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LBP-95-17

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Unit No. 1)	Docket No. 50-140-OLA-3 ASLBP No. 90-605-02-OLA October 4, 1995

MEMORANDUM AND ORDER
(Ruling on Motions for Summary Disposition)

In CLI-93-21, 38 NRC 87 (1993), the Commission reversed and remanded our ruling in LBP-92-4, 35 NRC 114 (1992), that Ohio Citizens for Responsible Energy (OCRE) and Susan L. Hiatt, lacked standing to intervene in this operating license amendment proceeding. Thereafter, we admitted the Intervenors' sole proffered contention. As admitted, that contention states:

> The portion of Amendment 45 to License No. NPF-58 which removed the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 USC 2239a) in that it deprives members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule.

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We then invited the Intervenors to file a motion for summary disposition on their contention and the Applicants to file a cross-motion for summary disposition. Those motions are now before us. The NRC Staff opposes the Intervenors' motion and supports the Applicant's cross-motion. For the reasons set forth below, we grant the Intervenors' motion for summary disposition and deny the Applicants' cross-motion for summary dispositon.

A. Our earlier ruling on standing in LBP-92-4 set forth the regulatory background underlying this license amendment proceeding and we need not repeat that history here. It suffices to note that section 182a of the Atomic Energy Act (AEA), 42 U.S.C. § 2232(a), requires that an application for a nuclear power plant operating license include technical specifications for the facility. It further provides that the technical specifications become part of the operating license. The Commission's regulations, 10 C.F.R. § 50.36, implement the statutory directive and generally describe the types of items that must be included in the technical specifications.

In 1987 the Commission initiated a program designed to encourage licensees to improve voluntarily the technical specifications of their facilities. As part of that program, the Staff issued Generic Letter 91-01 (Jan. 4, 1991) providing guidance on the preparation of a license amendment to remove from the technical specifications the

schedule for the withdrawal of reactor vessel material surveillance specimens. Specifically, the letter explains the function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to prevent reactor vessel embrittlement. It then states that it is duplicative to retain regulatory control over the schedule through the license amendment process because the Commission's regulations in 10 C.F.R. Part 50, Appendix H, § II.B.3 already require that a licensee obtain NRC approval for any changes to the withdrawal schedule. Finally, the generic letter provides that a licensee must commit to maintain the specimen withdrawal schedule in the updated safety analysis report.

The Intervenors' contention challenges the procedural consequences of removing the material surveillance specimen withdrawal schedule from the Applicants' technical specifications. They assert that such action deprives them of notice and an opportunity for hearing on future schedule changes in violation of the hearing provisions of section 189a of the Atomic Energy Act. In its summary disposition motion, the Intervenors state that their contention raises this single legal issue and that there are no factual matters in dispute.

Initially, the Intervenors assert that the withdrawal schedule traditionally has been part of the facility technical specifications and that, because of the hearing

requirements of section 189a, technical specifications could be changed only after notice and an opportunity for hearing on the proposed change. Next, the Intervenors state that the amendment removing the withdrawal schedule from the technical specifications permits the Applicants to change the schedule without any notice or public participation even though 10 C.F.R. Part 50, Appendix H, § II.B.3 of the Commission's regulations require the NRC to review and approve the changes to the withdrawal schedule. Thus, according to the Intervenors, the only effect of the amendment is to remove the public from the process in violation of section 189a.

In support of their argument, the Intervenors rely upon Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1451 (D.C. Cir. 1984), for the proposition that section 189a requires hearings on material licensing issues and Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980) for the proposition that an action granting a licensee the authority to do something it otherwise could not have done under existing authority is a license amendment within the scope of section 189a. The Intervenors then argue that the agency action at issue

> violates the Atomic Energy Act in that changes to the reactor vessel material specimen withdrawal schedule, which the NRC's regulations make material by requiring prior approval by the NRC, will be de facto license amendments, but will not be formally labeled as license amendments and noticed as such in the Federal Register with

opportunity for a hearing....

....

> Changes to the reactor vessel material specimen withdrawal schedule, with approval by the NRC, will give Licensees the authority to operate in ways in which they otherwise could not. Thus, they are de facto license amendments, and the public must have notice and opportunity to request a hearing. Anything less is in violation of the Atomic Energy Act.[1]

In opposing the Intervenors' summary disposition motion, the Applicants and the Staff agree that the Intervenors' contention raises a single legal issue and that there are no factual matters in dispute. Both parties also take the same position regarding the substance of the Intervenors' motion.

The Applicants and the Staff first argue that neither section 182a nor 10 C.F.R. § 50.36 require that the withdrawal schedule be included in the facility technical specifications. Specifically, they assert that the statute and regulations give the agency broad discretion in determining what information should be included in technical specifications. Additionally, they assert that applicable agency precedents provide that information such as the withdrawal schedule, which is unrelated to conditions or limitations required to obviate an abnormal situation or an event giving rise to an immediate threat to public health

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[1]Motion for Summary Disposition (Feb. 7, 1994) at 4-5 [hereinafter Intervenor's Motion].

and safety, should not be placed in the technical specifications. And, because the withdrawal schedule is not required by statute or regulation to be included in the facility technical specifications, the Applicants and the Staff maintain that there is no basis for requiring it to remain there even if it traditionally has been included in the technical specifications in the past.

Next, the Applicants and the Staff argue that the removal of the withdrawal schedule from the technical specifications, with the consequence that future changes to the schedule are without notice and an opportunity for a hearing, does not violate the hearing provisions of the Atomic Energy Act. For their part, the Applicants assert that section 189a requires a hearing only as to issues that are material to the agency's license issuance or amendment decision. They argue that here the withdrawal schedule is not material to the agency's license issuance decision so it can be removed without running afoul of section 189a. In support of their argument, the Applicants do not independently seek to establish the immateriality of the withdrawal schedule to the license issuance decision. Rather, the Applicants rely solely upon the Staff's assertion contained in the Staff's answer to the Intervenors' motion that the withdrawal schedule is not material to the Staff's license issuance decision. Finally, the Applicants argue that, because the withdrawal schedule

is not material to the license issuance decision, the schedule properly can be removed from the technical specifications and future charges in the schedule will not be de facto license amendments that are outside the Applicants' licensing authority.

Similarly, the Staff does not directly challenge the legal proposition asserted by the Intervenors that agency action granting a licensee permission to operate in ways in which it otherwise could not, is a licensing action within the meaning of AEA section 189a and that a change in the withdrawal schedule is such an action. Rather, the Staff argues that the removal of the withdrawal schedule from the facility technical specifications does not violate the hearing provisions of section 189a because all changes in the withdrawal schedule do not require prior agency approval and therefore such changes are not material to the agency's license issuance decision. Contrary to the Intervenors' argument that the withdrawal schedule is material to the agency's license issuance decision because the Commission's regulations require NRC approval of changes to the withdrawal schedule, the Staff asserts that the Intervenors have misinterpreted 10 C.F.R. Part 50, Appendix H, § II.B.3, and that the regulation is ambiguous. According to the Staff, the regulatory history of the Appendix H, which it presents through a Staff affidavit and a Staff memorandum to the Commission, SECY-83-80 (Feb. 25, 1983), shows that the

Commission intended to incorporate the applicable American Society for Testing and Materials (ASTM) Code into the regulation. Further, the Staff asserts the regulatory history establishes that changes to a withdrawal schedule that conform to the ASTM Code need not be submitted to, and approved by, the agency. Rather, the argument continues, only changes to the schedule that do not conform to the applicable ASME Code, and hence the regulation, "would likely require prior Commission approval in the form of a license amendment."[2] Thus, the Staff argues that the withdrawal schedule can be removed from the technical specification without violence to section 189a.

B. We need not belabor the arguments of the Applicants and the Staff that the removal of the withdrawal schedule from the facility technical specifications does not violate section 182a of the Atomic Energy Act or 10 C.F.R. § 50.36. The Intervenors concede this point and readily admit that removal of the withdrawal schedule from the technical specifications does not violate any legal strictures.

The Intervenors do not agree, however, with the Staff's additional assertion that this admission is fatal to their motion for summary disposition. According to the Staff, the

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[2]NRC Staff Response to Intervenors' Motion for Summary Disposition (Mar. 7, 1994) at 27 [hereinafter NRC Staff Response].

fundamental issue here is whether the withdrawal schedule is required by law or regulation to be included in the facility technical specifications. If not, the Staff claims there can be no basis for requiring the withdrawal schedule to remain in the technical specifications and the Intervenors' summary judgment motion should be denied. The Intervenors, on the other hand, argue that the focus of their contention is not on whether the withdrawal schedule remains in the technical specifications and that the "Intervenors are not insisting that the schedule be included in the Technical Specifications."[3] Rather, the Intervenors assert that their contention deals with the loss of hearing rights on future changes to the withdrawal schedule in violation of AEA section 189a as a consequence of the challenged license amendment.

Contrary to the Staff's assertion, the Intervenors' concession, i.e. that the removal of the withdrawal schedule does not violate the Commission's regulations, is not fatal to their motion. Similarly, the issue whether the withdrawal schedule is required by law or regulation to be included in technical specifications is not the fundamental question before us. Rather, the only issue before us is the one presented by the Intervenors' contention. That contention focuses exclusively on the asserted violation of

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[3]Intervenors' Motion at 6.

AEA section 189a hearing rights caused by future changes in the withdrawal schedule without notice and an opportunity for hearing due to the removal of the schedule from the facility technical specifications. As the Commission stated in reversing our earlier ruling that the Intervenors' lacked standing, "[w]ith the license amendment in effect, future changes to the withdrawal schedule no longer require notice and an opportunity for a hearing under section 189a."[4] Thus, the fundamental issue before us is whether the lack of notice and opportunity for hearing on future changes to the withdrawal schedule violates the Intervenors' section 189a hearing rights. And, the parties' approach to this AEA section 189a hearing rights issue[5] has further narrowed the question to whether a change in the withdrawal schedule is a material license issuance decision.

The Intervenors' argument in support of this question is premised on the legal proposition announced in Union of Concerned Scientists v. NRC, 735 F.2d at 1451, that section 189a requires a hearing on issues material to the agency's licensing issuance decision. From this premise, the Intervenors argue that, because 10 C.F.R. Part 50, Appendix H, § II.B.3 requires revisions in the withdrawal schedule to be approved by the NRC prior to implementation, changes in

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[4]CLI-93-21, 38 NRC at 93.

[5]See supra pp. 4-7.

the schedule are material licensing decision issues and, as such, can only be made in conformance with section 189a after notice and an opportunity for hearing. The linchpin of the Intervenors' argument, therefore, is their assertion that the Commission's regulations require prior agency approval of any changes to the withdrawal schedule.

In opposing the Intervenors' position, the arguments of both the Applicants and the Staff accept the Intervenors' premise that material licensing issues trigger section 189a hearing rights. They both argue, however, that future changes to the withdrawal schedule are not material licensing issues. The Staff reaches this conclusion by arguing that the Intervenors have misinterpreted the Commission's regulations and that Appendix H does not require that all revisions to the withdrawal schedule be submitted to the agency for approval before implementation. The Applicant reaches this same conclusion by relying exclusively on the Staff's assertion that revisions in the schedule are not material. Thus, the crux of the Staff's opposition, and, in turn, the Applicant's opposition to the Intervenor's argument, is the Staff's interpretation of the Commission's regulations. Accordingly, resolution of the Intervenors' summary disposition motion rests upon the proper interpretation of Appendix H, § II.B.3. If the Intervenors' interpretation is correct, then their summary disposition motion must be granted and the Applicants'

cross-motion must be denied. Contrarily, if the Staff's interpretation is correct, then the Intervenors' motion must be denied and the Applicants' cross-motion must be granted.

C. The starting point for analyzing any regulation is the language and structure of the regulation itself,[6] here Appendix H of Part 50 titled "Reactor Vessel Material Surveillance Program Requirements." Because Appendix H is legislative in character, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning.[7] Therefore, in construing any part or section of Appendix H, § II.B.3, that portion of the regulation may not be considered in isolation but must be considered in reference to the entire regulation so as to produce a harmonious whole.[8] In doing so, we first turn to the text of the Commission's regulation.

Section I, of Appendix H, labeled "Introduction," begins by stating that the purpose of the material surveillance program is to monitor changes in the fracture toughness properties of ferritic materials in the beltline region of reactor vessels resulting from neutron irradiation

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[6]Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, review declined, CLI-88-11, 28 NRC 603 (1988). See Pennsylvania Welfare Dept. v. Davenport, 495 U.S. 552, 557-58 (1990).

[7]1A Sutherland, Statutory Construction § 31.06 (5th ed. 1992).

[8]2A id. § 46.05.

and the thermal environment. It next indicates that fracture toughness test data from the material specimens in surveillance capsules periodically withdrawn from the reactor are to be used as described in Appendix G of Part 50. That Appendix specifies, inter alia, the fracture toughness requirements for reactor vessels. The introduction for Appendix H concludes by stating that editions E 185-73, -79, and -82 of the ASTM Code "Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels" referenced in Appendix H have been approved for incorporation by reference by the Director of the Federal Register and that notice of any changes to the material incorporated by reference will be published in the Federal Register.

Section II of the regulations, titled "Surveillance Program Criteria," first provides in paragraph A, that no surveillance program is required for reactor vessels for which it can be conservatively demonstrated that peak neutron fluence at the end of the design life of the vessel will not exceed 10^{17}n/cm^2. For reactor vessels that cannot meet this requirement, paragraph B provides that they must have their beltline materials monitored in accordance with Appendix H.

Subparagraph B.1 then states:

> That part of the surveillance program con-

> ducted prior to the first capsule withdrawal must meet the requirements of the edition of ASTM E 185 that is current on the issue date of the ASTM Code to which the reactor vessel was purchased. Later editions of ASTM E 185 may be used, but including only those editions through 1982. For each capsule withdrawal after July 26, 1983, the test procedures and reporting requirements must meet the requirements of ASTM E 185-82 to the extent practical for the configuration of the specimens in the capsule. For each capsule withdrawal prior to July 26, 1983 either the 1973, the 1979, or the 1982 edition of ASTM E 185 may be used.

Subparagraph B.2 then details the various requirements for the placement and attachment of surveillance capsules in the reactor vessel followed by Subparagraph B.3, which states:

> [a] proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The proposed schedule must be approved prior to implementation (emphasis supplied).

Finally, paragraph C of section II addresses the requirements for integrated surveillance programs for multiple reactors. The last part of Appendix H, section III, titled "Report of Test Results," sets forth the various reporting requirements for the surveillance program.

In support of their argument that changes to the withdrawal schedule are material licensing issues, the Intervenors argue simply that "the plain language of Appendix H requires licensee submittal of the schedule and prior NRC approval of the schedule before implementation."[9]

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[9]Intervenors' Answer to NRC Staff Response to Intervenors' Motion for Summary Disposition and Licensees' Cross Motion for Summary Disposition (Apr. 5, 1994) at 4.

The Staff, on the other hand, argues that the language of section II.B.3 is ambiguous and that the meaning of the provision must be found in its regulatory history. Specifically, the Staff asserts that the regulation "does not explicitly address changes to an approved schedule, nor does it indicate that prior approval is required for any change to an approved schedule, no matter how insignificant."[10] As previously mentioned, the Staff claims that the regulatory history of Appendix H indicates that only changes in the withdrawal schedule that do not conform to the applicable ASTM Code need to be approved by the agency prior to implementation.

Contrary to the Staff's argument, however, its claim that Appendix H is ambiguous cannot be squared with the plain meaning of the regulation. On its face, section II.B.3 clearly and unambiguously states that "[a] proposed withdrawal schedule must be submitted" to the agency and "[t]he proposed schedule must be approved prior to implementation." This language cannot reasonably be understood to mean anything other than what it plainly says, i.e., the NRC must approve proposed schedules before they are implemented.[11] As the Supreme Court has stated

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[10]NRC Staff Response at 19-20.

[11]Cf. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1310 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other issues, 760 F.2d 1320 (1985); aff'd en banc, 789 F.2d 26, cert. denied, 479 U.S. 923 (1986).

> in interpreting a statute a court should always turn first to one, cardinal cannon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[12]

Thus, where, as here, the meaning of the regulation is clear and obvious, the regulatory language is conclusive and we may not disregard the letter of the regulation. Rather, we must enforce the regulation as written. Similarly, we may not read unwarranted meanings into an unambiguous regulation even to support a supposedly desirable policy that is not effectuated by the regulation as written.[13] Further, to discern regulatory meaning, we are not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history. Aids to interpretation only can be used to resolve ambiguity in an equivocal regulation, never to create it in an unambiguous one.

In this instance, however, the Staff would disregard the plain meaning of the regulation to invent an ambiguity where none exists. It does this in a transparent attempt to avoid the consequences of the plain meaning rule, thereby permitting it to delve into regulatory history in an attempt

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[12]Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981); (citations omitted)). See Reves v. Ernst & Young, 122 L. Ed. 2d 525, 535 (1993); United States v. Clark, 454 U.S. 555, 560 (1982); Howe v. Smith, 452 U.S. 473, 483 (1981).

[13]See 2A Sutherland, supra, § 46.01.

to support an argument that section II.B.3 of Appendix H only requires agency approval of proposed withdrawal schedules that differ from the schedules contained in the incorporated ASTM Code. According to the Staff, the regulation is ambiguous because it does not explicitly address changes, including insignificant changes, to an already approved schedule. To make the regulation conform to its ambiguity argument, however, the Staff necessarily reads a word into section II.B.3 that is not there. It seeks, in effect, to insert the word "initial" before the term "proposed withdrawal schedule" in the first sentence of the regulation to convey the meaning that there only can be one withdrawal schedule for a reactor vessel and that any change or revision to that one schedule, or even a new subsequent schedule, is an amendment to the single, original schedule. Only by this unwarranted insertion of a word into the regulation can it rationally be argued that the regulation is ambiguous.

But neither any imagined word nor any ambiguity is in the regulation. When the words of section II.B.3 are given their ordinary meaning, the regulation speaks to the very circumstances the Staff recites. In simple and straightforward language, the regulation states that a proposed withdrawal schedule must be submitted to the Staff and approved before implementation. By definition, a schedule that is "proposed" is one that is offered "for

consideration, discussion, acceptance, or adoption."[14] Thus, under its literal terms, a new schedule or any change to an already implemented schedule, significant or otherwise, must be considered a "proposed" schedule and, as such, must be submitted to the agency and approved prior to implementation. This is what the plain words of the regulation say and this is what it means. Accordingly, section II.B.3 is unambiguous and there is no need to consult the regulatory history of the provision to discern its meaning as the Staff argues.

Nonetheless, assuming arguendo that the language of this regulation is ambiguous so that we may turn to the regulatory history of the provision to aid in its interpretation, we still do not find the Staff's argument persuasive. As originally promulgated, Appendix H specified the number of capsules and the specific withdrawal schedules to be followed.[15] It also provided that "[p]roposed withdrawal schedules that differs from those specified in paragraphs a. through f. shall be submitted, with a technical justification therefor, to the Commission for approval. The proposed schedule shall not be implemented without prior Commission approval."[16] In 1983, the

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[14]Webster's Third New International Dictionary 1819 (1971)

[15]See 10 C.F.R. Part 50, Appendix H,§ II.C.3.a.-f. (1974).

[16]Id. at 3.g.

Commission amended the regulation essentially to its current form.[17] Specifically, it deleted the withdrawal schedules from the original version and in their place incorporated by reference in section II.B. the various editions of the ASTM E 185 Code, including Table 1 of each of those editions that contains a withdrawal schedule.[18] At the same time, the Commission changed the provision dealing with agency approval of nonconforming schedules to state that "[a] proposed withdrawal schedule must be submitted with a technical justification therefore to the Director, Office of Nuclear Reactor Regulation, for approval. The proposed schedule must be approved prior to implementation."[19] Subsequently, in 1986 the latter provision was again amended to its current form when the Commission, by referencing 10 C.F.R. § 50.4, sought to standardize document submission requirements throughout the agency's regulations.

The Staff is correct that the 1983 amendment of Appendix H incorporated by reference the various editions of the E 185 ASTM Code (including Table 1 of those editions) into the regulation. The introduction to Appendix H and the

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[17] See 10 C.F.R. Part 50, Appendix H (1984).

[18] See Proposed Rule, 45 Fed. Reg. 75,536, 75,537 (1980) (noting deletion of withdrawal schedules from regulation "because the requirements for withdrawal schedules contained in the 1979 edition of ASTM E 185 provide satisfactory criteria for scheduling surveillance information gathering").

[19] 10 C.F.R. Part 50, Appendix H, § II.B.3 (1984).

agency response to certain public comments on the proposed rule that are part of the rulemaking record[20] make that clear. There is absolutely no regulatory history, however, to support the remainder of the Staff's argument that Appendix H, § II.B.3 means that only those changes in a proposed withdrawal schedule that do not conform to the applicable ASTM Code E 185 Table 1 need to be approved by the agency before implementation.[21] The Commission's 1983 deletion of specific withdrawal schedules from the original regulation and its incorporation by reference of various ASTM Code withdrawal schedules -- a substitution of qualitatively similar but quantitatively different schedules -- does not advance the Staff's argument. The Staff's argument overlooks the fact that along with this change the Commission deleted the provision that specifically limited

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[20] See NRC Staff Response at 23 & n.32.

[21] In support of its argument dealing with the regulatory history of Appendix H, the Staff partially relies upon an affidavit of several staff members. See, e.g., NRC Staff Response at 20 ("[s]ome of the regulatory history for Appendix H is provided in the attached affidavit"). To the extent that the affidavit contains more than a recitation of primary sources of regulatory history, i.e. final rules, proposed rules, statements of considerations, and matters in the rulemaking record, it is not a legitimate source of regulatory history. Only contemporaneous regulatory history can reflect the intent of the Commission that promulgated the regulation. See, e.g., Resolution Trust Corp. v. Cityfed Financial Corp., 57 F.3d 1231, 1242 (3rd Cir. 1995). Subsequent revisionist history is not valid regulatory history. See Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously....")(Scalia, J., concurring in part).

any requirement for prior agency approval of schedules only to those that differed from the schedules set forth in the regulation and substituted a new comprehensive requirement that the agency approve all proposed schedules prior to implementation.[22] The amendment of this provision imparts a meaning to Appendix H, § II.B.3 exactly the opposite of the meaning the Staff asserts. Indeed, only if the 1983 amendment of the nonconforming schedule provision had retained the gist of its original form would the Staff argument have any plausibility. Thus, even if we accept for the sake of argument that section II.B.3 is ambiguous so that we may turn to the regulatory history to aid in its construction, the Staff's interpretation finds no support there. In sum, the text of section II.B.3 of Appendix H, even when read in conjunction with the selected portions of regulatory history relied upon by the Staff, simply cannot be read reasonably to mean that only those proposed withdrawal schedules that do not conform to the applicable ASTM Code need be approved by the agency prior to implementation. Moreover, as should be obvious, the Commission's policy on improving facility technical

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[22]See 48 Fed. Reg. 24008, 24008 (1983) (where in statement of considerations accompanying final rule the Commission notes that it changed the reporting requirement in part III of the regulation from a proposed 90 days of capsule withdrawal to one year from that time "because capsule withdrawal schedules [already] must be approved by the Director, Office of Nuclear Reactor Regulation, as provided in paragraph II.B.3. of Appendix H").

specifications cannot alter the plain language or meaning of Appendix H.[23]

D. For the foregoing reasons, the Intervenors' motion for summary disposition is granted. Correspondingly, the Applicants' cross-motion for summary disposition is denied. Our grant of the Intervenors' motion, however, does not invalidate the license amendment at issue or require that

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[23]Additionally, we note that the Staff's interpretation before us of Appendix H, § II.B.3 conflicts with its interpretation of that same provision in Generic Letter 91-01. The letter to all NRC reactor license holders accompanying the generic letter states that "Section II.B.3 of Appendix H to 10 CFR Part 50 requires the submittal to, and approval by, the NRC of a proposed withdrawal schedule for material specimens before implementation. Hence, the placement of this schedule in the [technical specifications] duplicates the controls on changes to this schedule that have been established by Appendix H." Letter to all Holders of Operating Licenses or Construction Permits for Nuclear Power Reactors from James G. Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation (Jan. 4, 1991). In like vein, the generic letter itself states that "[t]he removal from the [technical specifications] of the schedule for the withdrawal of reactor vessel material surveillance specimens will not result in any loss of regulatory control because changes to this schedule are controlled by the requirements of Appendix H to 10 CFR Part 50." Generic Letter 91-01 (Jan. 4, 1991) at 2. See also CLI-93-21, 38 NRC at 89 (where the Commission characterizes the generic letter as indicating that "the Commission's regulations under 10 CFR Part 50, Appendix H, § II.B.3, already mandate prior NRC approval of any changes to the withdrawal schedule"). In its response to the Intervenors' summary disposition motion, the Staff euphemistically describes in a footnote its earlier conflicting interpretation of Appendix H, § II.B.3 by stating that "[i]n hindsight, it appears that [Generic Letter] 91-01 does not express the Staff's views on this matter with precision." NRC Staff Response at 27 n.33. The Staff also indicates that it is developing clarification for the statements in the generic letter and considering whether a rulemaking is necessary. No such clarification or rulemaking has occurred to date. Needless to say, it appears that the Staff's interpretation of Appendix H, § II.B.3 in the generic letter is correct.

the withdrawal schedule be returned to the technical specifications. The Intervenors are not insisting that the withdrawal schedule be included in the facility technical specifications. Rather, the Intervenors' contention only challenges the consequences of the amendment that would deprive them of notice and an opportunity for hearing on any future changes to the withdrawal schedule. Because Appendix H, § II.B.3 currently requires that a proposed withdrawal schedule be approved by the agency prior to implementation, any such requested change is a request for a material licensing action that triggers section 189a hearing rights.[24] Thus, as long as this regulatory provision remains in its current form, the grant of the Intervenors' motion requires that the agency treat any future proposed withdrawal schedule as a license amendment and provide notice and an opportunity for a hearing in accordance with section 189a of the Atomic Energy Act.

With our resolution of these motions for summary disposition, there are no further matters for decision in the proceeding and the proceeding is terminated. In accordance with 10 C.F.R. § 2.786(b)(1), Commission review of this Memorandum and Order may be sought by filing a petition for review within 15 days after service of this

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[24]See Union of Concerned Scientists v. NRC, 735 F.2d at 1451. See generally Citizens Awareness Network v. NRC, 59 F.3d 284, 294 (1st Cir. 1995).

Memorandum and Order. Requirements regarding the length and content of a petition for review and the timing, length, and content of an answer to such a petition are set forth in 10 C.F.R. § 2.786(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 4, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.
(Perry Nuclear Power Plant, Unit 1)

Docket No.(s) 50-440-OLA-3

CERTIFICATE OF SERVICF

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-95-17) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
4 day of October 1995

Office of the Secretary of the Commission