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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	Docket No. 50-440-OLA-3
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	License Amendment (Material Withdrawal Schedule)
(Perry Nuclear Power Plant, Unit No. 1)	

LICENSEES' BRIEF ON REVIEW OF LICENSING BOARD DECISION LBP-95-17

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April 26, 1996

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MISCELLANEOUS

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INTRODUCTION

Pursuant to CLI-96-4 (1996), The Cleveland Electric Illuminating Company, et al. ("Licensees") submit this brief requesting the Nuclear Regulatory Commission ("Commission" or "NRC") to reverse the Memorandum and Order (Ruling on Motions for Summary Disposition) of the Atomic Safety and Licensing Board ("Board"), LBP-95-17, 42 NRC 137 (1995). In granting the summary disposition motion of Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt ("Intervenors"), and denying Licensees' cross-motion for summary disposition, the Board erroneously concluded that the NRC must treat any future change to the reactor vessel material surveillance specimen withdrawal schedule for the Perry Nuclear Power Plant ("Perry") "as a license amendment and provide notice and an opportunity for a hearing in accordance with section 189a of the Atomic Energy Act." 42 NRC at 149. This legal

determination is incorrect and could have far reaching effects by transforming numerous routine requests by licensees for NRC approval under the regulations into the equivalent of license amendments requiring notice and opportunity for hearing under the Atomic Energy Act.

STATEMENT OF THE CASE

The major issue raised by the Board's decision is whether licensee activities for which the Commission requires prior NRC approval as part of its continuing regulatory oversight of reactor licensees constitute "material licensing actions" requiring license amendments for which notice and opportunity for hearing must be provided under section 189a of the Atomic Energy Act (the "Act"). This issue is presented in the context of a license amendment request to remove from the Perry Technical Specifications the withdrawal schedule for the reactor vessel material surveillance specimens. Under the Board's decision, license amendments would be required for changes to the withdrawal schedule even after the schedule is removed from the Technical Specifications because, according to the Board, the regulations require prior approval of such schedule changes.

On March 15, 1991, Licensees requested the NRC to amend the Perry operating license to transfer from the Technical Specifications to the Updated Safety Analysis Report the schedule for withdrawing reactor vessel material surveillance specimens.[1/] The requested amendment was in furtherance of the NRC's "Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Reactors," 52 Fed. Reg. 3788 (1987), and in accordance with Generic Letter 91-01 which

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[1/] See Letter PY-CEI/NRR-1313L from Michael D. Lyster, Centerior Energy, to U.S. Nuclear Regulatory Commission, March 15, 1991. This request was filed as a supplement to an earlier filed license amendment request. Id.

encouraged licensees to relocate the reactor vessel material surveillance specimen withdrawal schedule from plant Technical Specifications to safety analysis reports.[2/]

On November 12, 1993, Intervenors filed a supplemental petition contending that the removal of the specimen withdrawal schedule from the Perry Technical Specifications "violates section 189a" of the Act by depriving "members of the public of the right to notice and opportunity for a hearing on any changes to the withdrawal schedule."[3/] On February 7, 1994, Intervenors moved for summary disposition on their contention.[4/] Intervenors argued that notwithstanding removal of the reactor vessel specimen withdrawal schedule from the Technical Specifications, changes to the withdrawal schedule still require prior NRC approval under 10 C.F.R. Part 50, Appendix H, § II.B.3, which provides that:

> A proposed withdrawal schedule must be submitted with a technical justification as specified in § 50.4. The

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[2/] The Commission has subsequently issued a "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors." 58 Fed. Reg. 39,132 (1993). The primary objective of the Commission's policy is to improve plant Technical Specifications by removing unnecessary materials from them and to limit the specifications to "the technical requirements for [plant] features of controlling importance to safety." 58 Fed. Reg. at 39,136. The Commission observed that past practices had resulted in the "extensive" inclusion of unnecessary materials in the Technical Specifications which diverted licensee and NRC Staff attention from more important matters thereby resulting in an adverse impact on safety. 58 Fed. Reg. at 39,133. As argued in both the Staff's and Licensees' papers to the Board below (see notes 5 and 6 infra), the removal of the reactor vessel specimen withdrawal schedule from the Perry Technical Specifications is in accordance with the Commission's policy statement, the Act, and applicable NRC regulations and precedent. The Intervenors conceded, and the Board acknowledged in its decision, that the removal of the withdrawal schedule from the Technical Specifications did not violate any legal requirements. 42 NRC at 141-42. Accordingly, we will not elaborate on these arguments made to the Board by the Staff and Licensees.

[3/] See Petitioners' Supplemental Petition for Leave to Intervene, November 12, 1993. The Supplemental Petition was filed following the Commission's reversal of a previous Board decision which had ruled that Intervenors lacked standing to intervene with respect to the requested amendment. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87 (1993).

[4/] See Petitioners' Motion for Summary Disposition, February 7, 1994.

proposed schedule must be approved prior to implementation.

According to Intervenors, such prior NRC approval constitutes a material licensing action, thus requiring that changes to the withdrawal schedule be treated as license amendments with notice and opportunity for hearing under section 189a even after removal of the withdrawal schedule from the Technical Specifications.

The Staff's March 7, 1994, opposition to the Intervenors' request for summary disposition took issue with the Intervenors' interpretation of 10 C.F.R. Part 50, Appendix H, § II.B.3. The Staff noted that the regulation's language is ambiguous as to whether NRC approval of changes to previously approved withdrawal schedules is required. Based on its review of the regulatory history, the Staff concluded that the regulation requires prior NRC approval only for schedule changes that deviate from the ASTM E 185 standards explicitly incorporated into Appendix H, § II.B.[5/] Among other regulatory history, the Staff relied on amendments to Appendix H which had deleted from the regulation specific withdrawal schedules previously required of licensees "because the requirements for withdrawal schedules contained in . . . ASTM E 185 provided satisfactory criteria for scheduling surveillance information gathering." 45 Fed. Reg. 75,536, 75,537 (1980).

On March 21, 1994, Licensees filed a cross motion for summary disposition.[6/] Licensees argued that, even if section 189a guarantees a right to a hearing for NRC approvals not requiring a license amendment which are material to NRC licensing

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[5/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, March 7, 1994. The Staff's Response included an affidavit tracing the history of Appendix H in support of its interpretation.

[6/] See Licensees' Cross Motion for Summary Disposition and Answer to Ohio Citizens for Responsible Energy, Inc and Susan L. Hiatt Motion for Summary Disposition, March 21, 1994.

decisions, the withdrawal schedule was not material to any licensing decision of the NRC. Licensees also argued that future changes to the withdrawal schedule would not constitute a de facto license amendment entitling Intervenors to a hearing because, upon approval of the amendment removing the schedule from the Technical Specifications, no license amendment would be required for changes to the schedule. At that time, the license would permit changes to the withdrawal schedule and Licensees would not be operating outside the scope of their license authority, even assuming prior NRC approval under Appendix H, § II.B.3 were required.

On October 4, 1995, the Board issued a decision granting Intervenors' summary disposition motion and denying Licensees' cross-motion. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137 (1995). The Board essentially adopted Intervenors' arguments and concluded, at least implicitly, that any future changes to the withdrawal schedule were to be treated as license amendments, regardless of materiality. The Board also rejected the NRC Staff's interpretation of Part 50, Appendix H, § II.B.3, finding the regulation to be unambiguous and holding that it required the NRC to "approve all proposed schedules prior to implementation." 42 NRC at 147-48 (emphasis in original). Based on this determination -- arrived at notwithstanding the fact that the regulation makes no mention of changes to withdrawal schedules -- the Board reasoned that, "[b]ecause 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." 42 NRC at 148-49 (citations omitted). The Board thus concluded that the NRC must "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." 42 NRC at 149.[7/]

On November 7, 1995, Licensees petitioned the Commission pursuant to 10 C.F.R. § 2.786 for review of the Board's decision. By Order dated March 7, 1996, the Commission granted review. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Unit 1), CLI-96-4, 43 NRC ___ (1996). The Commission also directed the parties, in addition to arguments they chose to present, "to address the significance for this case of 5 U.S.C. §§ 551(8) and (9) (defining 'license' and 'licensing')." Id.

ARGUMENT

The Board's decision is erroneous. First, it transforms licensee activities subject to prior approval by the NRC Staff into the equivalent of license amendments for which notice and opportunity for hearing must be afforded under section 189a of the Act. No support can be found in the case law or the NRC regulations for this far reaching result. Congress was careful to provide hearing rights under the Act for only certain categories of Commission action, which do not include regulatory approvals that are part of the NRC's day-to-day regulatory oversight of reactor licensees. Judicial precedent reflects this intent. Moreover, the structure of NRC's regulations confirms that, without more, regulatory approvals such as Appendix H, § II.B.3 do not require section 189a hearings. The NRC has identified in 10 C.F.R. § 50.59 proposed licensee actions that require license amendments and therefore trigger notice and opportunity for hearing under section 189a. On its face, 10 C.F.R. § 50.59 only requires

[7/] The Board did authorize, however, the license amendment to remove the withdrawal schedule from the Perry Technical Specifications because, according to the Board, the Intervenors had challenged only the consequences of the amendment and not the amendment itself. 42 NRC at 148. See also, note 2 supra.

license amendments for NRC regulatory approvals, such as Appendix H, § II.B.3, to the extent they fall within one of the categories for which 10 C.F.R. § 50.59 requires an amendment. The Administrative Procedure Act ("APA") does not expand on the hearing rights provided by the Act and its regulations.

Second, the Board's decision eliminates materiality as a prerequisite for section 189a hearings, contrary to well-established precedent that section 189a requires a hearing only for issues material to those NRC licensing actions encompassed by that section. The Board's decision would require notice and opportunity for hearing even with respect to schedule changes that conform to the ASTM E 185 standards incorporated into Appendix H, § II.B, standards which the NRC has already determined satisfy its safety requirements. Therefore, such changes are immaterial to any licensing decision and no license amendment and opportunity for hearing should be required. Again, the NRC's regulatory regime confirms the lack of any hearing requirement for such changes. Schedule changes that comply with the ASTM E 185 standards or otherwise are immaterial to the public health and safety do not require approval by amendment under 10 C.F.R. § 50.59.

Third, the Board's decision is erroneous because it rejects the Staff's reasonable interpretation of Appendix H, § II.B.3. Based on the ambiguous language of Appendix H, § II.B.3 and the regulatory history showing that schedule changes complying with ASTM E 185 standards conform to NRC safety requirements, the Staff concluded that Appendix H, § II.B.3 requires NRC approval only for changes that deviate from the ASTM E 185 standards. The Board ignored both the inherent ambiguity of the regulatory language and its regulatory history.

Each of these three errors in the Board's decision is further addressed below.

I. The Board's Order Is Erroneous Because It Turns Licensee Actions Requiring Prior NRC Approval Into License Amendments.

A. Section 189a Does Not Mandate Hearings On Regulatory Approvals Which Are Part Of the NRC's Continuing Oversight Of Licensees.

The Board's decision, that the NRC's approval of withdrawal schedule changes under Appendix H, § II.B.3 requires notice and opportunity for hearing, rests on a fundamentally flawed assumption. It presumes that all licensee actions, no matter how inconsequential, that are subject to prior NRC approval trigger the right to a hearing under section 189a. This assumption is wrong. The language of section 189a was carefully crafted "to guarantee hearing rights in certain classes of agency action, but not in others." San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1313 (D.C. Cir. 1984), vacated in part and rehearing granted in part, 760 F.2d 1320 (D.C. Cir. 1985) (en banc) (emphasis in original). Accord, Florida Power & Light Co. v. Lorion, 470 U.S. 729, 738-39 (1985). Regulatory approvals that the NRC requires as part of its continuing oversight of operating reactors are not among the classes of agency action for which section 189a requires notice and opportunity for hearing.

As discussed in both San Luis Obispo and Florida Power & Light, the Act as originally introduced did not provide for hearings with respect to Commission licensing determinations. The lack of a hearing requirement prompted concerns and led to a proposed amendment to section 181 of the Act which would have provided that "[u]pon application, the Commission shall grant a hearing to any party materially interested in any agency action."[8/] This provision was soon recognized, however, as too

[8/] See Atomic Energy Commission, 1 Legislative History of the Atomic Energy Act of 1954, at 541, 625 (1955) [hereinafter cited as "Legislative History"] (emphasis added), discussed at San Luis Obispo, supra, 751 F.2d at 1313.

broad of a response to the perceived need and was dropped in favor of the current hearing requirements found in section 189a.[9/] As stated by Senator Hickenlooper in introducing new section 189a:

> [T]his section reincorporates the provisions for hearings formerly made part of section 181 but clearly specifies the types of Commission activities in which a hearing is required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held.[10/]

Thus, the legislative history of the Act "reveals the intent of Congress to guarantee hearing rights in certain classes of agency action, but not in others." San Luis Obispo, 751 F.2d at 1313 (emphasis in original). "If a particular form of Commission action does not fall within one of the . . . categories set forth in [section 189a], no hearing need be granted by the Commission." San Luis Obispo, 751 F.2d at 1314; accord Kelley v. Selin, 42 F.3d 1501, 1515 (6th Cir.), cert. denied, 115 S. Ct. 2611 (1995); Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1521 (lst Cir. 1989).

The categories of agency action for which section 189a requires the NRC to provide notice and opportunity for hearing are:

> any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties . . . .

[9/] See 100 Cong. Rec. 10,171 (1954) (remarks of Senator Pastore), reprinted in 3 Legislative History, supra at 3175 ("That wording was thought to be too broad, broader than it was intended to make it.")

[10/] 100 Cong. Rec. 10,171 (1954) (remarks of Sen. Hickenlooper), reprinted in 3 Legislative History, supra at 3175.

42 U.S.C. § 2239(a). The categories most relevant here and relied upon by the Intervenors and the Board are the licensing actions for which section 189a grants a right to a hearing – "the granting, suspending, revoking, or amending of any license or construction permit." The licensing actions for which notice and opportunity for hearing are required under section 189a do not, however, encompass the universe of Commission licensing actions. For example, in San Luis Obispo, the court held that lifting a license suspension did not fall within any of the classes of licensing actions set out in section 189a. Similarly, in Commonwealth of Massachusetts, the court held that the NRC's decision authorizing restart of a plant that had been shut down did not constitute a license amendment and did not trigger notice and opportunity for hearing under section 189a. Thus, even assuming NRC approvals under 10 C.F.R. Part 50, Appendix H, § II.B.3 are material licensing actions, which they are not, a hearing would be required only to the extent such approvals fall within one of the classes of licensing actions enunciated in section 189a.

NRC approvals of changes to withdrawal schedules for reactor vessel material surveillance specimens do not fall within any of the classes of licensing actions for which section 189a grants a right to a hearing. They are no different than numerous other regulatory approvals that the NRC requires on a continuing basis to assure that the activities authorized under NRC licenses continue to be conducted with no undue risk to the public health and safety.[11/] None of these provisions contemplate or

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[11/] See, e.g., 10 C.F.R. § 50.46 (a)(3)(ii) (use of approved integrated scheduling system for showing compliance with § 50.46); 10 C.F.R. § 50.48(c)(5) (compliance with fire protection requirements); 10 C.F.R. § 50.54(a)(3) (changes to quality assurance programs that reduce commitments); 10 C.F.R. § 50.55(f)(3) (for construction permit holders, changes to quality assurance programs that reduce commitments); 10 C.F.R. § 50.54(i-1) (decrease in scope of an operator requalification program); 10 C.F.R. § 50.54(q)(changes to emergency plans which decrease plan effectiveness); 10 C.F.R. § 50.54(w)(4)(ii) (post-accident cleanup plan); 10 C.F.R. § 50.54(bb) (spent fuel management and funding plan); 10

Footnote continued on next page

require license amendments because the approvals granted by the NRC under these provisions do not result in licensees operating beyond the scope of their previously authorized licenses.

The cases cited above refute the Board's ruling that such NRC approvals automatically trigger section 189a hearing requirements. Closely on point is the Sixth Circuit's decision in Kelley. Petitioners in that case argued that the NRC's granting of an exemption to the vendor of the spent fuel storage casks to be installed at Consumers Power Company's Palisades facility and NRC's "approval of amendments to Palisades' security and emergency plans" triggered section 189a's right to a hearing. 42 F.3d at 1514. The Sixth Circuit rejected the petitioners' arguments:

> There is no licensing decision being made here. . . . The decisions to which petitioners refer as site-specific do not grant Consumers the right to operate Palisades in any greater capacity than the plant had previously been allowed to operate, and the NRC did not exempt Consumers from operating under any specific safety requirements or change the rules applicable to Consumers to such an extent that it no longer followed otherwise applicable NRC rules and regulations.

Footnote continued from previous page

C.F.R. § 50.55a(f)(4)(iv) (use of subsequent editions and addenda of ASME Code for inservice testing of pumps and valves); 10 C.F.R. § 50.55a(g)(4)(iv) (use of subsequent editions and addenda of ASME Code for inservice inspection of pumps and valves); 10 C.F.R. § 50.61(b)(6)&(7) (reactor operation beyond pressurized thermal shock screening criterion); 10 C.F.R. § 50.82(d) (updated detailed decommissioning plan prior to start of major dismantlement activities); 10 C.F.R. Part 50, App. G, § III.B (test methods for supplemental fracture toughness tests); 10 C.F.R. Part 50, App. G, § IV.A.1 (reactor vessel beltline material Charpy upper-shelf energy of less than 50 ft-lb); 10 C.F.R. Part 50, App. G, § V.D (thermal annealing); 10 C.F.R. Part 50, App. G, § V.E (programs for satisfying requirements of App. G, §§ V.C. & D) 10 C.F.R. Part 50, App. H, § II.C (integrated reactor surveillance programs); 10 C.F.R. Part 50, App. J, § III.A.6 (test schedule for Type A integrated leakage rate test); 10 C.F.R. Part 50, App. K, § I.C.5.c (ECCS evaluation models).

42 F.3d at 1515 (emphasis added). The Sixth Circuit stated further that "the grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights." 42 F.3d at 1517; accord Commonwealth of Massachusetts, 878 F.2d at 1521; Duke Power Co. v. NRC, 770 F.2d 386, 389 (4th Cir. 1985). Similarly, the Kelley decision held that NRC's approval of the revised security and emergency plans for Palisades "[did] not require public participation." 42 F.3d at 1517.

Here too, the NRC's approval of a change to the withdrawal schedule will not grant Licensees, in the words of the Kelley decision, "the right to operate [Perry] in any greater capacity than the plant had previously been allowed to operate." Nor will it "exempt [Licensees] from operating under any specific safety requirements or change the rules applicable to [Perry] to such an extent that it no longer follow[s] otherwise applicable NRC rules and regulations." Therefore, the NRC's approval does not trigger section 189a hearing rights.

The cases cited by the Board and Intervenors are not to the contrary. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied sub nom. Arkansas Power & Light Co. v. Union of Concerned Scientists, 469 U.S. 1132 (1985), involved a category of licensing proceedings explicitly within the scope of section 189a. The issue there was whether questions concerning emergency evacuations were material to the Commission's licensing decision to grant an operating license so that they had to be heard in a hearing already required under section 189a. The court in Union of Concerned Scientists did not rule that any request for NRC approval under its regulations constitutes "a material licensing action that triggers section 189a

hearing rights," which is the principle for which the Board cites the case. 42 NRC at 149.[12/]

The purported principle upon which the Board's decision rests is refuted by San Luis Obispo and Commonwealth of Massachusetts. The lifting of the license suspension for the Diablo Canyon facility in San Luis Obispo and the NRC's authorization of the restart of the Pilgrim reactor in Commonwealth of Massachusetts, both determined to fall outside section 189a, were certainly "material" or "important" licensing actions.[13/] Indeed, the court in San Luis Obispo expressly rejected an argument that "all actions by the Commission which bring about a 'significant change' in the licensing status of a nuclear facility come within the mandate of section 189(a)." 751 F.2d at 1312; see also 751 F.2d at 1314. Thus, contrary to the Board's conclusion, a material licensing action, by itself, does not trigger section 189a hearing rights. The licensing action must also fall within one of the classes of licensing actions specified in section 189a.

The other case primarily relied upon by the Board and the Intervenors, Citizens Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995), is similarly inapposite. In that case, the court concluded that the NRC's approval (effectuated by a change in interpretation of its decommissioning regulations) of the licensee's "component removal project" had "substantially enlarged the [licensee's] authority" to engage in activities far beyond those previously authorized. 59 F.3d at 294. The court did not lay

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[12/]See San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 30 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986) ("Union of Concerned Scientists holds only that the Commission cannot exclude from a section 189(a) hearing issues that its rules or regulations require it to consider in its licensing decisions.")

[13/]The first definition of "material" found in Black's Law Dictionary is "important." Thus, for example, a representation relating to a matter "which is so substantial and important as to influence [the] party to whom made is 'material.'" Black's Law Dictionary Sixth Edition (1990).

down the broad rule of law promoted by the Board that NRC approvals which are part of its continuing regulatory oversight require notice and opportunity for hearing under section 189a. Such an interpretation is refuted by Kelley and other cases (San Luis Obispo, Commonwealth of Massachusetts and Duke Power) holding that such regulatory approvals by the NRC do not constitute amendments to a reactor's license that would trigger hearing rights under section 189a.[14/]

That regulatory approvals under Appendix H, § II.B.3, and similar regulatory approvals (see note 11 supra), do not -- without more -- trigger hearing rights under section 189a is confirmed by the structure of the NRC regulations. The regulations in 10 C.F.R. § 50.59 identify those regulatory approvals that require license amendments and therefore trigger section 189a hearing rights. Under 10 C.F.R. § 50.59, license amendments are required (1) to make changes to a plant's technical specifications and (2) to make changes in the facility or the procedures described in the safety analysis report (or to conduct tests or experiments not described in the safety analysis report) "which involve an unreviewed safety question." 10 C.F.R. § 50.59(c).[15/] A proposed change, test, or experiment is deemed to involve an unreviewed safety question if (i) the probability of occurrence or the consequences of an accident previously evaluated may be increased; (ii) the possibility for an accident of a different type than previously evaluated may be created; or (iii) the margin of safety underlying any technical specification may be reduced. 10 C.F.R. § 50.59(a)(2).

[14/] The intervenors also cited Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980), vacated and remanded, 459 U.S. 1194 (1983). See LBP-95-17, 42 NRC at 140. However, the Supreme Court's vacating the Sholly decision "deprives [it] of precedential effect." County of Los Angeles v. Davis, 440 U.S. 625, 634 n. 6 (1979); see also Citizens Assoc. for Sound Energy v. NRC, 821 F.2d 725, 728 (D.C. Cir. 1987) ("The Sholly decision is no longer of precedential value.")

[15/] A license amendment also would be required to change the terms and conditions of the actual license document itself, which obviously is not involved here.

Thus, the NRC has identified in 10 C.F.R. § 50.59 those general categories of licensee actions that require approval by license amendments. Under the NRC's regulations, other regulatory approvals of licensee actions (such as Appendix H, § II.B.3 and similar approvals listed in note 11 supra) require a license amendment only if they fit one of the categories for which 10 C.F.R. § 50.59 requires an amendment.[16/] Otherwise such regulatory approvals are merely part of the NRC's routine regulatory oversight of its licensees and do not enlarge or expand on a licensee's authority to operate its plant in a manner adverse to public health and safety. Therefore, as opined by the court in Kelley, these approvals do not require notice and opportunity for hearing.

B. The Administrative Procedure Act Does Not Impose Any Additional Hearing Requirements.

In its March 7, 1996, Order granting review, the Commission directed the parties to "address the significance for this case of 5 U.S.C. §§ 551(8) and (9)," which define "license" and "licensing" under the APA. Section 551(8) states that:

> "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

Section 551(9) defines "licensing" as follows:

> "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment,

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[16/]Upon removal of the reactor vessel material surveillance specimen withdrawal schedule from the Perry Technical Specifications, the withdrawal schedule would be included in the Updated Safety Analysis Report and changes to the schedule would be subject to 10 C.F.R. § 50.59 as well as Appendix H, § II.B.3. Therefore, any future changes to the withdrawal schedule that involve an unreviewed safety question would require a license amendment, with notice and opportunity for a hearing under section 189a. This result allays any concern, referenced by the Commission in reversing the Board's earlier decision that Intervenors lacked standing, that Intervenors may not be provided notice and opportunity for hearing on changes to the withdrawal schedule that could potentially affect public health and safety. See CLI-93-21, 38 NRC at 95-96.

withdrawal, limitation, amendment, modification, or conditioning of a license.

The APA definitions have limited significance with respect to the issues in this case. First, it is well established that the underlying substantive statute, here section 189a of the Act, and not the APA determines the right to a hearing. Therefore, even assuming the NRC's approval of changes to the withdrawal schedule constitutes "licensing" as defined by the APA, the APA would not enlarge or expand on the hearing rights provided by section 189a. Second, a review of the cases applying the APA definitions of "license" and "licensing" reflects that, although defined broadly, those terms do not include day-to-day regulatory approvals by a regulatory agency. The only court decision to address this issue has ruled that these APA definitions do not include such approvals made by a regulatory agency as part of its oversight responsibilities.

1. The APA Does Not Require A Hearing for NRC Licensing Actions.

A long line of judicial authority establishes that the underlying substantive statute and not the APA determines the obligation of an agency to hold a hearing with respect to agency actions.[17/] Thus, cases construing the right to a hearing with

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[17/] See, e.g., United States v. First Nat'l Bank Through O'Hara, 727 F.2d 762, 763 (8th Cir. 1984) ("[The APA] creates no right to a hearing; the APA only prescribes procedures to be followed when a hearing is required by another statute."); Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 282 (1990) ("[I]t is the enabling statute (i.e., the Atomic Energy Act) and not the APA that determines whether an on-the-record hearing is required."). The legislative history of the Atomic Energy Act reflects an awareness that the APA independently does not provide for agency hearings. This led the Congress to enact section 189a. See, e.g., S. 3323 and H.R. 8862, To Amend the Atomic Energy Act of 1946: Hearings Before the Joint Comm. on Atomic Energy, 83d Cong., 2d Sess. 152-53 (supplemental statement of Joseph Volpe, Jr., Volpe, Boskey & Skallerup) ("Unless the basic legislation requires the licensing proceeding to be determined upon the record after opportunity for an agency hearing, the agency is not required to follow the provisions as to hearing and decision contained in Section 7 and 8 of the Administrative Procedure Act."), 417 (statement of Oscar M. Ruebhausen, Chairman, Special Comm. on Atomic Energy, Ass'n of the Bar of the City of N.Y.) ("Under the bill it is not clear whether hearings are required. Unless hearings are so required, the hearings provisions of the Administrative Procedure Act will not come into play."), reprinted in 2 Legislative History, supra at 1786-87 and 2051, respectively.

respect to NRC licensing action and the nature of any hearing required have looked to section 189a and its legislative history, rather than to the APA. Cases such as San Luis Obispo and Commonwealth of Massachusetts have held that section 189a does not grant the right to a hearing for all agency licensing actions. Other cases have held that a formal adjudicatory hearing on the record in accordance with 5 U.S.C. §§ 556 and 557 is not required for certain NRC actions for which section 189a does grant a hearing. See, e.g., Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968); City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

The City of West Chicago decision most directly addresses the lack of relevance of the APA provisions associated with licensing in determining whether a hearing is required for NRC licensing actions. In that case, the Seventh Circuit held that the NRC is not required to provide formal adjudicatory hearings in accordance with 5 U.S.C. §§ 556 and 557 for material licenses issued under Part 40 of the NRC's regulations. In so holding, the Seventh Circuit rejected the City's argument that 5 U.S.C. § 558(c) required such a hearing under the APA. This provision of the APA provides in relevant part that:

> When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

The Seventh Circuit held that this provision of the APA does not independently mandate an adjudicatory hearing but "merely requires any adjudicatory hearing mandated under other provision of law to be set and completed in an expeditious and judicious

manner." 701 F.2d at 644. In so holding, the Seventh Circuit reversed its own prior precedent and followed that of the First, Fifth and Ninth Circuits which have similarly held that the APA provides no independent right to a hearing with respect to agency licensing actions as defined by the APA.[18/]

In short, even assuming that NRC approvals of withdrawal schedules constitute "licensing" under the APA, the APA would not provide for a hearing with respect to such approvals. Any right to a hearing is determined by section 189a, which, as discussed above, does not include such regulatory approvals among the classes of agency action for which notice and opportunity for hearing are provided.

2. Day-To-Day Regulatory Approvals Do Not Constitute APA Licensing.

The NRC's approval of reactor vessel specimen withdrawal schedules and the other similar approvals required by the NRC under its regulations (see note 11 supra) constitute part of its day-to-day regulatory oversight of its licensees. The APA licensing definitions have been construed to exclude such routine regulatory administration. The cases applying 5 U.S.C. §§ 551(8) and (9) have typically involved

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[18/] Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 n.11 (1st Cir. 1978); Taylor v. District Engineer, U.S. Army Corps of Engineers, 567 F.2d 1332, 1337 (5th Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977). But see New York Pathological & X-Ray Labs, Inc. v. INS, 523 F.2d 79, 82 (2d Cir. 1975) (holding on a preliminary injunction request that a full adjudicatory hearing is required under § 558(c)). In addition to involving a motion for a preliminary injunction, the factual circumstances of New York Pathological arguably involved "withdrawing, suspending and revoking" of a license. See 523 F.2d at 81-82. The second sentence of 5 U.S.C. § 558(c) does provide certain procedural protections (notice and opportunity to respond) with respect to the "withdrawal, suspension, revocation, or annulment of a license." Those agency actions are not involved here (but nonetheless are among the licensing actions for which section 189a provides notice and opportunity for hearing). Moreover, a dissenting opinion New York Pathological read 5 U.S.C. § 558(c) as providing no independent right to a hearing as the other circuits above that have subsequently ruled on this issue.

individual certificates, permits and the like,[19/] and not continuing regulatory oversight of agency licensees. The only case to consider whether approvals granted as part of an agency's day-to-day administration of its regulations constitute "licensing" concluded that such agency action does not fall within the APA definition of that term. American Cylinder Manufacturers Comm. v. Department of Transportation, 578 F.2d 24 (2d Cir. 1978).

In that case, the American Cylinder Manufacturers Committee ("ACMC") argued that approvals by the Department of Transportation ("DOT") to foreign manufacturers to have compressed gas cylinders analyzed and tested outside the United States in accordance with its rules and regulations constituted "licensing" under the APA. The Second Circuit rejected these claims as "an exaltation of form over substance." 578 F.2d at 27. The court analyzed the issue as follows:

> When one studies the substance of the . . . rules and their genesis, it becomes apparent that, though the "approval" procedure may appear on the surface to fall within the broad definition of "licensing" under the Administrative Procedure Act, 5 U.S.C. §§ 551(8), (9), in reality the procedure involves the performance by DOT of a skilled, but essentially pro forma, act – i.e., determining whether, on the face of an application, a foreign manufacturer has shown the capability for meeting specifications relating to testing and analysis.

[19/]See, e.g., Bullwinkel v. FAA, 787 F.2d 254, 256-57 (7th Cir. 1986) (private pilot's airman medical certificate from the Federal Aviation Administration license under the APA); National Cable Television Assoc., Inc. v. FCC, 554 F.2d 1094 (D.C. Cir. 1976) (cable television operator's certificate of compliance from the Federal Communications Commission APA license); Blackwell College of Business v. Attorney General, 454 F.2d 928, 934 (D.C. Cir. 1971) (Immigration and Naturalization Service's approval of college for attendance by non-immigrant alien students under Immigration and Nationality Act license under APA). Accord "Attorney General's Manual on the Administrative Procedure Act," United States Department of Justice, Tom C. Clark, Attorney General, at 16 (1947) ("Licensing proceedings [include] the grant, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, certificates of public convenience and necessity, airman certificates, and the like.")

* * * * *

. . . . It would be strange indeed if DOT, while charged with the duty of protecting the American public from the dangers of transporting hazardous substances, was permitted to make regulations in conformance with the industry's capabilities, but was denied the power to administer the regulations which properly and validly carry out this charge. We believe, as the Supreme Court has stated, that "administrative agencies and administrators [are] familiar with the industries which they regulate and [are] in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." Common sense dictates that . . . the agency must also have the authority to oversee the application of its regulations. As Judge Friendly has put it, "Congress could hardly have intended to deprive [this] agenc[y] of [its] ability to administer."

. . . . Appellant's position would imply that DOT cannot carry out its functions under these provisions without the aid of others in the industry who are not charged with the public duty. . . .

To hold, as ACMC would have us do, that its members should be permitted to oversee DOT in accepting and approving applications submitted by foreign manufacturers would be to involve an applicant's competitor's in the day-to-day administration of DOT's regulations vis-a-vis that applicant. Such involvement is not only unrequired by the statutes and regulations, but it is unwise as well.

578 F.2d at 27-29 (citations omitted).

To require a hearing for changes in the withdrawal schedule of reactor vessel material specimens would raise the same concerns as those in ACMC. Similar to DOT, Congress has authorized the Commission to promulgate such rules and

regulations as are necessary to carry out its regulatory responsibilities under the Act. 42 U.S.C. § 2201(b). The courts have held that the NRC has wide discretion in overseeing the implementation of those rules and regulations in furtherance of the Act's statutory objectives.[20/] To require the NRC to hold hearings on approvals it has seen fit to include in its day-to-day regulation of reactor licensees would be an unwarranted intrusion into the regulatory affairs of the Commission and needlessly complicate the NRC's regulatory oversight of its licensees as entrusted to the NRC by the Congress.

II. The Order Is Erroneous Because It Eliminates Materiality As A Requirement For A Hearing Under Section 189a.

Section 189a has been interpreted to require notice and opportunity for hearing only with respect to issues that are material to NRC licensing decisions for the classes of licensing actions encompassed under section 189a. See, e.g., Union of Concerned Scientists, 735 F.2d at 1443; Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). Even assuming that NRC approval of reactor vessel specimen withdrawal schedules falls within one of the classes of licensing actions for which 189a grants a right to a hearing, the Board's order would require notice and opportunity for hearing on all such NRC approvals, regardless of their materiality.

In Union of Concerned Scientists, the NRC conceded that emergency preparedness exercises had to be satisfactorily completed before the NRC could issue an operating license. 735 F.2d at 1438. As a result, the court concluded that such exercises were material to the NRC's decision to grant an operating license and were required

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[20/] See, e.g., Siegel v. AEC, supra, 400 F.2d at 783 ("[The] regulatory scheme [of the Atomic Energy Act] is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."); County of Rockland v. NRC, 709 F.2d 766, 776 (2d Cir.), cert. denied, 464 U.S. 993 (1983). ("Congress has given the Commission considerable latitude to decide difficult questions that arise with respect to nuclear safety."); accord Kelley v. Selin, supra, 42 F.3d at 1511-12.

to be part of the section 189a hearing on the operating license. Id. In contrast, in Bellotti the NRC issued an order modifying and amending a reactor operating license to require the licensee to develop a plan for reappraisal and improvement of management functions. 725 F.2d at 1382. Because the substance of the plan was not a factor in the NRC's decision to modify the license, it was not material to the decision. Accordingly, a hearing on the substance of the plan was irrelevant to determining whether the order modifying and amending the license should be issued, and no hearing was required. Id.

Here, implementation of the Board's decision would require the NRC to provide notice and opportunity for hearing with respect to changes in the withdrawal schedules regardless of the materiality of the change. Such notice and opportunity for hearing would be required even if those changes comply with the ASTM E 185 standards incorporated into Appendix H, § II.B.1. As discussed in the Statement of the Case, the regulatory history of Appendix H demonstrates that withdrawal schedules conforming with ASTM E 185 standards satisfy NRC safety requirements. Accordingly, withdrawal schedules conforming with ASTM E 185 standards are not material to any conceivable licensing decision, and therefore do not require notice and opportunity for hearing under section 189a.

Again, the structure of the NRC regulations confirms the correctness of this analysis. The Commission has in 10 C.F.R. § 50.59 identified those types of regulatory approvals that are material for licensing purposes by requiring license amendments for particular categories of licensee activities. Schedule changes that comply with the ASTM E 185 standards or otherwise are not material to the public health and safety would not constitute unreviewed safety questions for which 10 C.F.R. § 50.59

would require a license amendment. On the other hand, changes to withdrawal schedules that did not conform with ASTM E 185 would likely be determined to involve an unreviewed safety question and require a license amendment under 10 C.F.R. § 50.59(c).[21/]

III. The Board's Order Is Erroneous Because It Rejects The Staff's Reasonable Interpretation Of Appendix H, § II.B.3.

Based on the history of Appendix H, the Staff interprets Appendix H, § II.B.3 to require NRC approval only for schedules that deviate from the ASTM E 185 standards incorporated by reference in Appendix H, § II.B.1.[22/] Section II.B.1 of Appendix H requires a licensee's reactor vessel material specimen program to comply with the applicable edition of ASTM E 185 (the "Standard Practice for Conducting Surveillance Tests for Light-Water Cooled Nuclear Power Reactor Vessels").[23/] ASTM E sets forth requirements for scheduling the withdrawal of reactor material vessel specimens which, upon ASTM E's inclusion in Appendix H, led the NRC to delete from Appendix H other provisions that had previously required licensees to follow specific withdrawal schedules. The NRC did so because, as stated earlier, "the requirements for withdrawal schedules contained in . . . ASTM E 185 provided satisfactory criteria for scheduling surveillance information gathering." Based on this and other related regulatory history, and the ambiguous language of Appendix H, § II.B.3 on whether NRC

[21/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, supra at 27.

[22/] See NRC Staff Response to Intervenors' Motion for Summary Disposition, supra at 17-27, and the supporting affidavit of Barry J. Elliot, Jack R. Strosnider and Christopher I. Grimes.

[23/] The applicable editions of ASTM E 185 E have been officially incorporated by reference into the regulations. See Introduction to Appendix H ("ASTM E 185-73, -79 and -82 . . . have been approved for incorporation by reference by the Director of the Federal Register"). Accordingly, the applicable editions of ASTM E 185 E have the binding force and effect of NRC regulation. See 5 U.S.C. § 552(a)(1) and 1 C.F.R. Part 51.

approval of changes to previously approved withdrawal schedules is required, the Staff concluded that Appendix H, § II.B.3 requires NRC approval only for changes to withdrawal schedules that do not conform with the scheduling requirements of ASTM E 185.

The Board rejected the Staff's interpretation and held that "all proposed schedules" require the NRC's approval. 42 NRC at 147-48 (emphasis in original). In its decision, the Board argues that § II.B.3 is clear and unambiguous on its face and that the Staff disregards its plain meaning. 42 NRC at 143-48. However, the regulation is hardly as clear and unambiguous as the Board claims. It provides only that "[t]he proposed schedule must be approved prior to implementation." It does not specify whether it is only the initial schedule that must be approved or whether changes to that schedule must also receive prior approval. While the Board criticizes the Staff for "the unwarranted insertion" of the word "initial" into the regulation (42 NRC at 146), the Board itself without warrant inserts the word "all" in order to find no ambiguity in the provision. 42 NRC at 147. The Staff's interpretation of Appendix H, § II.B.3 is reasonable based on the regulation's history and purpose, and the Commission should adopt it.

CONCLUSION

For the foregoing reasons, the Commission should reverse the Board's Memorandum and Order, LBP-95-17, issued October 4, 1995. The Board has erroneously concluded that NRC approvals of withdrawal schedule changes under 10 C.F.R. Part 50, Appendix H, § II.B.3 constitute material licensing actions that must be treated as if they were license amendments. The Board's decision is contrary to section 189a, well-established case law, the Commission's regulatory regime and established regulatory

practice. It would require the NRC to treat approvals required as part of its continuing regulatory oversight as if they were license amendments subject to the procedural requirements of section 189a. The Board's decision also eliminates materiality as a prerequisite for section 189a licensing hearings and rejects the Staff's reasonable interpretation of Appendix H, § II.B.3.

In addition to Appendix H, § II.B.3, the NRC's regulations contain many other provisions requiring NRC approval of licensee actions which are not otherwise subject to notice and opportunity for hearing under section 189a. See note 11, supra. The Board's rationale would emboss upon such regulatorily established Staff approvals the procedural trappings of license amendments. Generic application of the Board's ruling would have a significant impact on the both the NRC Staff and NRC licensees. It would greatly burden the NRC's regulatory oversight with new procedural requirements with no concomitant benefit to the public health and safety.

Respectfully submitted,

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Dated: April 26, 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	Docket No. 50-440-OLA-3
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	License Amendment (Material Withdrawal Schedule)
(Perry Nuclear Power Plant, Unit No. 1)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensees' Brief On Review of Licensing Board Decision LBP-95-17 were sent on April 26, 1996 by first class mail, postage prepaid, to the persons on the attached Service List.

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