



NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 27, 1983

MEMORANDUM FOR: Samuel J. Chilk
Secretary to the Commission

FROM: *HHEP* Herzel H. E. Plaine
General Counsel

SUBJECT: EFFECT OF 2-2 VOTE AND AUTHORITY OF STAFF
TO MAKE FINDING OF NO SIGNIFICANT HAZARDS
CONSIDERATION ON SPENT FUEL RERACKING
AMENDMENTS

You have asked us to advise you on the effect of a 2-2 Commission vote on SECY-83-249 where the staff is asking for Commission views on a draft proposed finding of no significant hazards consideration on an application to rerack the spent fuel pool for Ocone.

Staff has traditionally made findings on no significant hazards considerations under delegations to it by the Commission,¹ and the Congress, in enacting the Sholly amendment, was aware of this past Commission practice of delegating the function to staff. Conference Report No. 97-884, 98th Cong., 2d Sess., at 37 (1982).

Commission action would be required to revoke this delegation. Such revocation could be accomplished by revising the delegations of authority in the manual chapter, by decision in the applicable regulation itself, or by some other means (such as a Commission order). We have discovered no evidence of any Commission decision to revoke the staff delegation of authority on this matter. Though both the pertinent regulations (10 CFR 50.91 and 50.92), and the preamble which explains the rules (48 Fed. Reg. 14864, April 6, 1983) speak in terms of "the Commission," this does not constitute a revocation of the delegation, as in each instance the term can be read in the sense of the Commission as

¹Manual chapter 0123-03 provides: "The Director is authorized and directed to ... take such action as is necessary to carry out the functions assigned in this chapter [and] take action to ... issue, renew and amend licenses ..." This has always been understood to include the no significant hazards consideration findings that need to be made to avoid any prior hearings on facility license amendments.

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an agency, including staff with delegated authority. This is because the term "Commission" as used in 10 CFR 50.91 and 50.92 is defined in 10 CFR 50.2 as "... the Nuclear Regulatory Commission or its duly authorized representatives." There is no indication in the rule preamble that a different meaning of "Commission" was intended. Simple use of the term "Commission" in congressional correspondence describing the rulemaking presents the same difficulty in interpretation.

Moreover, construction of "Commission" in 50.91 and 50.92 as meaning only the collegial Commission would lead to the result that all proposed and final significant hazards considerations determinations, and not just those on revoking amendments, would need to be made by the collegial Commission. This produces a result which is at odds with both past and current practice.

As indicated in our memorandum entitled "Commission Voting Procedures" dated June 29, 1983, a 2-2 vote on a matter within staff's delegated authority leaves staff free to act within its authority. It is our view, therefore, that a 2-2 vote on SECY-83-249 results in the situation whereby, absent further guidance by a Commission majority, the staff is free to act within its authority. It may choose to follow through with its proposal, or it may choose to wait for more definitive Commission guidance. The fact that the paper with the staff's proposed course of action is designated as a "notation vote" or "negative consent" item should make no difference. If staff has delegated authority, the votes of Commissioners serve as guidance to staff on how that authority should be exercised, no matter how they are expressed.²

Nor do we believe that it makes any difference that staff has sent SECY-83-249 to the Commission. Sending a paper to the Commission should not constitute an irrevocable relinquishment of authority by staff to the collegial Commission.

²As a practical matter it is unlikely staff would act on a matter within its authority contrary to the views of a Commission majority. However, the Commission could, by majority vote, revoke the delegation to staff and, in such a case, staff would not be free to act.