

A F F I R M A T I O N

R E S P O N S E S H E E T

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER AHEARNE

SUBJECT: SECY-82-202 AMENDMENT TO 10 CFR PART 140, "FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS"

APPROVED X DISAPPROVED _____ ABSTAIN _____
NOT PARTICIPATING _____ REQUEST DISCUSSION _____

COMMENTS:

as notified

J. Ahearne

SIGNATURE

6/16/82

DATE

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8210280 ~~820930~~ 820930
PDR FOIA
BUCKLES82-425 PDR

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

Mr. Ahearne's comments on Secy 82-202:

This notice is confusing because it blurs the distinction between the license amendment and the indemnity agreement amendment. They involve separate issues and separate interests.

In voting on Secy 81-549, I suggested the rule change addressed in Secy 82-202 because the opportunity for comment seemed unnecessary and potentially confusing. ^{1/} The Secy paper does point out there may in fact be a distinct group of people with an interest in the indemnity agreement (see Secy 82-202, pp. 3-4). However, by using arguments such as "the substantive issue. . . was whether the spent fuel generated at one reactor site could be transported to and stored in the reactor site without unduly endangering the public health and safety" and to "provide a second opportunity for public comment or intervention. . . would be unnecessarily duplicative," (Enclosure B, p. 5), the proposed notice leaves the reader with the impression that both opportunities for comment dealt with the health and safety issues of the underlying transaction and ignores the fact that §140.9 related to a set of issues and interests different from those of the underlying transaction.

In addition, after acting on Secy 81-549 and requesting the rule dealt with in this paper, in Secy 81-591 ^{2/} the Commission addressed the issue of the appendixes to Part 140. In an SRM dated December 18, 1981, the Commission concluded:

"Because of the level of detail and the fact that this policy is merely one form which would be acceptable to the Commission rather than the required form, it would be more appropriate to publish this appendix (as well as the other appendixes) as a Regulatory Guide rather than a Regulation. It should include caveats similar to the staff wording on page 4 of SECY-81-591."

The "other appendixes" are primarily the forms of an indemnity agreement referred to in the first sentence of §140.9. After the appendixes are removed from the regulations and issued as Regulatory Guides, there will need to be conforming changes made to the first sentence of §140.9. Since a

^{1/} It did not seem worthwhile to request comments on the exact wording of an indemnity agreement and some people might not understand there were two separate, distinct actions--one amending the indemnity agreement and one authorizing the underlying transaction such as transshipment of fuel.

^{2/} A paper dealing with particular changes to Appendix A, "Form of Nuclear Energy Liability Policy for Facilities".

variation from the normal form of indemnity agreement will no longer be a deviation from something set out in the regulations, it may also be appropriate to delete entirely the requirement for issuing a Federal Register Notice because changes to the agreements may no longer be significant enough to justify an FRN.

Because resolution of the issue concerning an opportunity for hearing or comment has value independent of subsequent changes to the appendixes, the proposed notice should be issued. However, the FRN should note that the Commission is considering additional changes to §140.9 in the near future.

Consequently I would modify the proposed notice as follows.

-- Replace the last sentence of the summary with:

"The Commission is proposing this action because the scope of public comment appropriate for an action of this type is so restricted that the opportunity for public comment is unnecessary."

-- Replace the first paragraph on page 5 with:

"Because granting a hearing or requesting public comment on such an insubstantial point as the precise wording of an amendment to the standard indemnity agreement is not meaningful, the Commission is proposing to delete the second sentence of this as unnecessary.

"This does not affect an interested person's opportunity to comment on health and safety aspects of the underlying activity. To the extent an amendment to the indemnity agreement reflects a change in the underlying activity, there will be an opportunity to raise issues in the context of a proceeding to amend the facility or material licenses. For example, in the situations described above, the separate proceedings to amend the appropriate facility and material licenses provided an opportunity to discuss whether the spent fuel generated at one reactor site could be transported to and stored at a second reactor site without unduly endangering the public health and safety.

"In addition, it should be noted the Commission will be proposing to delete the appendixes to Part 140 from the regulations in the near future since the Commission believes it would be more appropriate to publish guidance with that level of detail as regulatory guides. At that time the Commission will consider additional changes as appropriate to the first sentence of §140.9."