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

March 9, 1979

MEMORANDUM FOR: Howard K. Shapar, Executive Legal Director

THRU: Edward S. Christenbury, Chief Hearing Counsel

FROM: WJO William J. Olmstead

SUBJECT: SECTION 189(a) HEARING REQUIREMENTS FOR OPERATING LICENSE AMENDMENTS

Niagara Mohawk Power Corporation (Licensee) has requested Commission approval to operate a radwaste incinerator system which it plans to construct at its Nine Mile Point facility. The Licensee seeks approval pursuant to 10 CFR §§20.305, 20.106(b) and 20.302. Since the Licensee plans to construct the facility at Nine Mile Point, the NRR technical reviewers believe an amendment to the Licensee's Part 50 license is required. While no NRC action has yet been taken on the request, substantial public interest in the proposal has been generated and numerous requests for hearing on the proposal have been received. The NRR Staff is split on the question as to whether the request involves a significant hazards consideration under Section 189(a) of the Atomic Energy Act of 1954 (as amended).1/ NRR has prepared a Staff paper recommending to the Commission that a hearing be noticed on the matter. You have requested a memorandum of law setting forth the legal requirements for hearings under Section 189(a) where: (1) a hearing request has been received on an amendment application prior to the publication of notice and (2) the hearing is requested on a matter determined by the Staff to involve no significant hazards considerations.

1/ 42 USC 2239(a), (1976).

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Section 189(a)[1/] contains a number of clear requirements. A mandatory hearing is required on any licensing action taken to grant a construction permit for utilization and production facilities under 42 USC §§2133 or 2134(b) or a testing facility under 2134(c). If such a mandatory hearing has been held and a construction permit issued as a result, an operating license, construction permit amendment or operating license amendment may be issued without a hearing if 30 days prior notice is given before issuing the license or amendment. If a request for a hearing is received from a person with the requisite affected interest following notice then the request must be granted. Prior notice may be dispensed with if no significant hazards considerations are associated with a construction permit amendment or an operating license amendment.

1/ "Sec. 189. Hearings and Judicial Review.--
"a. In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit...the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104 b. for a construct[illegible] permit for a facility, and on any application under section 104 c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

A number of issues concerning amendments to construction permits and operating licenses are unresolved by the language of Section 189:

1. Is there a right to a hearing on license amendments which involve no significant hazards considerations?

2. Must the opportunity for hearing and any hearing be given before the amendment is issued in cases which do not involve significant hazards considerations?

3. Does a person with the requisite affected interest have a right to challenge the "no significant hazards" determination? If so, how and in what manner?

4. Does Section 189 require a hearing on an amendment if the request for hearing is made before (a) the significant hazards determination is made or (b) the Commission determines what action to take on the application?

<u>Right to a Hearing on Amendments Involving No Significant Hazards</u>

Section 189 permits the NRC to dispense with thirty days prior notice of an amendment action if it is determined that the amendment involves

"no significant hazards considerations." There is no definitive legislative history on what is meant by "significant hazards." The joint committee report states: "Finally, it is expected that the authority given AEC to dispense with notice and publication would be exercised with great care and only in those instances where the application presented no significant hazards consideration."[1/] As one measure of the test, however, the joint committee states that "Of course, where an amendment presents a significant hazards consideration, referral to the ACRS should follow.[2/]

It is not clear when the words "significant hazards consideration" were added to the draft Section 189 legislation. Earlier drafts of the section used words such as "significant safety question" or "no substantial new safety questions."[3/] The final Committee Report, however, indicates that the significant hazards criterion "...is presently being applied by the Commission under the terms of AEC Regulation 50.59."[4/] That regulation

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1/ United States Code Congressional and Administrative News. H.R. Rep. No. 1966, S. Rep. No. 1677, 87th Cong., 2d Sess., reprinted in [1962] U.S. Code Cong. Ad. News 2207, 2214, hereinafter "1962 J. Comm. Rpt.".

2/ Id., p. 2215.

3/ See e.g., ltr. to J. T. Ramey from L. K. Olson dtd. Nov. 30, 1960, Joint Committee on Atomic Energy, "Improving the AEC Regulatory Process," Vol. II Appendix, 87th Cong., 2d Sess., p. 578 (Comm. Print 1961).

4/ 1962 J. Comm. Rpt., supra n. 1, p. 2214. Section 50.59 was a codification of the Commission's decision in General Electric Company (Vallecitos), 1 AEC 541 (1960); See 27 Fed. Reg. 5491 (June 9, 1962) and 26 Fed. Reg. 3030 (April 8, 1961). These provisions were also included in the Vermont Yankee technical specifications in the Commission's decision in Yankee Atomic Electric Company, 1 AEC 768 (1961).

was first published June 9, 1962 and made effective July 9, 1962 (27 Fed. Reg. 5491). The Committee report is dated July 5, 1962. Thus, it is apparent that the Committee was aware of the statement of considerations accompanying 50.59. The Statement of Considerations, consistent with the Committee Report, states: "If the proposed change involves significant hazards considerations not previously described or implicit in the hazards summary report, the proposed change, test or experiment must be referred to the [ACRS] for report and must be scheduled for public hearing." The Statement of Considerations further notes the Commission's intention to delegate authority to the staff to determine whether amendments involve significant hazards and to authorize the staff to issue amendments which the rule does not require to be referred to the ACRS and to public hearing.[1/]

It cannot be definitively determined whether the Joint Committee and/or the Commission thought that a hearing was required on amendments involving no significant hazards if such hearings were requested by a person with the requisite affected interest under Section 189. It is noted, however, that at the time it was relatively rare for the AEC to receive a request for intervention in mandatory hearings and the Commission and Congress tended to view the hearing process as informa 'e

1/ This is a significant authorization since the Joint Committee Staff report proposing the Section 189 legislation indicated that the determination should be made by the Licensing Board. Staff of Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Report on Improving the AEC Regulatory Process 73 (Comm. Print 1961). Since the J. Comm. Rpt. is silent on this issue but references 50.59, it is reasonable to conclude that Congress was endorsing Commission practice in this regard.

rather than adversary. Prior to the 1962 amendments, however, Section 189 was interpreted to require mandatory hearings on practically every licensing action. During the April 17, 1962 hearings, the Joint Committee questioned Commissioner Olsen concerning the Vallecitos decision. He indicated that the Commission was aware that it had taken a stricter view of the mandatory hearing requirement than Congress had intended.[1/] The Vallecitos decision attempted to abate that requirement for changes not involving significant hazards. Major debates were held during 1961-62 concerning whether the mandatory ajudicatory hearings were helpful. The Joint Committee Report indicates throughout that "informal" hearings are encouraged and at one point states: "The second hearing on the operating license was regarded, by most witnesses, as unnecessary and burdensome in the absence of bona fide intervention."[2/]

It probably could be fairly implied that Section 189 and the associated legislative history can be read to the effect that where a mandatory CP hearing has previously been held, hearings are not required on any OL or CP amendment which does not involve significant hazards even if a hearing

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1/ AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the J. Comm. on Atomic Energy, 87th Cong., 2d Sess. 6 (April 17, 1962).

2/ 1962 J. Comm. Rpt. supra, n. 1, p. 4, p. 2214.

were to be subsequently requested.[1/] Such a conclusion, however, assumes that the 1962 amendments affected Section 189 in its entirety rather than just the mandatory hearing requirement adopted by the Congress in 1957.[2/] Consistent Commission practice since 1962 has been to interpret Section 189 as affording a right to a hearing, if requested, on license amendments regardless of whether they involve significant hazards. Case law also supports this latter view.

The District of Columbia Circuit Court of Appeals considered this issue in a case involving an extension of the last date for completion of construction.[3/] The Court discusses the argument that the last two sentences of Section 189(a) indicate Congressional intent to dispense with hearings when the Commission determines that the amendment involves no significant hazards consideration.[4/] The Court states that "...the Commission must surely make the required significant hazards determination, and note such determination in its order, if it intends to put forward such determination as the basis for its denial of a hearing." The court noted that such determinations require "close scrutiny". While

1/ In a memorandum by David Cavers and William Mitchell presented to the Joint Committee as a result of the April 17, 1962 hearings, the view is expressed that "...under the Holifield-Pastore bill, a hearing on an amendment would never be mandatory, presumably the Commission, in the exercise of its discretion, would require a hearing for an amendment raising an important safety issue." Proposed Amendments to the Atomic Energy Act of 1954: Hearings on H.R. 12336 and S. 3491 Before the Subcommittee on Legislation, J. Comm. On Atomic Energy, 87th Cong., 2nd Sess. 51 (1962).

2/ 71 Stat. 576, P.L. 85-256 (September 2, 1957).

3/ Brooks v. AEC, 476 F. 2d 924 (D.C. Cir. 1974).

4/ The government did not make this argument in its brief but, of course, it may have suggested such an interpretation during oral argument or it may have been made by intervenors.

this language seems to indicate that no hearing is required where there are no significant hazards, the court proceeds to discuss the legislative history of Section 189 and states that "...it was Congress' intent to lessen the mandatory hearing requirement only when there was no request for a hearing."[1/] The court concludes that where petitioners had already formally expressed interest in a proceeding "elementary fairness" demands that notice and an opportunity for hearing be provided before taking the action. While the court does not further address the question of whether the hearing may be dispensed with or whether the action can be taken *pendente lite* where there are no significant hazards once the opportunity has been provided, it seems fair to conclude that the court's decision should not be read as *requiring prior* hearings on amendments involving no significant hazards considerations. The Court's earlier reference to denial of a hearing would be consistent with the remainder of its discussion if it read "denial of a *prior* hearing." Since the Court had to decide the case without benefit of a record to review on the significant hazards determination, it logically assumed that significant hazards might exist as a preface for the rest of its decision.

Whether or not *Brooks* is properly read to require a hearing on all amendments if there is a request by a person having an affected interest, Commission and Staff practice since 1973[2/] indicate that Section 189 is now

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1/ *Brooks*, *supra*., p. 926.

2/ Commission rules from 1962 to 1972 (10 CFR 2.106) made clear that for amendments for which pre-notice had not been issued, the post-notice provided 15 days opportunity to request a hearing. There is no indication that a request would have acted to stay the amendment.

interpreted to require an opportunity for hearings on OL and CP amendments when requested. This does not mean that an adjudicatory hearing will be held, however, only that if requested, an opportunity for hearing will be afforded to interested persons. The actual holding of a hearing would depend upon such persons making the required showings and overcoming the inevitable problem of framing litigable contentions and surviving appropriate motions for summary disposition. The latest statement of NRC Staff position on this issue indicates the view that "a significant hazards determination" involves an essentially procedural determination, viz, whether opportunity for hearing must be afforded before or after issuance of an amendment.[1/] This also is apparently the view of the Appeal Board.[2/]

Timing of the Hearing

While Section 189(a) can be fairly read to require a hearing on request on all CP or OL amendments regardless of whether such amendments involve significant hazards, as the above discussion indicates, the legislative history is not entirely clear on the point. It is even more ambiguous on the issue of timing concerning amendments.

1/ "NRC Staff Response to Commission Questions of December 11, 1978," Northern Indiana Public Service Co. (Bailly Nuclear 1), Brief p. 36 (January 10, 1976).

2/ Georgia Power Co. (Vogtle Units 1 and 2), ALAB-291, 2 NRC 404, 406 (1975).

Prior to the 1957 amendments 10 CFR 2.102 (1956) had provided that construction permits and operating licenses could be issued without prior notice or prior public hearing. The Joint Committee criticized the procedure by which a construction permit could be issued prior to the hearing.[1/] A study undertaken by the Joint Committee's staff concluded that the statute only required "...an opportunity for hearing, as opposed to the automatic holding of a hearing before action is taken."[2/] Congress then amended Section 189 to provide for 30 days prior notice on each application for a facility license under Section 103 or 104 b and for testing facility applications under Section 104 c.[3/] While the amendment still was not clear as to when the hearing was required to be held it was generally concluded that mandatory hearings were to be held prior to action.[4/] The Supreme Court in 1961 held that no operating license could issue until after notice and the holding of hearings at which respondents could be heard if they desire.[5/]

1/ Section 202: Hearings on H.R. 7383 Before the Joint Committee on Atomic Energy, 85 Cong. 1st Sess. 487-88 (February 26-March 5, 1957).

2/ Staff of J. Comm. on Atomic Energy, 85th Cong. 1st Sess., A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities 19 (Comm. Print 1957).

3/ 71 Stat. 576, P.L. 85-256 (September 2, 1957). For further discussion, _see_ House Rep. No. 435, May 9, 1957, p. 12.

4/ Cohen note, _supra_, p. 9.

5/ _Power Reactor Development Co._ v. _Int. Union of Elec., Radio and Machine Workers, AFL-CIO, 367 U.S. 396 (1961)._

Because of its wording, the 1957 amendment could be construed as requiring a mandatory hearing for operating licenses. The AEC General Counsel so so interpreted the provision.[1/] This gave rise to the 1962 amendment where the Joint Committee's plain purpose was to relax the mandatory hearing requirement.[2/] The Committee states:

> Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing.... It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration."[3/]

It is significant that the JCAE staff report had recommended that if it were concluded that no hearing was necessary on changes, that a notice of proposed decision should be prepared for Federal Register publication, "...to be effective not less than a specified period after publication."[4/] In a note to its comment, the JCAE staff recommended codifying the Commission's Order in Vallecitos, supra.

The problem presented by the 1962 amendments and associated legislative history is that no distinction is made between "mandatory" hearings where there has been no request and those hearings which are required to be held upon request. If the 1957 amendment is interpreted to have amended the "hearing on request" out of the Act for those licensing actions for

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1/ See discussion in Note to Mr. Shapar frm. J. A. Cohen dtd. Jan. 2, 1970, p. 3.

2/ 1962 J. Committee Rpt. supra, n. 1, p. 4.

3/ Id.

4/ JCAE Staff Report, supra n. 1, p. 4, p. 73.

which mandatory hearings were required then the 1962 amendments relaxed the requirements for hearings prior to action only "in absence of a request therefor". If, on the other hand, the 1957 amendments were additive and did not otherwise affect the requirement for a "hearing on request" except to provide for prior notice, then the 1962 amendments, by relaxing the notice requirement returned the timing of "hearings on request" to the legal status afforded prior to 1957. The Joint Committee Staff Study preceding the 1957 hearings suggested four procedures by which the AEC could meet its public hearing requirements.[1/] The fourth procedure is strikingly similar to the 1957 amendment. The Study states:

> "A fourth procedure would be similar to that presently in effect of issuing a notice of proposed action, except that here a public hearing would be automatically scheduled, even if not requested, at the end of the notice period.
> . . .
> The disadvantages of this type procedure are that it would . . . [impose] both the burden of the [notice of proposed action] and [required hearings]."[2/]

While the legislative history is vague on the point, it would appear to be a better view considering the foregoing discussion of Brooks, Commission practice, and the 1962 legislative history, to construe the report's words "dispense with the 30-day notice requirement" as encompassing both the prior notice and a prior request for hearing. Under this view Section 189 would be properly construed as granting hearing rights upon request to persons with affected interests on CPs, OLs, CP amendments and

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1/ Staff of Joint Comm. on Atomic Energy, 85th Cong., 1st Sess., A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities 22 (Comm. Print 1957).

2/ Id, p. 23.

OL amendments except where the CP was issued following a mandatory hearing. In the latter case, an OL and CP and OL amendments which involve significant hazards considerations may be issued without a hearing provided 30 days prior notice and opportunity for hearing is given. If no significant hazards are associated with an OL or CP amendment the action can be taken without either prior notice or opportunity for prior hearing even if requested.

Where there are no significant hazards considerations, the decision to offer the opportunity for hearing after issuing an amendment might be challenged, probably on the ground that due process requires that, where a right to be heard exists (as Commission practice recognizes), it must be accommodated in a meaningful time and in a meaningful manner.[1/] In dealing with such a due process challenge to AEC's action in removing an issue from a licensing hearing and treating it in a rulemaking proceeding, the District of Columbia Court of Appeals observed:

> "Administrative action taken <u>prior</u> to a full hearing has always been permissible when the state's interest in acting promptly to promote the general welfare, including economic well-being outweighs the individuals interest in having the opportunity to be heard before the state acts, perhaps in error, in ways that may cause him significant injury."[2/]

1/ Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

2/ Union of Concerned Scientists v. AEC, 499 F. 2d 1069, 1081 (D.C. Cir. 1974` In this case the Commission had removed the ECCS issue from individual licensing cases and adopted an interim rule, effective immediately, without prior opportunity for public comment or participation.

Following the 1962 amendments, the Commission amended Part 2 of its Rules of Practice. In the accompanying Statement of Considerations the Commission stated:

> "In the absence of a request by an applicant or an intervenor, the Commission will not normally direct that a hearing be held...unless there is a difficult safety problem of unusual public importance or there is substantial public interest which would warrant that course."[1]

This statement is consistent with the Court's formulation in UCS. There appears to be no legal impediment to issuing an amendment and later holding a hearing during which it might be concluded that the amendment should not have been issued in the first instance.

Challenging the Significant Hazards Consideration

The preceding discussion assumes that where an amendment is issued without prior 30-day notice and without a prior opportunity for hearing, the determination that no significant hazards were involved was correct and not challenged. It appears appropriate to examine whether the significant hazards determination can be challenged and if so when and in what type proceeding.

No legislative history can be found on this issue. The Brooks court, however, states that where the Commission, without explanation, puts forward the no significant hazards determination as its basis for a

1/ 27 Fed. Reg. 12184 (December 8, 1962).

denial of hearing, the public interest requires close judicial scrutiny.[1/] This language is consistent with the recent trend in the circuit courts to require that hitherto informal policy decisions be taken only after opportunity for public input has been provided through some type of proceeding.[2/] Courts have required other agencies to consider the views of those whose interests might be affected before making a discretionary decision which has the effect of precluding a forum for the expression of contrary views. This is particularly true where the agency action appears to fail to protect the beneficiaries of the administrative scheme.[3/]

Thus, SEC was reversed in a "no action" decision made without input from stockholders seeking to have the SEC staff investigate DOW Chemical's refusal to include a proposal to discontinue napalm manufacture in the company's proxy materials.[4/] Similarly, the court reviewed and reversed an EPA decision not to institute proceedings to cancel DDT registration.[5/] Assuming that the significant hazards determination is used as a procedural device, going to the issue of when to hold the hearing rather than being used to deny a hearing altogether, it is apparent that such a situation stands in contrast to the cases cited above where no hearing was provided at all. The Commission's Rules of Practice provide a method for challenging the no significant hazards determination prior

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1/ 476 F.2d. 924, 926.

2/ Stewart, Reformation of Administrative Law, 88 Harv. L. Rev. 1669, 1752 (1975).

3/ Id. p. 1755.

4/ Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972).

5/ Environmental Defense Fund v. Ruchelshaus, 439 F.2d 584 (D.C. Cir. 1971).

to issuance of a license amendment in cases where a person has actual notice of an application for amendment. Under 10 CFR 2.206 a person may request that the appropriate Staff Office Director institute a proceeding to modify a license. The Director may deny such a request but must set forth the basis for his denial in writing. The denial is subject to Commission review within twenty days. Whether or not the courts would review this determination is not clear. The courts have uniformly held that they will not review collateral or interlocutory rulings of the Commission.[1/]

If a hearing were scheduled after the amendment issued, those seeking to challenge the determination would not have been deprived a hearing on the merits of the amendment. Consequently, they probably would have to demonstrate entitlement to equitable relief, such as a stay, rather than be heard as a matter of law. Such a challenge would be subject to the Virginia Petroleum Jobbers[2/] test for a stay. Assuming the no significant hazards determination was correct it is difficult to see how the stay test could be met. An alternate course would be to challenge the no significant hazards considerations determination at the licensing hearing. Here again, a petitioner would confront the stay test as codified in 10 CFR 2.788.

1/ Honicker v. NRC, ___ F.2d ___, No. 78-2137 (D.C. Cir. Dec. 21, 1978); Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1974); Thermal Ecology Must be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970).

2/ Virginia Petroleum Jobber's Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

Requests for Hearing Received Before Making a Significant Hazards Consideration

Previously in this discussion it has been assumed that the Commission was able to determine whether or not an application involved significant hazards consideration. Where an application for amendment is received and it is not clear whether it involves a significant hazards consideration it is normal practice to wait until a conclusion is reached in the safety evaluation before determining whether 30 days prior notice should be provided. In some cases, where time has been of the essence and the Staff's review was expected to take some time, the action was pre-noticed even though it was ultimately determined that there were no significant hazards. While 10 CFR 2.105(a)(4) permits the appropriate Director to afford such an opportunity for public hearing, the choice is discretionary, not legally required. The question then becomes: what effect a request for hearing, received from a person with an affected interest who has actual notice of the licensee's application, has on the ability of the Staff to proceed with its significant hazards determination. No legal authority can be found which would provide any insight into this question. Applying the principles enuciated above, however, it would appear that no right of hearing accrues until a determination is made to take some form of agency action. Since that decision necessarily implies the Staff's resolution of the significant hazards question, it is fair to conclude that no hearing right, except as afforded under 10 CFR 2.206 or 2.105, accrues until the Staff's conclusion in its safety evaluation is reached. At that time if there are no significant hazards the license may be amended and notice of hearing issued after the fact.

Conclusion on the Nine Mile Application

While it is not legally required to hold a hearing on the Niagara Mohawk proposal to build an incinerator if no significant hazard considerations are present, the Commission's policy on discretionary hearings seems to dictate holding a hearing in this case. The Statement of Considerations accompanying the promulgation of 10 CFR Part 2 indicates that the Commission was inclined to hold a hearing if there is a difficult safety problem of unusual public importance or there is substantial public interest which would warrant that course. While the Nine Mile application may not present the former it certainly presents the latter category. In 1971 the Commission amended 10 CFR 2.105 to provide for "earlier notice of proposed action in nuclear power plant licensing, in order to facilitate public participation...with a minimum of licensing delays."1/ The changes allowed notice before the Staff had reached its conclusion as to whether the proposed amendment complied with the Commission's regulations. Thus, the Commission's rules clearly contemplate discretionary pre-notice of amendments and hearings in circumstances where the public interest warrants. Numerous requests for hearing have been received including two countys and the State of New York. In the circumstances the Staff is seeking Commission guidance in a Staff paper in this office for concurrence. Although the action in this case can be taken pendente lite upon the determination that the amendment involves no significant hazards, there has been substantial discussion among the Staff on the question. In view of the large public interest in this matter it is evident that it

1/ 36 Fed. Reg. 4686 (1971).

would be better policy to refrain from issuing the amendment until hearings on this matter have been completed. The paper recommends that the Commission notice the matter for hearing on public interest grounds and I recommend that you concur for the office.