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(23)

Mr. Dave McLoughlin
Deputy Associate Director
State and Local Programs and Support
Federal Emergency Management Agency
Washington, D.C. 20472

Dear Mr. McLoughlin:

We are writing on behalf of the New England Coalition on Nuclear Pollution (NECNP) to object strongly to the serious procedural defects of NUREG-065/FEMA-REP-1, Rev. 1, Supp. 1, November, 1987, "Criteria for Utility Offsite Planning and Preparedness, Draft Report for Interim Use and Comment". Such substantive regulations simply are not valid and cannot be applied to any utility emergency response plan unless FEMA has first complied with all of the requirements of the Administrative Procedure Act (APA).[1] Although the federal register publication identifies these rules as a joint issuance of FEMA and NRC, my comments are addressed to you because FEMA, and not NRC, is the agency responsible for evaluating utility emergency response plans.

From a letter we received on November 30, 1987, written by Edwin J. Reis, Deputy Assistant General Counsel of the NRC, to the Seabrook Off-site Licensing Board in In re In the Matter of Public Service Company of New Hampshire, (Seabrook Station, Units 1 and 2), Docket Nos. 50-443, 50-444 (Off-site Emergency Planning), it is clear that these regulations are for immediate use by FEMA in evaluating the utility offsite radiological emergency response plan for the Massachusetts part of the Seabrook Emergency Planning Zone. FEMA is also planning to use these regulations immediately to review the Shoreham emergency plans. Thus, without the prior opportunity for notice and comment rulemaking

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1 This letter does not include NECNP's substantive comments about NUREG-065/FEMA-REP-1, but only states NECNP's objections to procedural defects in the publication of these regulations and their proposed "interim" use.

letter sent 3/25/88

required by the APA, these rules for "interim use" are going to be used to evaluate emergency response plans for the only two nuclear plants in the country in which utility plans will be used instead of state or local plans. Such action is contrary to law, contrary to FEMA's statutory and regulatory mandate, and contrary to the public interest. Before such regulations can be applied to evaluate any utility plan, they must be lawfully promulgated through notice and comment rulemaking.

FEMA Must Issue Its Own Regulations Governing Utility Emergency Response Plans

Under section 201 of the Disaster Relief Act of 1974, 42 U.S.C. §5131 (1982), as implemented by Executive Order 12148, the director of FEMA is charged with the responsibility for developing and implementing programs for disaster preparedness. FEMA is the federal agency responsible for establishing and coordinating federal policies for civil emergency planning and for representing the president in working with state and local governments and the private sector to stimulate vigorous participation in civil emergency preparedness programs. Executive Order 12148. Thus, it is FEMA's responsibility to issue regulations for evaluation of emergency plans of any kind, and it must amend its own rules in order to lawfully enact regulations governing evaluation of utility emergency response plans. NRC regulations, 10 C.F.R. §50.47, 10 C.F.R. §50, Appendix E, alone cannot govern evaluation of such plans and do not satisfy APA requirements because the NRC is not the agency with the power to evaluate plans on emergency preparedness. FEMA is responsible for and must enact the regulations governing evaluation of such plans.

FEMA has previously recognized its responsibilities for enacting regulations governing evaluation of utility emergency response plans in testimony before Congress earlier this year. You stated then that, in developing criteria for use by FEMA in evaluating utility plans, your agency would solicit and consider a wide spectum of comment from all concerned groups before establishing these criteria. The announcement that you will proceed on an "interim" basis makes a mockery of those statements.

APA Requirements

The APA sets forth the only lawful methods by which an agency may enact and apply substantive regulations, such as the ones recently published for "interim use and comment". Unless regula-

tions fit within one of the statutory exceptions, where an agency chooses to proceed through notice and comment rulemaking to establish norms or rules governing agency action, then that agency must abide by the requirements of section 553 of the APA. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 545-46 (1978). Section 553 requires that notice and comment rulemaking be accompanied by advance publication of the rule, opportunity for public participation through submission of written comments, and publication of the final rule along with a statement of its basis and purpose. 5 U.S.C. §553 (1982). Each of these requirements is fundamental to administrative law. See Chocolate Manufacturers Association v. Block, 755 F.2d 1098, 1102 (4th Cir. 1985); see also 1K. Davis, Administrative Law Treatise §6.1 at 450 (2d ed. 1978).

The section 553 requirements are not meaningless provisions. "The APA establishes procedural requirements for rulemaking precisely because they are presumed to elicit responses which, when given the requisite consideration by the agency, may affect its decision." Simmons v. ICC, 757 F.2d 296, 300 (D.C. Cir. 1985). Notice and comment rulemaking is designed "to allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules." National Tour Brokers Association v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978). It was Congress' judgment "that the public interest is served by a careful and open review of proposed administrative rules and regulations." Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 881 (3d Cir. 1982)(emphasis added). The APA framework creates a prepublication dialogue which allows the agency to educate itself on the full range of interests the rule affects. See, e.g., Council of the Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 380 (D.C. Cir. 1981).

In simultaneously publishing and applying these new emergency planning rules, FEMA and NRC have failed to comply with each of the APA requirements. The agencies have thereby also undermined the important purposes to be served by those requirements.

Those Regulations Do Not Fit Within Any of the Section 553 Exceptions

The regulations recently published in the federal register do not fit within any of the exceptions to section 553 which would allow waiver of the section 553 procedural protections. Consequently, failure to abide by the section 553 notice and comment procedures

makes the rules invalid, and they cannot be applied to the Seabrook and Shoreham plants at this time.

The most basic premise about exceptions to the requirements of the APA is that they should be narrowly construed. "It should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." State of New Jersey v. United States EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980); see also cases cited therein.

1. The Regulations are Substantive Rules

The new regulations governing evaluation of utility emergency response plans are obviously substantive rules. Thus, the regulations do not fit within section 553(b)(A) of the APA, exempting interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice from the notice and comment requirements.

FEMA and NRC, themselves, are well aware that the new rules are substantive. They have acknowledged as much by publishing them for comment even while they are to be used on an "interim" basis. Further, current FEMA regulations exclude FEMA consideration of anything other than state and local planning and preparedness and only set forth criteria for review and approval of state and local radiological emergency plans and preparedness. 44 C.F.R. §§350.4, 350.5. If FEMA now intends to alter these rules to consider utility radiological emergency plans and set forth criteria for their review and approval, then it is making changes in substantive rules. An agency which is amending its rules must do so in compliance with section 553 of the APA. See, e.g., Consumer Energy Council of America v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982), aff'd sub nom, Process Gas Consumers Group v. Consumers Energy Council of America, 463 U.S. 1216 (1983).

In addition, the newly proposed regulations have all the classic characteristics of substantive rules. A rule which modifies existing rights, law or policy or affects individual rights and obligations is substantive. Also, if a rule is promulgated pursuant to statutory direction or under statutory authority, it is a substantive rule. See, e.g., W.C. Bowen, 807 F.2d 1502, 1504, as amended, 819 F.2d 237 (9th Cir. 1987).

These new rules can only be issued pursuant to FEMA's authority to develop and implement disaster preparedness programs, Disaster

Relief Act of 1974, 42 U.S.C. §5131 (1982), and Executive Order 12148, and therefore clearly are to be promulgated pursuant to FEMA's statutory authority. Further, FEMA is enacting new regulations which will significantly alter the criteria for evaluation of emergency response plans in cases where such plans are submitted by a utility. These rules affect the interests and rights of numerous individua s and states who are intimately affected by emergency response planning because they live in the areas which must respond to nuclear accidents. Thus, these regulations are substantive rules subject to the section 553 procedural requirements.

2. The Regulations Do Not Fit Within the "Good Cause" Exception to Section 553

The new proposed regulations also do not come within the section 553 exception for "good cause". FEMA cannot show in this instance that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B).

The good cause exception has repeatedly been found to be essentially an emergency procedure; notice and comment should be waived only when delay would cause real harm. The exception is not to be used to circumvent notice and comment requirements whenever an agency finds it inconvenient to follow them. See, e.g., Buschmann v. Schweiker, 676 F.2d 352, 357 (9th Cir. 1982); American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981); United States Steel Corp. v. EPA, 595 F.2d 207, 214, clarified on other grounds, 598 F.2d 915 (5th Cir. 1979). As stated in the legislative history to this provision of the APA:

> The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other

> hand, lack of public interest in rule-making warrants an agency to dispense with public procedure.
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> . . . .
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> It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection . . . . Cause found must be real and demonstrable.

S.Rep. No. 752, 79th Cong., 2d Sess. 19, 200, 217 (1945)(emphasis added).

A desire to implement a new program or policy quickly is not good cause under section 553. In Buschmann v. Schweiker, 676 F.2d 352, 357 (9th Cir. 1982), the court found no emergency and consequently no good cause where HEW claimed that interim regulations were immediately necessary to administer the new supplementary security income (SSI) program. Accord Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980). Similarly, in State of New Jersey v. United States EPA, 626 F.2d 1038 (D.C. Cir. 1980), the D.C. Circuit found no emergency and no good cause where there were statutory deadlines for enacting regulations under the Clean Air Act. Accord Western Oil & Gas v. United States EPA, 633 F.2d 803, 810-13 (9th Cir. 1980); United States Steel Corp. v. EPA, 595 F.2d at 214.

The reason for the narrowness of the good cause exception is to promote the important benefits derived from notice and comment rulemaking. "'When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decision-maker should be vigorously enforced.'" Buschmann v. Schweiker, 676 F.2d at 357 (quoting Western Oil & Gas v. United States EPA, 633 F.2d 803, 813 (9th Cir. 1980)). Public participation is especially important in cases involving health and safety issues like those implicated in emergency planning. As emphasized by the court in National Association of Farmworkers Organizations v. Marshall, 628 F.2d 604, 621 (D.C. Cir. 1980), a case in which the court required notice and comment before protective pesticide standards for children employed under the agriculture waiver program could be applied, "especially in the context of health risks, notice and comment procedures assure the dialogue necessary to the creation of reasonable rules." The National Association of Farmworkers Organizations v. Marshall court also emphasized that where regulations involve the first attempt of an agency to develop standards in a particular area, that is exactly

the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism. Id.

In no way can the situation at issue here qualify as one constituting good cause so as to allow dispensing with section 553 notice and comment procedures. No emergency situation exists. For one thing, in the case of Seabrook, the following additional issues must be resolved before the plant can receive a low power license: the adequacy of the New Hampshire part of the Seabrook Emergency Plan; the technical issues of biofouling, steam generator tubing, and environmental qualification of the RX coaxial cable; and various low power licensing issues. As was true in the cases of the SSI and Clean Air Act regulations discussed above, a mere need to administer a program or to have regulations to cover a particular topic does not create an emergency situation. FEMA's and NRC's desire to get these plans approved promptly is an insufficient reason for ignoring the APA requirements.

Additionally, the need for public input is absolutely crucial on this issue of health and safety. Many individuals and states have a real stake in ensuring that emergency plans are workable and effective because they actually live within the emergency planning zone. Their participation in the rulemaking process is invaluable. Furthermore, as was true in National Association of Farmworkers Organizations v. Marshall, because the changes FEMA is considering are so fundamental and involve an attempt to develop wholly new standards for evaluation of certain types of emergency plans, there is even a further reason for requiring compliance with notice and comment in this instance. Promulgation of FEMA regulations governing evaluation of utility offsite radiological emergency response plans will require fundamental changes from and additions to FEMA's current rules, applicable

only to state and local emergency response plans.[2] Real thought must go into determining the content of the rules, and the rules must be exposed to public scrutiny and discussion. FEMA, itself, has acknowledged its need to develop new regulations and to proceed carefully through that process.

These new proposed rules, therefore, do not fall within any of the exceptions to section 553, and failure to abide by the section 553 notice and comment procedures makes the rules invalid.

Post hoc Notice and Comment Does Not Cure Noncompliance with the APA

FEMA and NRC also cannot attempt to circumvent the requirements of section 553 by applying the drafted rules on an interim basis and later submitting those rules for notice and comment. Such a procedure is blatantly unlawful because the regulations are not valid until they have been enacted in compliance with the APA.

In State of New Jersey v. United States EPA, 626 F.2d 1038 (D.C. Cir. 1980), the court rejected the Administrator's argument that noncompliance with the APA was excused by the EPA's acceptance of public comment received within sixty days after promulgation of the "final" rule which was to be effective "immediately". Post hoc allowance of comments could not cure the failure to comply with section 553:

> "Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency

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2 For example, FEMA has consistently emphasized the importance of preparedness in assessing the adequacy of state and local plans. FEMA has found that a written plan, on its own, is an inadequate indicator of the effectiveness of an emergency response plan. Crucial to the plan's operation are training, drills, and an actual exercise. See 44 C.F.R. §350.9. In the absence of these critical indicators, FEMA has no basis for knowing whether individuals crucial to the plan's operation will understand and respond to a nuclear emergency as planned. Accordingly, fundamental changes will have to be considered so as to assure preparedness when only a utility emergency response plan is available.

> decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. Other courts have recognized this difference and rejected arguments similar to that asserted here:
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> > Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way. . . .We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a fait accompli.
>
> . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act."

626 F.2d at 1049, quoting United States Steel Corp. v. EPA, 595 F.2d 207, 214-15, clarified on other grounds, 598 F.2d 915 (5th cir. 1979), quoting City of New York v. Diamond, 379 F. Supp. 503, 517 (S.D.N.Y. 1974).

The Kollett v. Harris court also found that the fact that regulations were only interim ones and that interested persons were given an opportunity to comment following their promulgation did not excuse departure from the APA. The purpose of prior notice and comment is to afford persons an opportunity to influence agency action in the formative stage, before implementation, when the agency is more likely to be receptive to argument. 619 F.2d at 145.

Similarly, in National Association of Farmworkers Organizations v. Marshall, 628 F.2d 604, 621 (D.C. Cir. 1980), the court reasoned that an agreement by the agency to accept additional data from interested parties even after the regulations were in effect did not cure the procedural defects of noncompliance with the APA. "This ongoing sensitivity to developing knowledge is to be encouraged; it is a normal requirement of competent administration. It does not, however, justify suspension of requirements otherwise mandated for the initial promulgation of regulations." 628 F.2d. at 621-22 (footnotes omitted).

The reasoning of these courts applies equally here. FEMA's and NRC's proposal to apply these new regulations in the "interim" to the Seabrook and Shoreham plants and simultaneously request public comment is no substitute for prepromulgation notice and com-

ment. Given the fact that these two plants are the only ones to which review of a utility emergency response plan will apply, interim application makes an absolute farce of any subsequent notice and comment. Congress required that notice and opportunity for comment precede rulemaking. See State of New Jersey, 626 F.2d at 1050.

Conclusion

The requirements of the courts and of the APA are clear. Prepromulgation notice and comment are required for rules like the ones drafted by FEMA and NRC for review of utility emergency response plans. The rules do not fit within any of the exceptions to section 553 for they are substantive regulations and good cause does not exist to dispense with fundamental APA procedural protections. In addition, post hoc allowance of notice and comment is insufficient to satisfy the APA. Consequently, these rules cannot be issued on an interim basis and applied to the Shoreham and Seabrook plants, the only two plants to which the rules are relevant, before notice and comment rulemaking is complied with. Public input and serious consideration is required before these regulations can have the force of law.

The appropriate course of action is for FEMA, the agency responsible for emergency preparedness, to give advance notice of these regulations, allow for public comment, appropriately incorporate those comments into the rule, and publish a final rule with a statement of its basis and purpose. Only then, once FEMA has lawfully promulgated its rules, may they be applied to utility emergency response plans submitted for the Seabrook and Shoreham plants.

We stress, in conclusion, that these are FEMA's legal obligations. They may not be evaded simply because the review is being conducted at NRC's request to be used in an NRC licensing proceeding. There is nothing in NRC's rules or in any Memorandum of Understanding which can alter FEMA's requirements under the APA. If NRC's lawyers have advised FEMA otherwise, they are incorrect. In this connection, you will note that NRC went through a formal rulemaking before adopting its own new rule. The same standard applies to FEMA; indeed it applies with greater force since the detailed substantive criteria for reviewing utility plans are FEMA's criteria and FEMA's responsibility.

We therefore urge you to assert your statutory authority to proceed to consider the solicited comments and finalize a lawful

rule before conducting your review of the utility Massachusetts plan for Seabrook.

Sincerely,

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