTravers	DCrutchfield
4/29/93	4/29/93	4/29/93	5/13/93	5/14/93	5/15/93

ADPR:NRR	ADT:NRR	DD:NRR	D:NRR
JPartlow	WRussell	FMiraglia	TMurley
5/21/93	5/14/93	5/24/93	6/6/93

Enclosure

EXAMPLES OF ACTIONS/ISSUES WITHIN EACH PRIORITY CATEGORY

FOR OPERATING REACTORS

Priority 1: High Priority

Immediate action usually required; review completion date must be met; firm commitment of resources required.

- operating plant safety issues of very high significance including
  - event analysis of a serious operating incident
  - initial evaluation of unresolved safety questions to determine safety significance and generic applicability
  - unsatisfactory license operator qualification program
  - resolution of inspection team findings with high safety or safeguards significance
- bulletin development and review of responses
- significant non-compliance issues related to reactor vessel integrity
- 10 CFR 50.54(f) letter development and review of responses
- reactive team inspection support (AIT, IIT, OSTI, Special Inspection) and activities directly related to plant restart decisions
- support for court and licensing board hearings and response to interrogatories, 2.206 petitions, and EDO/Congressional ticket items
- incident response center support

  for The initial response. Final response NOT This high... more like for 3.
- technical support for enforcement discretion or safety evaluations for license amendments or exemption requests for actions to prevent unnecessary reactor shutdown or startup delays or significant derating of the plant
- ACRS/Commission briefings
- technical support for orders issued to licensees
- support for escalated enforcement actions
- support for evaluating highly safety significant allegations and differing professional views/opinions
- licensee performance evaluations to support SALP, senior management meetings, EDO and Commissioner meetings with licensee
- reviews for lead plant or complete conversions to the improved STS

PRIORITY 2: High Priority Near-term

Short-term actions, minor changes to review completion date can be negotiated

- evaluation of operating events, inspection findings, and Part 21 reports to identify safety issues requiring action and assess licensee performance
- assistance to regions including consultation on TS interpretation, and task interface agreements
- significant safety, emergency planning and safeguards issues
- reload reviews
- development of multiplant issues of high safety significance and review of licensee responses
- decommissioning issues (exemptions, orders, reviews, etc.)
- TS interpretations that could impact plant operation
- power uprate proposals
- preparation of generic communications on issues of moderate safety significance
- review of 50.59 evaluations of highly safety-significant items (steam generator replacement, dry cask spent fuel storage installation)
- ISI/IST relief requests
- generic STS line item improvements
- pressurized thermal shock review and evaluation

PRIORITY 3: Low Priority

Longer-term actions, review completion date is flexible, items that are "marginal to safety"

- development of multiplant actions of lower safety significance and review of licensee responses
- surveillance program reviews
- non-power reactor issues if safety significant or essential to mission (operating license review, license renewal)
- spent fuel pool expansion reviews not meeting Priority 1 or 2
- piping as-built/design non-conformance reviews
- participation in ASME, ANS, and IEEE codes and standards activities

- topical report reviews and code case reviews which are required to demonstrate compliance with the regulations or provide operating flexibility/economic benefit and are expected to have wide reference ability
- safety-significant problems with the offsite dose calculations manual or radiological effluent technical specification, review of waste issues
- severe accident policy implementation
- support to RES on new generic issues of moderate safety significance
- seismic hazard characterization
- inservice inspection and testing program implementation and relief requests not affecting continued operations or restart
- proposed relief from previous commitments (e.g., EP, DCRDR, RG 1.97)
- voluntary upgrades to safety systems (e.g., analog-to-digital conversions)
- preparation/revision of inspection procedures, inspection manual chapters, NRC management directives
- requests for TS amendments required for economic advantage (e.g., changes in core and equipment operating limits, limiting conditions for operation and surveillance requirements, deletion of equipment that is no longer used, administrative TS changes)
- review of licensee self-initiated performance improvement programs developed in response to weaknesses in safety performance
- technical support for allegations and differing professional opinions of low safety significance

PRIORITY 4: Items That Can Be Deferred

Items that can be deferred or closed out without further staff review, e.g., issues not directly impacting plant safety, generic and confirmatory items with relatively low safety significance

- ASME code case reviews with limited applicability
- long-term followup of events or inspection findings with low safety significance
- preparation of generic communications that address items of low safety significance and administrative matters
- technical support for new generic issues of low safety significance
- changes to legally binding requirements (e.g., TS, license conditions) that are solely editorial