DD-85-9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF INSPECTION AND ENFORCEMENT
James M. Taylor, Director

In the Matter of the	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-413
	)	50-414
(Catawba Nuclear Station,	)	
Units 1 & 2)	)	(10 CFR 2.206)

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

On June 27, 1984, Robert Guild, counsel for the Palmetto Alliance, filed a request for action pursuant to 10 CFR 2.206 with the Director of the Office of Inspection and Enforcement. The Palmetto Alliance asked the Director to institute proceedings pursuant to 10 CFR 2.202 to modify, suspend, or revoke the construction permits for Duke Power Company's (the licensee) Catawba Nuclear Station and to take other appropriate action on the basis of violations of Appendix B to 10 CFR Part 50 and instances of harassment and intimidation of quality control inspectors. The Palmetto Alliance, which had intervened in the Catawba operating license proceeding, bases its request primarily on its disagreements with the Atomic Safety and Licensing Board's Partial Initial Decision in the proceeding. Although the Board found some problems in the licensee's implementation of its quality assurance program, the Board did not believe that these problems indicated a "pervasive failure or breakdown"

of the quality assurance program and, hence, the Board authorized issuance of an operating license for Catawba Unit 1. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-24, 19 NRC 1418, 1434 (June 1984). The Board reaffirmed its view in a supplemental decision on other related quality assurance matters. See Partial Initial Decision Resolving Foreman Override Concerns and Authorizing Issuance of Operating Licenses, LBP-84-52, 20 NRC 1484, 1506-08 (November 1984). An operating license for Catawba Unit 1, which limited operation initially to five percent of full power, was issued by the Commission on December 6, 1984. 49 Fed. Reg. 48395 (December 12, 1984). A full power license was issued on January 17, 1985. 50 Fed. Reg. 3435 (January 24, 1985). Appeals from the Licensing Board's decision are currently pending before the Atomic Safety and Licensing Appeal Board.

A notice was published in the Federal Register indicating that the Palmetto Alliance's request was under consideration. 49 Fed. Reg. 30813 (August 1, 1984). On September 27, 1984, the Government Accountability Project (GAP) filed an "Enforcement Action Request" with the Office of Inspection and Enforcement in which GAP asked that the Commission impose $250,000 in civil penalties for alleged acts of harassment and intimidation by Duke Power Company of employees at Catawba. Because GAP's request concerns the same issue of enforcement action for discrimination and harassment as is raised in the Palmetto Alliance's

request, this decision responds to both requests. [1/] Duke Power Company filed a response to GAP's request on April 22, 1985. Letter to James M. Taylor from W. H. Owen, Exec. Vice President (hereinafter "DPC Response").

My decision in this matter has been delayed by an intervening event. On December 10, 1984, the U.S. Court of Appeals for the Fifth Circuit overturned a Secretary of Labor determination concerning application of Section 210 of the Energy Reorganization Act of 1974, as amended (ERA). Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). Since the Commission's employee protection rule in 10 CFR 50.7 is derived from Section 210 of the ERA, I elected to delay my decision until the staff could assess the effect, if any, of the Fifth Circuit's decision on the

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1/ In considering these petitions under 10 CFR 2.206, the issue before the staff is not, of course, whether the Licensing Board's decision to authorize issuance of an operating license was a correct one. If that were the issue, the petitions could be dismissed without regard to their merits in view of the long-standing principle that § 2.206 is not a permissible avenue for relief with respect to matters that may be raised appropriately before the presiding officer in a pending proceeding. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443 (1981); Consolidated Edison Co. (Indian Point Station, Units 1-3), CLI-75-8, 2 NRC 173, 177 (1975); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 & 2; Oyster Creek Nuclear Generating Station), DD-85-1, 21 NRC 263, 265 (1985), aff'd, CLI-85-4 (April 4, 1985). The facts raised in the instant petitions, however, have a bearing not only on the question of whether operating licenses should have issued, but also on the question of whether the staff should exercise its independent responsibilities to enforce the conditions of the NRC's regulations and construction permits. For this reason, the staff has considered the substantive merit of the petitions to determine whether enforcement action is appropriate in accordance with Subpart B and Appendix C of 10 CFR Part 2. See also infra text at 13-15.

NRC's application of 10 CFR 50.7. The results of that assessment are discussed in this decision.

For the reasons stated in this decision, I have determined that a violation of 10 CFR 50.7 has occurred. Thus, to the extent that GAP and the Palmetto Alliance ask that I find violations of NRC requirements on the basis of discrimination against Mr. Ross, their requests have been granted. To the extent that the Palmetto Alliance requests initiation of show-cause proceedings and GAP asks for imposition of a civil penalty in an amount of $250,000, their requests are denied.

I want to emphasize that my decision in this matter, including the severity level and proposed sanction for the violation involving the discrimination against Mr. Ross, are based on the findings of fact contained in the Atomic Safety and Licensing Board's Partial Initial Decision. The remainder of this decision details the particular facts on which the staff has relied.

II. The Violation of 10 CFR 50.7

On one matter the staff agrees with the petitioners that enforcement action should be taken. In fact, even prior to receipt of the petition the staff was considering escalated enforcement based on the Board's decision. The Palmetto Alliance and GAP contend that Duke Power Company violated 10 CFR 50.7 in its treatment of G. E. "Beau" Ross, a supervisor of welding inspectors. Mr. Ross claimed he was given a low performance rating by his supervisor for expressing safety concerns. This issue was explored in some

detail during the operating license hearings and is described in the Board's Partial Initial Decision. LBP-84-24, supra, 19 NRC at 1513-20. 2/

On its consideration of the Ross matter, the Board concluded:

> Based on our review of the testimony and exhibits, the setting in which the events occurred, and the credibility of the witnesses, the Board finds that the 1981-1982 evaluation, the November 1982 interim evaluation, and the 1982-1983 evaluation of Mr. Ross, all at the "fair" or "2" level, were unfair and in retaliation for Mr. Ross' and his crew's strict adherence to QA procedures and expression of safety concerns. The persons directly responsible for the discriminatory evaluations of Mr. Ross were Mr. Davison, Mr. Allum (as to the interim and 1982-1983 evaluations), and Mr. Grier (as to the 1982-1983 evaluation, which he should have overruled). Mr. Grier and Mr. Davison occupy senior level supervisory positions. Therefore, these actions are fully attributable to the Duke Power Company.

LBP-84-24, supra 19 NRC at 1518-19 (footnote omitted). However, despite the urging of the Palmetto Alliance, the Licensing Board declined to find a violation of 10 CFR 50.7:

> That provision prohibits discrimination against an employee for engaging in certain "protected activities," as defined in section 210 of the Energy Reorganization Act of 1974. Since there is no clear evidence in the record indicating that Mr. Ross himself voiced concerns to the NRC prior to the evaluation in question, we find no violation of 10 CFR 50.7. But see Ross, Tr. 6777. However, the evaluations did constitute discrimination against Mr. Ross on account of his voicing safety concerns. They therefore violated the spirit of section 50.7, if not its letter.

LBP-84-24, supra, 19 NRC at 1518 n.27.

Under 10 CFR 50.7(a), the Commission has prohibited discrimination by a Commission licensee, permittee, applicant, or others against an

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2/ The Board adopted the Staff's proposed findings of fact as a substantial part of its discussion of this incident.

employee for "engaging in certain protected activities." Section 50.7(a) states, "Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment." Unfair performance evaluations for reporting safety concerns can constitute discrimination within the meaning of § 50.7 because such evaluations constitute an adverse mark in the employee's personnel file and can be used as a basis for demoting or firing the employee. In determining whether Duke Power Company violated 10 CFR 50.7 in giving Mr. Ross discriminatory performance ratings, the key question is whether Mr. Ross' activities were "protected." As noted above, the low performance ratings were in retaliation for Mr. Ross' strict adherence to procedures and expressions of safety concerns. Adherence to procedures and reporting of safety concerns to management can constitute protected activities within the meaning of § 50.7.

The Commission's current employee protection rules, including 10 CFR 50.7, are derived from Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851. Section 50.7 itself states, "The protected activities are established in Section 210." Section 210 provides employees who have been the victims of impermissible discrimination with a direct means of obtaining a remedy against their employer, including obtaining job reinstatement and back pay. The responsibility for administration of the employee remedies under Section 210 rests with the Secretary of the United States Department of Labor. See 42 U.S.C. 5851(b). The Secretary has held consistently that employees are protected under Section 210 from retaliation and

discrimination for purely internal safety activities that involve no contact with representatives of the Commission. 3/

The staff recognizes, of course, that the Secretary's construction of the remedial provisions of Section 210 is not accepted universally. Notwithstanding the Ninth Circuit's opinion in Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162-63 (9th Cir. 1984), the Fifth Circuit has held that, absent contact with the NRC, a quality control inspector has not engaged in a "protected activity" for purposes of Section 210 by identifying safety deficiencies to his management. Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). The Fifth Circuit decision is, however, at odds with the remedial purposes of Section 210. As the Ninth Circuit explained,

> Quality control inspectors play a crucial role in the NRC's regulatory scheme. The NRC's regulations require licensees and their contractors and subcontractors to give inspectors the "authority and organizational freedom" required to fulfill their role as independent observers of the construction process. 10 CFR Part 50, Appendix B, at 413. In a real sense, every action by quality control inspectors occurs "in an NRC proceeding," because of their duty to enforce NRC regulations.

3/ See Wells v. Kansas Gas & Electric Co., 83-ERA-12 (June 14, 1984) (internal quality control complaints are protected), appeal pending sub nom. Kansas Gas & Electric Co. v. Donovan, No. 84-2114 (10th Cir.); Mackowiak v. University Nuclear Systems, Inc., 82-ERA-8 (April 29, 1983), remanded on other grounds, 735 F.2d 1159 (9th Cir. 1984) (internal quality control complaints are protected); Pennsyl v. Catalytic, Inc., 83-ERA-2 (Jan. 13, 1984) (refusal to work can be a protected activity); Landers v. Commonwealth Lord Joint Venture, 83-ERA-4 (Sept. 9, 1983) (filing of nonconformance report is protected; no contact with NRC until after termination); Atchison v. Brown & Root, Inc., 82-ERA-9 (June 10, 1983) (filing of nonconformance report is protected), vacated and remanded sub nom. Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984); Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982) (employee made complaints to plant management about safety conditions).

> At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

Mackowiak, supra, 735 F.2d at 1163. The rationale of Brown & Root could force quality control inspectors to make a difficult choice. They could follow their employer's chain-of-command and the procedures contemplated by the NRC's quality assurance and control requirements and raise their safety concerns initially to plant management. Under this approach, the inspectors essentially lose the protections of Section 210. Alternatively, they can obtain the protections of Section 210 by ignoring management's reporting procedures and raising their safety concerns directly to the NRC. This dilemma does not enhance public health and safety. To ensure that public safety is served by encouraging the reporting of defects, an inspector should not be subject to discrimination for bringing safety issues to his employer's attention. 4/

Thus, the Ninth Circuit has stated the better view of "protected activities" under Section 210 and this view, which is consistent with the words of the statute and congressional intent, should be followed in the application of the Commission's employee protection regulations, such as

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4/ This is not to say that employees can expect adverse action for reporting safety matters or that employers routinely discriminate against employees in such a fashion, but, unfortunately, such discrimination does sometimes occur. Without the protection of Section 210, the incentive for employees to report defects is weakened.

10 CFR 50.7. 5/ When it adopted § 50.7, the Commission stated, "Employees are an important source of such information [concerning regulated activities] and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers." 47 Fed. Reg. 30452 (July 14, 1982). This same principle is equally valid whether employees raise safety concerns to the NRC or to their employers who are ultimately responsible for safe construction and operation of their facilities. The Commission recently endorsed this view when it authorized the filing of an amicus curiae

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5/ It should be noted that the Department of Labor continues to support the broad remedial construction of Section 210 in its brief before the Tenth Circuit in Kansas Gas & Electric Co. v. Donovan, No. 84-2114. Furthermore, Brown and Root is wrong as a matter of law. In Mackowiak, the Ninth Circuit followed the reasoning of the District of Columbia Circuit in a case holding that the filing of internal safety complaints was a protected activity under the Federal Coal Mine Health and Safety Act. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 722 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). In Brown and Root, the Fifth Circuit rejected the Ninth Circuit's analysis on the ground that the Ninth Circuit's decision was predicated in part on provisions of the mine safety act that were substantially different from Section 210. The Fifth Circuit found that the mine safety act, unlike Section 210, had express provisions protecting internal complaints. However, the court failed to recognize that these provisions were from amendments to the Act enacted after the Phillips decision. In fact, the original statutory language of the Federal Coal Mine Health and Safety Act construed by the D.C. Circuit in Phillips and relied on by the Ninth Circuit in Mackowiak is virtually identical to Section 210. In 1977, the Federal Coal Mine Health and Safety Act was amended to ensure the continued broad construction of the employee protection provisions. See S. Rep. No. 181, 95th Cong., 1st Sess. 36, reprinted in 1977 U.S. Code Cong. & Ad. News 3436. The legislative history of Section 210 indicates that it was patterned after the original version of the Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173 § 110, 83 Stat. 758 (1969). See S. Rep. No. 848, 95th Cong. 2d Sess. 29 (1978).

brief before the Tenth Circuit in support of the Department of Labor's position in the Kansas Gas & Electric Co. v. Donovan case. Accordingly, I find that discrimination against employees for voicing safety concerns internally is prohibited under 10 CFR 50.7(a) and subjects the licensee employer to the sanctions identified in 10 CFR 50.7(c).

In its response to GAP's "Enforcement Action Request," Duke Power Company suggests that "the Commission never intended to place itself in the position of determining in the first instance" whether a violation of § 50.7 has occurred and, thus, the Commission would find a violation of § 50.7 "only in consequence of findings adverse to an employer initially made by the Department of Labor." DPC Response at 17, 18. Duke Power Company bases its view on isolated sentences from the Statement of Considerations that accompanied issuance of § 50.7 and on remarks in a staff paper to the Commission supporting provisions in legislation that ultimately evolved into Section 210 of the Energy Reorganization Act. If I were to adopt Duke Power Company's view and apply it to this case, I could not find a violation of 10 CFR 50.7 because the Department of Labor did not receive and then act favorably on a complaint from Mr. Ross under Section 210 of the Energy Reorganization Act.

Duke Power Company misperceives the complementary, yet independent, authorities and responsibilities of the Department of Labor and the Nuclear Regulatory Commission in protecting employees from discrimination and retaliation for raising matters pertaining to nuclear safety. Although Section 210 assigns authority to grant employee remedies to the Department of Labor, enactment of that statute did not limit the Commission's pre-existing authority under the Atomic Energy Act to

investigate alleged discrimination and take appropriate action against its licensees to combat it. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-527, 9 NRC 126, 132-39 (1979). In urging his colleagues to adopt Section 210, Senator Hart, the Senate floor manager, said

> [Section 210] is not intended to in any way abridge the Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new Section 210 need not delay any action by the Commission to carry out the purpose of the Atomic Energy Act of 1954.

124 Cong. Rec. S15318 (daily ed. Sept. 18, 1978). When the Commission amended its regulations in 1982 to expand the scope of its employee protection regulations (regulations which pre-dated enactment of Section 210) the regulations did not specify that findings by the Department of Labor were a prerequisite to finding a violation of §50.7.

The comments cited by Duke Power Company from the Statement of Considerations were made only in the context of (1) emphasizing that employee discrimination could result in Commission sanctions as well as the Department of Labor's award of a direct remedy to an employee and (2) rejecting a proposal that the Commission provide in its rules for imposition of civil penalties against individuals who made frivolous complaints to harass an employer. To be sure, the Department of Labor and the Commission are aware of the need to coordinate their efforts and cooperate in the effective administration of employee protection provisions under Section 210 and the Commission's regulations and to this end the Department and Commission have entered into a Memorandum of Understanding. 47 Fed. Reg. 54585 (Dec. 3, 1982). To limit the

Commission's power in the fashion Duke Power Company suggests overlooks the reality that an aggrieved employee may decline to file a complaint or may settle a complaint for personal reasons. The Commission's responsibility goes beyond immediate remedial action to the person affected. The Commission must ensure that licensees correct conditions that have resulted in improper discrimination that could affect other employees and prevent the recurrence of such discrimination. This power must be available to the Commission whether or not a particular employee has exercised his or her rights under Section 210.

In view of the Board's finding that the November 1982 interim evaluation and 1982-83 evaluation of Mr. Ross' performance "were unfair and in retaliation for Mr. Ross' and his crew's strict adherence to QA procedures and expression of safety concerns," Duke Power Company violated 10 CFR 50.7. 6/ The staff believes that the Board incorrectly included contact with the NRC as a necessary element of a "protected activity" under 10 CFR 50.7 and that the Board erred in finding no violation. Although Duke Power Company has sought reversal of the Board's findings regarding improper attempts by Mr. Grier to influence Mr. Ross' testimony, the licensee has not sought to reverse the Board's conclusions regarding the unfair performance evaluations and does not contest them in its response to GAP. See DPC Response at 7, 13. In light of the Board's findings that the performance evaluations were

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6/ See LBP-84-24, supra, 19 NRC at 1518. The Board also concluded that the 1981-82 evaluation was unfair and retaliatory. This evaluation would not be covered by Section 50.7 because it occurred prior to October 14, 1982, the rule's effective date.

discriminatory, a violation of Section 50.7 has been established and enforcement action should be taken.

III. The Board's Decision Does Not Bar Enforcement Action for the Violation

Although the Board said that it did not believe § 50.7 had been violated, the Board's remarks on § 50.7 are not binding and the staff is not estopped from taking enforcement action. Under the doctrine of collateral estoppel, a prior determination in an adjudicatory proceeding will bar a party from further litigation of an issue if: (1) the issue was determined by a valid and final judgment; (2) the issue sought to be precluded is the same as that involved in the prior action; (3) the issue was actually litigated; and (4) the determination on the issue was essential to the prior judgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2) LBP-79-27, 10 NRC 563, 566 (1979), aff'd, ALAB-575, 11 NRC 14 (1980). These criteria are not met here.

Apart from brief references in the parties' proposed findings of fact, the question of whether the discriminatory evaluations constituted a § 50.7 violation was not briefed or litigated as a specific contention. 7/ The Board's decision is not, as yet, a "final

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7/ The staff's proposed findings suggested that the Board did not need to reach the question of whether § 50.7 had been violated. See NRC Staff's Proposed Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision, at 122 (March 8, 1984).

judgment," because an appeal has been taken in the case. 8/ But even if it were a final judgment, the Board's remarks regarding § 50.7 were unnecessary to its decision in the operating license proceeding and are not controlling here. The Board's primary responsibility was to determine whether the requisite "reasonable assurance" determinations could be made to permit licensing of the plant. See 10 CFR 50.57(a). For purposes of making these determinations, the underlying facts regarding the handling of Mr. Ross have significance in assessing the adequacy of the quality assurance program, whether or not they represent a specific violation of § 50.7. The Board seemed to acknowledge the collateral nature of the § 50.7 question by relegating its treatment of the issue to a brief footnote and by suggesting that the more important inquiry was whether Duke's conduct would preclude the "reasonable assurance determinations necessary for licensing." See LBP-84-24, supra, 19 NRC 1518 n.27; 10 CFR 50.57(a)(3).

Initiation of enforcement action here does not contradict the Commission's policy against initiating enforcement proceedings to grant relief on matters that are within the jurisdiction of the presiding

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8/ See 10 CFR 2.760(a). The staff has not appealed the Board's conclusion regarding § 50.7 because it agrees with the Board's ultimate decision finding that the plant meets the licensing standards of the Atomic Energy Act and the Commission's regulations. See Duke Power Co. (Cherokee Nuclear Station, Units 1-3), ALAB-478, 7 NRC 772, 773 (1978). As the staff has indicated in its brief (at 26 n. 23) in the Catawba appeal before the Appeal Board, the correctness of the Board's interpretation of 10 CFR 50.7 does not bear on the correctness of its findings on the significance of the Ross incident.

officer in a licensing proceeding. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443, 444 (1981). Even if the Licensing Board had agreed in this case that the discrimination against Mr. Ross constituted a § 50.7 violation, the Board was not empowered to impose civil penalties, suspend the construction permits, or apply any other sanction, except to deny or condition the grant of an operating license -- a step the Board did not find warranted here. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1238 (1982); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1102-03 (1982). For the foregoing reasons, the staff is not barred from taking enforcement action here. The staff has concluded that a violation of 10 CFR 50.7 has occurred and enforcement action should be taken.

IV. Violations of 10 CFR Part 50, Appendix B

Before turning to an analysis of the appropriate enforcement sanction for the § 50.7 violation, the other violations alleged by the petitioners should be discussed. Both GAP and the Palmetto Alliance argue that multiple instances of harassment and intimidation in violation of 10 CFR Part 50, Appendix B occurred that warrant enforcement action. The Palmetto Alliance refers to "43 violations" of quality assurance requirements for which, it believes, the Board took no effective action. Guild Letter at 2. These 43 violations are derived from a report of the task force initiated by Duke Power Company to review the welding inspectors' concerns. The welding inspector task force was the subject of substantial litigation before the Board. See LBP-84-24, supra, 19 NRC

at 1446-1505. A few of the items identified by the task force had been previously identified by NRC Region II and were the subject of Notices of Violation. The remainder, though they represented noncompliance with NRC requirements, were of Severity Level IV or V significance under the enforcement policy. In accordance with the policy, Region II did not formalize these noncompliances in a Notice of Violation because they were identified and corrected by the licensee. See 10 CFR Part 2, Appendix C, § IV.A. (1984), as revised, § V.A., 49 Fed. Reg. 8583, 8589 (March 8, 1984); see LBP-84-24, supra, 19 NRC at 1499. As the Licensing Board and the previous Director of this Office also concluded, the Region's actions appear to conform with the enforcement policy and no further action is warranted on my part to overturn the Region's judgment. See LBP-84-24, supra, 19 NRC at 1498-99; DD-84-16, 20 NRC 161, 180-81 (July 1984).

The Palmetto Alliance and GAP also ask for enforcement action on the basis of certain harassment incidents. Not every harassment incident warrants the finding of a violation under Criterion I of Appendix B to 10 CFR Part 50. Whether a harassment incident constitutes a violation of the requirements in Criterion I to maintain sufficient authority and organizational freedom for quality assurance personnel depends on such factors as the nature of the incident, the persons involved in the incident, and the actions of management and supervisory personnel in response to the incident. The available evidence does not suggest that the licensee condoned or encouraged intimidation or harassment of quality control supervisors or was irresponsible in reacting to such incidents. As the Board noted, 19 NRC at 1444, "the cases of serious harassment were relatively few in number" and, in most cases, the licensee "acted in a

reasoned manner to discourage repetition." Id. at 1532. The Board did find that the licensee could have done more to publicize its actions or to communicate "in a more supportive way" with the quality control inspectors, see id., but as described more fully in section V of this decision, these facts have been taken into account in determining the appropriate enforcement sanction for the violation of 10 CFR 50.7.

In its "Enforcement Action Request" (at 8), GAP refers to reports by Duke Power Company and Region II as "new evidence of an atmosphere of harassment and intimidation." The references are apparently to reports concerning foreman overrides that were the focus of the "Welder B" issue that the Licensing Board had left open in its June 22nd Partial Initial Decision. See LBP-84-24, supra, 19 NRC at 1585. Contrary to the implication in GAP's "Enforcement Action Request," few of the 200 persons interviewed during the Duke investigation claimed harassment or intimidation. The reports and related information were the subject of further hearings that commenced on October 9, 1984, before the Licensing Board. The Board recently issued its decision regarding this matter and concluded that instances of foreman overrides were isolated, did not compromise plant safety, did not indicate pervasive harassment and intimidation, and did not represent a significant breakdown in quality assurance at Catawba. See LBP-84-52, supra, 20 NRC at 1506-07. The staff agrees with those findings.

Region II did issue a Notice of Violation to the licensee for failure to follow procedures related to the "Welder B" issue. See NRC Inspection Report No. 50-413/84-88 & 50-414/84-39 (Aug. 31, 1984). No

further enforcement action for violations of 10 CFR Part 50, Appendix B is appropriate.

V. Proposed Enforcement Action

The Palmetto Alliance urges the staff to initiate show-cause proceedings to modify, suspend, or revoke the Catawba construction permits on the basis of the alleged violations of 10 CFR 50.7 and Appendix B. GAP contends that a civil penalty of $250,000 should be proposed and that civil penalties should be "automatic" in such cases to "punish" employers for harassment. However, not every violation of NRC requirements warrants initiation of show-cause proceedings or imposition of civil penalties. See Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400 (1978). Sanctions are not "automatic". The choice of enforcement sanctions for violations of NRC requirements rests within the sound discretion of the Commission based on consideration of such factors as the significance of the underlying violations and the effectiveness of the sanction in securing lasting corrective action. See General Statement of Policy and Procedure for NRC Enforcement Actions, 10 CFR Part 2, Appendix C, §§ I and VII (1985). The Commission's policy on the application of enforcement sanctions, which was applicable at the time of the violation, is set forth in 10 CFR Part 2, Appendix C, 47 Fed. Reg. 9989 (March 9, 1982). The policy classifies different types of violations by their relative severity and describes the circumstances in which formal sanctions, including orders, civil penalties, and notices of violation are appropriate.

Under this policy, the violation fits most closely the example of a Severity Level II violation under the severity categories in Supplement VII because the discriminatory evaluations involved action by management above first-line supervision. In its decision the Board found:

> The persons directly responsible for the discriminatory evaluations of Mr. Ross were Mr. Davison, Mr. Allum (as to the interim and 1982-83 evaluations), and Mr. Grier (as to the 1982-83 evaluation, which he should have overruled). Mr. Grier and Mr. Davison occupy senior level supervisory positions. Therefore, these actions are fully attributable to the Duke Power Company.

LBP-84-24, supra, 19 NRC at 1519. Since Mr. Ross as a foreman was a first-line supervisor, the discriminatory action by Mr. Allum and Mr. Grier involved management above first-line supervision. It is recognized that the examples of severity levels in the supplements to Appendix C are just that and, therefore, neither controlling nor exhaustive. However, in view of the Board's finding, a classification of the violation at Severity Level II appears appropriate and departure from the guidance of the policy is not warranted.

The base civil penalty for a Severity Level II violation was $64,000 at the time this violation occurred. The enforcement policy then in effect, as well as the present policy, provides for mitigation or escalation of the base civil penalty on the basis of several factors including the adequacy of corrective actions, poor prior performance in an area of concern, prior notice of similar events, and multiple occurrences. Duke Power Company has removed the unsatisfactory performance appraisals from the Beau Ross personnel file and inserted a statement that his performance was satisfactory during those periods. In addition, Duke has taken certain other corrective actions including 1)

establishment and implementation of a QA Department Harassment Resource Procedure; 2) retention of an employee relations specialist, 3) amplification of the construction department instructions involving intimidation and coercion, and 4) implementation of a quality awareness program. Thus, escalation of the penalty for inadequate corrective actions does not seem appropriate. However, Duke has maintained Mr. Ross's adverse performance appraisals in a separate file and has included in that file a letter which states that they do not concur with the Board's findings. These actions indicate that Duke has not fully acknowledged the seriousness of this violation. Furthermore, the Board identified additional corrective actions that Duke was required to take. These circumstances suggest that mitigation of the civil penalty for unusually prompt and extensive corrective actions is not appropriate.

With regard to prior notice of similar events and multiple occurrences, the record did not contain evidence of prior notice of other

similar events or other violations of the same significance. Thus, a civil penalty of $64,000 will be proposed. 9/

Initiation of further proceedings, as the Palmetto Alliance suggests, is not warranted. 10/ The request stems primarily from their

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9/ Although Duke Power Company will have a full opportunity to contest the proposed civil penalty in accordance with 10 CFR 2.205, a brief response is warranted here to the licensee's arguments that civil penalties are not available or should not be used for violations of § 50.7. As noted earlier, the legislative history of Section 210 provides no support for the suggestion that the Commission lacks authority to impose civil penalties for violations of duly-promulgated regulations related to employee protection against discrimination. No such limitation exists in Section 210 of the Energy Reorganization Act or in Section 234 of the Atomic Energy Act. The civil penalty provision "spurned" in the staff paper cited by the licensee referred to an extension of such sanctions to non-licensed employers. The same staff paper acknowledges the Commission's existing authority to impose civil penalties on its licensees.

The licensee also suggests that the Commission should not impose civil penalties for violations of § 50.7, at least where the Department of Labor has awarded the employee a remedy, because the civil penalty would not likely have any additional remedial effect. However, the Commission expressly provided for possible imposition of civil penalties in § 50.7(c) for violations of § 50.7(a). Civil penalties for violations of § 50.7, as well as for violations of other NRC requirements, are appropriate if a civil penalty may positively affect the conduct of the licensee or other similarly situated persons and are not grossly disproportionate to the gravity of the offense. Atlantic Research Corp., CLI-80-7, 11 NRC 413, 421 (1980).

10/ Because an operating license has been issued, suspension or revocation of the construction permit for Unit 1 would be essentially meaningless. Enforcement action may still be appropriate, however, for violations that occurred during construction even after an operating license has been issued. Quality assurance is important in both construction and operation of a nuclear plant. The violation of § 50.7 discussed in this decision can also occur during operation and, thus, enforcement action is appropriate to discourage similar violations by this licensee in the future as well as to discourage similar violations by other licensees. See Atlantic Research Corp., CLI-80-6, 11 NRC 411, 420-21 (1980).

apparent disagreement with the Board's conclusion with respect to the significance of instances of harassment of welding inspectors: i.e., "harassment was not a widespread phenomenon at Catawba." LBP-84-24, supra, 19 NRC at 1532. Although the Board found from the record that "some welding inspectors were subject to harassment by craft workers and craft foreman for doing their jobs," the Board concluded that "[t]he few incidents described did not deter these inspectors from performing their duties, nor was the freedom of the QA program restricted." Id. at 1531. The staff agrees with these conclusions and the petitioners have not provided any new information which would suggest a different result. 11/

In his letter on behalf of the Palmetto Alliance, Mr. Guild also takes issue with the Licensing Board's conclusion that the evidence in the operating license proceeding did not demonstrate a pervasive quality assurance breakdown at Catawba. Mr. Guild's letter is little more than an appeal of the Licensing Board's adverse ruling on the Palmetto Alliance's quality assurance contention (Contention 6) in the operating license proceeding. Mr. Guild now wants the Director to initiate show-cause proceedings "to fully probe the significance of this serious misconduct by Duke Power Company and take needed remedial measures to insure that the full scope of Quality Assurance deficiencies are

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11/ Mr. Guild points to the discussion of harassment incidents in the Licensing Board's decision as the basis for the Palmetto Alliance's § 2.206 request. Without specific attribution, GAP lists a number of alleged harassment incidents which, it believes, establishes "a pattern of harassment, intimidation and discrimination." GAP Enforcement Action Request at 5. These incidents appear to be derived primarily from the incidents discussed in the Licensing Board's decision. Compare GAP Enforcement Action Request, at 3-5, with LBP-84-24, supra, 19 NRC at 1479-92, 1504-32, 1541-48.

identified and corrected prior to operation of the Catawba Nuclear Station." Guild Letter at 2. The significance of quality assurance problems at Catawba on which Mr. Guild relies and their impact on plant operation have been fully examined by the Licensing Board and, unlike the Board's remarks about § 50.7 discussed above, were a critical part of its inquiry to determine whether the requisite "reasonable assurance" determinations under 10 CFR 50.57 could be made to permit licensing. See generally LBP-84-24, supra, 19 NRC at 1432-46. If the Palmetto Alliance disagrees with the Licensing Board's decision to issue an operating license, it should pursue its appeal before the Appeal Board, not ask the staff to institute show-cause proceedings to go over the same issues that were properly before the Licensing Board and which formed the basis for the Board's decision. 12/ 10 CFR 2.762; see Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443 (1981); cf. Rockford League of Women Voters v. NRC, 679 F.2d 1218, 1222 (7th Cir. 1982).

Moreover, the staff has considered the same basic allegations as were before the Licensing Board - in fact in response to a petition filed on behalf of the Palmetto Alliance - and determined that no enforcement action was warranted. At the time Mr. Guild's letter was received, the Director had just issued a decision under 10 CFR 2.206 that responded to an earlier petition filed on behalf of the Palmetto Alliance by GAP. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), DD-84-16, 20 NRC 161

12/ The Palmetto Alliance has in fact appealed the Board's June 22nd decision.

(1984). That petition raised many of the same issues and relied substantially on much of the same evidence that was presented in the Catawba operating license proceeding. In his decision on the petition, the Director concluded, as did the Licensing Board, that the problems at Catawba, including the violations of Appendix B to Part 50 that had been identified, did not represent a significant breakdown in quality assurance that would warrant initiation of show-cause proceedings to modify, suspend, or revoke the construction permits. Id. at 181. Accordingly, the Palmetto Alliance's request for extraordinary relief in its earlier § 2.206 petition was denied.

Mr. Guild's June 27th letter does not raise any new factual information regarding the matters covered in the July 6th Director's decision or, for that matter, in the Licensing Board's decision. Thus, as the Director informed Mr. Guild in a letter acknowledging receipt of Mr. Guild's request for action under 10 CFR 2.206 dated July 20, 1984, the problems identified at Catawba do not represent a massive or pervasive breakdown in the quality assurance program. No adequate reasons have been presented in Mr. Guild's letter, nor is there information of which the staff is aware from its inspections, to reverse the determination made on this point in the earlier Director's decision.

Accordingly, I have determined that a Notice of Violation and Proposed Imposition of Civil Penalty should be issued pursuant to 10 CFR 2.201 and 2.205 for the violation of 10 CFR 50.7 and that no further enforcement action is warranted.

VI. Conclusion

For the reasons stated in this decision, the requests of the Palmetto Alliance and GAP have been granted in part and denied in part.

A copy of this decision will be provided to the Secretary for the Commission's review in accordance with 10 CFR 2.206(c). Unless the Commission otherwise directs, the staff will issue a Notice of Violation and Proposed Imposition of Civil Penalty as described in this decision after the conclusion of the period within which the Commission may review this decision.

James M. Taylor, Director
Office of Inspection and Enforcement

Dated at Bethesda, Maryland,
this 4th day of June 1985.