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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

June 27, 1996

MEMORANDUM TO: David L. Morrison
Director
Office of Nuclear Regulatory Research

FROM: Martin G. Malsch
Deputy General Counsel
Office of the General Counsel

SUBJECT: OGC REVIEW OF THE DRAFT FINAL RULE ON A CONSTRAINT FOR AIR EMISSIONS FOR OTHER THAN POWER REACTORS

Subject to the modifications identified below, the Office of General Counsel is prepared to offer a "no legal objection" to the rulemaking package on establishing a constraint on air emissions for other than power reactors. We have also included the issues raised on this package by the EPA's Office of General Counsel for your information.

1. The Commission Paper should include a brief discussion of the context for this rulemaking, i.e., EPA rescission.

2. The statement on page 2 of the Commission Paper that "A provision defining the effective date of the rule has been added to ensure that there is not a time when both NRC's and EPA's rule would be in effect" is somewhat unclear. We would suggest that the sentence read: "A provision defining the effective date of the rule has been added to ensure that the NRC constraint rule and the EPA rescission rule take effect at the same time.". This same revision should be made on page 22 of the Federal Register Notice (FRN).

3. The material on page 2 of the Commission Paper relating to enforcement issues is somewhat misleading. The statement in the Paper indicates that an "exceedence in subsequent years would not be violations". It is our opinion that these future exceedences would be violations warranting enforcement action if they were a result of the licensee not following its corrective action program. Although this concept was stated correctly on page 7 of the FRN, the same problem exists in the first full paragraph on page 2 of the Public Announcement.

4. We should notify the Commission that the final EPA rescission rule will not be issued until the NRC informs the EPA that the Commission's procedures for suspending or terminating deficient Agreement State programs are finalized. We should also notify the Commission that the Office of State Programs plans to apply the procedures for suspension and termination of Agreement State programs that were submitted to the Commission on April 25, 1996. As such these procedures will be treated as final despite the fact that the Policy Statement on Principles and

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Policy for the Agreement State Program has not been approved by the Commission for final implementation. Furthermore, the FRN for the final rule will indicate that the Commission does have these procedures in place. This should satisfy EPA's concern.

5. The material on page 6 of the FRN should include a cite to the EPA's proposed rule on rescission.

6. The first sentence in the first full paragraph on page 7 of the FRN states that "The constraint on dose from air emissions is different than a limit". A similar statement is made on page 18 and page 23 of the FRN in the response to comments on Issue 3. These statements are inconsistent with the discussion in the response to Issue 2 on pages 14 through 17 of the FRN and the statements should be clarified accordingly.

7. On page 13 of the FRN we refer to the primary purpose of the rulemaking as "to reduce costs" by allowing EPA to rescind. This statement should be revised to read that the purposes of the rulemaking are not only to reduce costs but also to ensure that doses are maintained "at the low level currently achieved by NRC licensees" (which is now stated as a secondary purpose).

8. You should consult with Mike Lesar of the Rules Review and Directives Branch, ADM, about any Office of the Federal Register requirements as to making final rule effective dates dependent on non-specific time conditions. In addition, effective dates may not be appropriate for inclusion in the text of a rule, as the draft text now attempts to do in Section 20.1101(d)(3) on page 34 of the FRN.

9. The response on page 28 to Issue 12 indicates that the rule will be codified in a "separate Subpart E" to Part 20. However, the regulatory text doesn't provide such a direction to the Office of the Federal Register. In addition, the statement should be revised to read "...but that it is not the same as a limit necessary for adequate protection ...".

10. Add the following to the discussion of Issue 5 on pages 20 through 22 of the FRN (and also to page 13 of the Regulatory Analysis): "Under Section 274 of the Atomic Energy Act the Commission reviews Agreement State programs to ensure that adequacy and compatibility of the State Program is maintained. The Commission has also approved procedures to suspend or terminate programs that are not adequate or compatible.

In addition to our comments, EPA OGC staff has identified the following issues that will need to be resolved:

1. The need for the procedures on Agreement States noted above (resolved by point number 10 above).

2. Delete the phrase "recommend and implement corrective actions" pursuant to Subpart I on page 11 of the FRN as incorrect (agree).

3. To avoid any unnecessary provocative comments, delete the phrase "are necessary under Subpart I as EPA does not perform routine inspections to ensure compliance with their regulations" on page 11 of the FRN (agree).

4. On page 17 of the FRN, the need to emphasize "enforcement discretion" as the rationale for addressing situations where individual licensees are unable to comply (disagree; retain existing language which is broad enough to cover the use of enforcement discretion)

5. The reference, on page 24 of the FRN in the response to comments on Issue 9, to "nearest resident" is incorrect. The reference should be to the "maximally exposed person outside the facility". Although this is usually the nearest resident, this is not the case in all circumstances (agree).

6. The reference, on page 24 of the FRN in the response to comments on Issue 9, to "environmental" air emissions is troublesome to EPA in that the implications of this term are unclear. EPA suggests using the phrase "emissions to ambient air." (agree)

7. The reference, on page 24 of the FRN in the response to comments on Issue 9, to "patients are excluded from this rule" is incorrect. EPA notes that although patients need not be considered in determining compliance, that it is not true that patients are excluded from the rule's coverage (while the exact nature of the EPA concern is unclear, we believe that the NRC and EPA agree on this issue. The problem could be fixed very simply be deleting the first sentence of the response; the last sentence of the response on page 25 should be sufficient to make the staff's point in response to the commenters).

8. Point number 3 on page 28 of the FRN notes that the language in the rule has been changed to indicate the exclusion of Rn-222 from the rule. However, EPA cannot find any reference in the rule text documenting this exclusion (agree).