Mr. Nathaniel Scurry
Office of Management and Budget
Reports Management, Room 3201
New Executive Office Building
Washington, D. C. 20502

Dear Mr. Scurry:

In accordance with Section 3507 of Public Law 96-511 of December 11, 1980 and regulations of the Office of Management and Budget, I am enclosing for OMB review copies of Standard Form-83 and the Supporting Statement covering an information collection requirement regarding licensees analyses of significant hazards issues in their license amendment requested. The requirement is necessitated by recent legislation, as described in the enclosed Commission papers, SECY-83-16 and 16A.

The estimated respondent burden is ~~2,400~~ 6,000 hours.

In accordance with NRC's procedures, my staff has reviewed this proposed information collection for duplication and found no similar requirement in the agency. Therefore, we are transmitting this material for appropriate OMB review and approval.

OMB approval is requested by the close of business Friday, February 18, 1983, to ensure adequate time to meet the legislative deadline.

Sincerely,

Patricia G. Norry, Director
Office of Administration

Enclosures:
As stated
DISTRIBUTION:

PDR	WJOlmstead
PNorry, ADM (2)	TDorian
WBesaw, TIDC	OELD R/F
DMB Official file	OELD S/F
DMB r/f	Central File
WSchwink, DEDORGR	Regs R/F
IMB (Program Office)	bcc: Purple
	Trammell

OFC	:OELD	:OELD	:NRR	:DEDORGR	:DMB	:ADM	:
NAME	:TDorian:de	:WJOlmstead	:RPurple	:WSchwink	:SScott	:PNorry	:
DATE	:2/11/83	:2/ /83	:2/ /83	:2/ /83	:2/ /83	:2/ /83	:

SUPPORTING STATEMENT

Request for OMB Approval of Reporting Requirement in Interim Final Rule on "Notice and State Consultation"

As explained in the enclosed Commission papers, SECY-83-16 and 16A, NRC is under a tight, legislatively-imposed deadline to promulgate several rules. One of these, an interim final rule on "Notice and State Consultation," involves a reporting requirement, concerning the issue of significant hazards considerations, that needs OMB's approval. The reporting requirement does not overlap or duplicate any other NRC or federal information collection requirements. It is found in pages 13, 20, 26 and 28a of enclosure 4A of SECY-83-16A and pages 13, 20, 26 and 28 of enclosure 4A of SECY-83-16. The preamble of the rule in enclosures 4 and 4A explains the importance of the significant hazards issue. In this context, review of enclosures 3 and 3A, involving a sister rule, may be helpful.

Under §§ 50.91(a)(1) and (b)(1) of the rule (see pages 26 and 28 or 28a), a licensee requesting an amendment must provide to the NRC and the State in which its facility is located its amendment application and its analysis about the issue of significant hazards. To get a quick start on the public notification and State consultation procedures required by the legislation, both NRC and the State need licensees' analyses on significant hazards issues because licensees are in the best position to explain their amendment requests: NRC needs licensees' analyses to quickly make and publish for public comment its "proposed determinations" on significant hazards issues (see the explanation of "proposed determinations" in the preamble of the rule); and the States also need licensees' analyses in order to quickly consult with NRC (see the State consultation procedures in the preamble of the rule).

As discussed in enclosure 5 of the two papers described before, the rule would apply to 76 operating nuclear power plants and to two testing facilities. Licensees of these reactors request about 600 amendments per year, an average of about eight requests per year for each licensee. It is estimated that a licensee would spend on the average of about ~~four~~ hours per analysis, ~~(32 hours for all eight of its amendment requests per year)~~: most analyses would simply require a quick determination under the standards in § 50.92(b) of the rule described in enclosures 3 and 3A; some amendment requests would require more extensive analyses under the standards in § 50.92(c). For 600 amendments, the total burden on licensees would be about ~~2,400 staff~~ hours. Assuming an hourly rate of ~~$75~~, an analysis for an amendment request would cost a licensee about ~~$300~~. The total cost for 600 amendments would be about ~~$180,000~~.

NRC would use a licensee's analysis as a starting point for its significant hazards review. ~~On the average, NRC would spend about 10 hours reviewing each request, for~~ a total of 6,000 hours ~~for~~ 600 requests per year. ~~It would thus devote about three person years of staff time to all 600 amendment requests (assuming 2,000 hours per staff year). and increase its information budget by this amount, that is, by 6,000 hours.~~

[7590-01]

NUCLEAR REGULATORY COMMISSION

Documents containing reporting or recordkeeping requirements:
Office of Management and Budget review

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget Review of information collection.

SUMMARY: The Nuclear Regulatory Commission has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

1. Type of submission, new revision or extension: New.

2. The title of the information collection: Notice and State consultation.

3. The form number if applicable: N/A.

4. How often the collection is required: Each time a licensee of a nuclear power plant or of a testing facility requests a license amendment.

5. Who will be required or asked to report: As stated in No. 4.

6. An estimate of the number of responses: 600 per year.

7. An estimate of the total number of hours needed to complete the requirement or request: ~~4~~ 6 hours per license amendment, for a total of ~~2,400~~ 6,018 hours for 600 amendments.

8. An indication of whether Section 3504 (h), Pub. L. 96-511 applies: N/A.

9. Abstract: Under an NRC interim final rule, "Notice and State Consultation," a licensee of a nuclear power plant or of a testing facility would have to provide to the NRC and the State in which its facility is located its amendment application and its anlaysis about the issue of significant hazards.

Copies of the submittal may be inspected or obtained for a fee from NRC Public Document Room, 1717 H Street N.W. Washington, D.C. 20555.

Comments and questions should be directed to the OMB reviewer, Jefferson B. Hill (202) 395-7340.

NRC Clearance Officer is R. Stephen Scott, (301) 492-8585.

Dated at Bethesda, Maryland, this day of , 1983.

Patricia G. Norry, Director
Office of Administration

AA61-2 PDR

OFFICE OF THE SECRETARY

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

IN RESPONSE, PLEASE REFER TO: M830222

ACTION - GCunningham
Cys: Dircks
Roe
Rehm
Stello
Denton

February 28, 1983

WO

MEMORANDUM FOR: William J. Dircks, Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - DISCUSSION OF SECY-83-16A - REGULATIONS TO IMPLEMENT PUBLIC LAW 97-415, 2:30 P.M., TUESDAY, FEBRUARY 22, 1983, COMMISSIONERS' CONFERENCE ROOM, D.C. OFFICE (OPEN TO PUBLIC ATTENDANCE)

The Commission provided OELD with guidance for the purpose of revising SECY-83-16A and requested that the paper be returned to the Commission for review and affirmation.
(OELD) (SECY Suspense: 3/4/83)

(Subsequently, SECY-83-16A was scheduled for affirmation on Thursday, March 10, 1983.)

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Ahearne
Commissioner Roberts
Commissioner Asselstine
Commission Staff Offices
PDR - Advance
DCS - 016 Phillips

Rec'd Off. EDO
Date 3-1-83
Time 9:00 P

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1p

830870

AA61-2 POR

WO
Dorian

LAW OFFICES OF
DEBEVOISE & LIBERMAN

1200 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE (202) 857-9800

February 14, 1983

The Honorable Nunzio J. Palladino
Chairman
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Chairman:

NRC Rulemaking Regarding No
Significant Hazards Consideration

I. BACKGROUND

The NRC Staff's most recent draft proposal to the Commission regarding license amendments involving no significant hazards considerations included "reracking of a spent fuel storage pool" as a specific example of an amendment that is "likely" to involve significant hazards considerations. (SECY-83-16 at p. 21, Enclosure 3 (January 13, 1983)) During the January 18, 1983 Commission meeting wherein this draft proposal was discussed, Commissioner Ahearne expressed concern that this proposed example did not fall within the three technical criteria set forth by the Staff for identifying activities involving significant hazards considerations. The Staff's position is that the reracking example was not added because it fell within the three criteria, but rather was added at the instigation of the legislative process. SECY-83-16 at pp. 16-17. We believe the Staff's position to be in error.

We have analyzed the appropriate legal authority and legislative history regarding this matter and bring it to your attention for consideration. From our analysis, as set forth more fully below, we conclude that (1) congressional action did not bind the NRC to include reracking spent fuel pools as examples of licensing amendments that are likely to involve significant hazards considerations, (2) in any event, the legislative history viewed as a whole does not support the Staff position that reracking of spent fuel pools should be generally listed as an example of amendments likely to involve significant hazards considerations, and (3) adopting the Staff proposal

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on this issue would, in effect, result in the repeal by implication of prior legislation as it relates to amendments regarding spent fuel pool rerackings.

II. DISCUSSION

A. The Commission Is Not Bound By Enabling Legislation To Specify That Amendments For Spent Fuel Pool Rerackings Are Likely To Involve Significant Hazards Considerations

The issue presented by Commissioner Ahearne is one of statutory construction on which the case law is clear:

> Here, as in every case involving statutory construction, the starting point is the language of the statute itself. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239, 246 (1978). If the statutory words are clear, there is neither need nor warrant to look elsewhere. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492, 67 S.Ct. 789, 793, 91 L.Ed. 1040, 1050 (1947); Glenn v. United States, 571 F.2d 270, 271 (5th Cir. 1978). Congress adopted and the President signed only the act itself. The reports of committees and the congressional debates did not become law. A court should depart from the official text of the statute and seek extrinsic aids to its meaning only if the language is not clear, United States v. Missouri Pac. R.R. Co., 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376-77 (1929), or if apparent clarity of language leads to absurdity of result when applied, United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-64, 84 L.Ed. 1345, 1350-51 (1940). [American Trucking Ass'ns, Inc. v. I.C.C., 659 F.2d 452, 458-59 (5th Cir. 1981).]

In short, if the underlying statute is not ambiguous with regard to the issue in question, the agency is not bound by or required to seek additional guidance from reports of congressional committees or congressional debate. Indeed, where the statute is clear, the courts have cautioned against "plunging into the murky waters of legislative history in an attempt to fathom [congressional intent] . . . ." West v. Bergland, 611 F.2d 710, 723 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980), quoting United States v. LeFaivre, 507 F.2d 1288, 1295 (4th Cir.

1974), cert. denied, 420 U.S. 1004 (1975). See also United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932) wherein the Supreme Court stated that "In proper cases, [committee] reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful." See also Griffin v. Oceanic Contractors, Inc., 102 S.Ct. 3245, 3245, 3250-51 (1982).

Applying the case law here, Section 12(a)(2)(C) of the NRC Authorization Act (Public Law 97-415), the underlying statute, establishes a statutory scheme for NRC review and approval of amendment requests involving no significant hazards and states, in pertinent part, that the Commission "shall . . . establish . . . (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration . . . ." We submit that neither the terms or intent of this provision leaves any doubt regarding the congressional mandate, viz., based on its technical judgement, the Commission is to establish standards for identifying amendments which do not involve considerations of significant hazards.

The statute does not state or even imply that the Commission is to base its standards on any criteria other than its technical judgement of what constitutes significant hazards. Nor does the statute state or even imply that exceptions to the Commission's technical judgement are authorized, such as would be the case if the Commission considered all reracking of spent fuel pools as involving a significant hazard based solely on some statements of legislators without a sound technical basis. Indeed, the statute gives no additional guidance to the NRC regarding such standards; and none is needed. This point is significant in that during deliberations on the statute, Congress had before it the Commission's proposed criteria defining significant hazards considerations which did not include as an activity likely to involve significant hazards considerations the reracking of spent fuel pools. See e.g., Hearing before the House Subcommittee on Energy and the Environment, 97th Cong. 1st Sess., p. 202 (February 24, 1981); Hearings before the Senate Subcommittee on Nuclear Regulation 97th Cong. 1st Sess., pp. 162-3 (March 25 and 31, 1981). If Congress had sought to supplant the Commission's technical judgment regarding spent fuel pool reracking with its own congressional mandate, the statute would have directed the Commission accordingly; it does not.

In sum, the statutory mandate set forth in Section 12 (a)(2)(C) of the Authorization Act is clear on its face and leaves no room for question as to the congressional intent, viz., based on its technial judgement, the Commission is to establish standards for identifying amendments which do not involve considerations of significant hazards. In that the statute is clear and unambiguous on its face, the Commission is not bound by any statements made in Senate reports or congressional debate regarding the statute.[1]

B. The Legislative History Does Not Reflect A Congressional Intent That Spent Fuel Pool Rerackings Be Viewed As Amendments Likely To Involve Significant Hazards Considerations

While we maintain that the statute is clear, and thus, the Commission is not bound by statements in the legislative history regarding reracking spent fuel storage pools, we submit that, in any event, the legislative history does not reflect congressional intent that the Commission should treat spent fuel storage rerackings as likely to involve significant hazards considerations.

In reviewing the legislative history, we were cognizant of the Supreme Court's long-standing admonition that the impact of legislative materials must be evaluated in light of the whole legislative scheme, the purpose sought to be achieved and the particular statutory provisions

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[1] If the Commission excluded a category of activities, such as reracking spent fuel pools, based not on technical criteria as to what constituted a "significant hazards consideration" as directed by the statute, but on non-binding statements of legislators, it could be argued that the NRC was exceeding its statutory authority. See e.g., Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472-3 (1977), wherein the Supreme Court stated:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."' . . . [The scope of the Rule] cannot exceed the power granted the Commission by Congress under §10(b)." Id., at 212-214, 47 L.Ed.2d 668, 96 S.Ct. 1375. [Footnote omitted]

under scrutiny. United States v. The Heirs of Boisdore', 1850, 8 How. 113, 122, 12 L.Ed. 1009. In addition, "[s]ince the conclusions in the conference report were commended to the entire Congress, they carry greater weight than other of the legislative history."[2] American Jewish Congress v. Kreps, 574 F.2d 624, 629 n. 36 (D.C. Cir. 1978). Finally, "[r]esort to legislative materials [in construing a statute] is not permissible where [such materials] . . . are contridictory or ambiguous." Holtzman v. Schlensinger, 484 F.2d 1307, 1314 (2nd Cir. 1973) cert. denied, 416 U.S. 936 (1974). See also NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129 n. 24 (1971).

The legislative history of this statute reflects that Section 12 of the Authorization Act, the underlying provision in question, was modified by the Conference Committee in an attempt to obtain the concurrence of both the House and Senate. Thus, neither the Senate or House versions of the bill contained all the provisons of the final statute which received the concurrence of both houses of Congress. Accordingly, to the extent that that statue is unclear on its face, which we maintain it is not, the Conference Report is to be given great weight in attempting to construe the intent of Congress. See American Jewish Congress v. Kreps.

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[2] In this regard, the courts are reluctant to presume general congressional concurrence with reports of either house of Congress without clear indication of total consensus on the issue. See e.g., TVA v. Hill, 437 U.S. 153, 192 (1978) wherein the Supreme Court stated as follows:

> Only recently, in SEC v. Sloan, 436 U.S. 103, 56 L.Ed.2d 148, 98 S.Ct. 1702 (1978), we declined to presume general congressional acquiescence in a 34-year old practice of the Securities and Exchange Commission despite the fact that the Senate Committee having jurisdiction over the Commission's activities had long expressed approval of the practice. Mr. Justice Rehnquist, speaking for the Court observed that we should be "extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." Id., at 121, 56 L.Ed.2d 148, 98 S. Ct. 1702.

The Congressional Conference Report on the relevant provision of the statute states, in pertinent part, as follows:

> The conferees also expect the Commission, in promulgating the regulations required by the new subsection (2)(C)(i) of section 189a of the Atomic Energy Act, to establish standards that to the extent practicable draw a clear distinction between license amendments that involve a significant hazards consideration and those amendments that involve no such consideration. These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations. These standards should be capable of being applied with ease and certainty, and should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. [Conf. Rep. No. 97-884, 97th Cong., 2d Sess., 37 (1982).]

Significantly, the Conference Report only provides direction consistent with the express provisions of the statute itself, i.e., the Commission should base its standards regarding significant hazards considerations on technical issues involving "significant health, safety or environmental considerations." Id. The Report provides no support for the position that Congress intended that the Commission include spent fuel reracking in a category of activities likely to involve significant hazards considerations. If Congress had sought to provide specific views to the Commission concerning its mandate to establish technical criteria as they relate to spent fuel pool rerackings, Congress would have provided such additional views in the Conference Report. Indeed, Congress provided additional views on other issues, such as its statements in the Conference Report that in establishing technical criteria the Commission should be "sensitive to the issue posed by the license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility...)." Id. at pp. 37-8.

In that the Conference Report reflects the positions of both houses of Congress, its failure to include specific requirements regarding spent fuel storage reracking is

clearly reflective of the final Congressional intent that reracking should be treated no differently than other activities. This is particularly the case here, where Congress had before it the Commission's proposed rule on this subject which did not include spent fuel reracking in a category which involved significant hazards considerations. If Congress had intended otherwise it would have so stated.

Turning now to the legislative history involving Senate and House reports and debate, the NRC Staff apparently bases its position that the Congress intended that reracking should be included as an example of amendments involving significant hazards considerations on the following section of the Report of the Senate Committee on Environment and Public Work (SECY-83-16, supra, at Enclosure 3 p. 17):[3]

> The Committee anticipates, for example, that consistent with prior practice, the Commission's standards would not permit a "no significant hazards consideration" determination for license amendments to permit reracking of spent fuel pools. [S. 1207 at p. 15.]

An examination of case law involving statutory construction indicates that when resort is made to the legislative history, and such is found to be controlling, fairly clear direction has been provided by Congress. For example, see Commissioner v. Bilder, 369 U.S. 499, 502-503 (1962) wherein the Court found that the legislative history clearly reflected Congress' intent to exclude living expenses from the definition of medical care. In the instant matter the Senate Report does not provide specific direction to the Commission. Rather, the Senate Committee merely anticipates a continuation of prior Commission practice. Fairly read this statment presumes that the Commission, not Congress, will continue to make appropriate decisions with regard to spent fuel pool rerackings. In any event, the statement is ambiguous on its face and is based on an erroneous assumption. To explain, the Report expresses a preference for the Commission to continue its prior practice, but erroneously concludes that based on prior practice the "Commission's standards

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[3] Significantly, we can find no support or basis in the legislative record for this Committee statement. It is our understanding that it is based, in part, on a telephone call to one member of the NRC Staff who was asked for an example of an amendment that was typically prenoticed.

would not permit a 'no significant hazards consideration' determination for license amendments to permit reracking of spent fuel pools." Id. This assumption is in error.

Clearly, past Commission practice has never precluded an applicant for reracking from requesting, and upon an acceptable showing, from receiving a no significant hazards consideration finding by the Staff. To the best of our knowledge, during the past six years, the Staff has never expressly made a finding in any one of the eighty reracking applications it has granted that such an activity involves or does not involve a significant hazards consideration.[4] We submit that the lack of such findings is not reflective of technical considerations, but rather illustrative of the fact that a no significant hazards consideration finding has not as yet been sought. (For a thorough discussion of the history of this issue, see letter of W. G. Counsil (Northeast Utilities) to you of February 10, 1983, regarding the issue, incorporated herein by reference.) In short, the Senate Committee Report, while endorsing a continuation of past Commission practice erroneously characterized that practice as one which precluded the possibility of an applicant for reracking from obtaining a no significant hazards consideration finding. In that this portion of the Report is based on an erroneous premise and is therefore ambiguous

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[4] To be clear, it is not our position that reracking technology not yet proven should be accorded a no significant hazards consideration finding. But, when such technology has reached the stage where it is proven and involves no significant hazards, it should not be precluded from obtaining a no significant hazards consideration finding upon an acceptable showing.

This distinction between new and proven technology may have been at the heart of the concern expressed by this Senate committee which includes as a member Senator Mitchell from Maine. Senator Mitchell, in discussions regarding other legislation, has expressed concern over the possibility of expediting the review and hearing process as it relates to new reracking technology such as pin compaction recently proposed at Maine Yankee, a nuclear power plant in his home state. 128 Cong. Rec. S15669-70 (daily ed. Dec. 20, 1982)(Statement of Sen. Mitchell). With regard to new technology, we concur that consistent with past practice, it should not receive a no significant hazards consideration finding.

and contridictory on its face, reliance on such statements to construe the intent of a statute is precluded. Holtzman v. Schlensinger, supra.

While the NRC Staff apparently does not rely on other portions of the legislative history for its position, we believe that this issue is raised in one other portion of the legislative record, viz., a House debate wherein Congressman Ottinger in responding to a question from Congresswoman Snowe states as follows:

> . . . the expansion of spent fuel pools and the reracking of the spent fuel pools are clearly matters which raise significant hazards considerations, and thus amendments for such purposes could not, under section 11(a), be issued prior to the conduct or completion of any requested hearing or without advance notice.[5]

Due to Congressman Ottinger's position as Chairman of the Subcommittee which sponsored this bill, his remarks are to be accorded more weight than a normal legislator expressing his opinion. However, even the "contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." Consumer Product Safety Commission v. GTE Sulvania, Inc., 447 U.S. 102, 118 (1980). In any event, Congressman Ottinger's remarks are based on assumptions which are unsupported by any factual material, erroneous, and which Conressman Ottinger is unqualified to make, i.e., that "the reracking of spent fuel pools are clearly matters which raise significant hazards considerations." (Emphasis supplied) Indeed, in that the NRC Staff has approved over 80 such reracking with, to the best of our knowledge, findings in each that there is, in essence, negligible impact, Congresman Ottinger's statement is unsupportable and erroneous. (For a detailed discussion of the impacts of reracking see the letter of A.C. Theis (Duke Power Company) to you dated February 9, 1983, incorporated herein by reference.) In that Congressman Ottinger's statement is based on an apparent erroneous assumption, and is thus ambiguous on its face, reliance on such statement to construe the intent of a statute is precluded. Holtzman v. Schlensinger, supra.

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[5] We note that the basis for Congresswoman Snowe's question and Congressman Ottinger's response may have been rerackings involving new technology such as pin compaction then proposed for Maine Yankee, a nuclear power plant in Congresswoman Snowe's home state. See note __, supra.

In sum, a review of the legislative history provides little support for the Staff position that Congress mandated that spent fuel pool reracking should be listed as an example of amendments likely to involve significant hazards considerations. Indeed, we maintain that it is arbitrary to take such a view of congressional intent which would preclude a finding of no significant hazards consideration for amendments related to spent fuel reracking while allowing other, far more hazardous amendments to be judged on a case-by-case basis.

C. The Staff Proposal Would Result In An Improper Repeal Of Legislation By Implication

The inclusion of reracking as an example of an amendment likely to involve a significant safety hazard consideration is inconsistent with prior legislation. The no significant hazards consideration legislation was enacted in 1962. Act of Aug. 29, 1962, Pub. L. No. 87-615, §2, 76 Stat. 409. The concept thus has a gloss of two decades of practice before the Atomic Energy Commission and its successor, the NRC. Although the March 1980 notice of proposed rulemaking apparently constituted the first official publication of the three criteria used to determine whether no significant hazards consideration exists,[6] that notice indicated that the criteria already had been in use by the NRC Staff for a considerable period of time. 45 Fed. Reg. 20491, 20493 (1980).

Despite this long history of not precluding a finding of no significant hazards consideration with regard to reracking amendments, the Staff proposal would alter this practice and establish reracking as a new generic category of amendment applications that are presumed to involve significant hazards considerations. See SECY-83-16, Enclosure 3 at 21.

The Staff does not base this proposed change upon statutory mandates, but as noted, on a one-sentence reference to reracking appearing in the Senate report. Such statement, contains no suggestion that longstanding

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6 The criteria are whether operation of the plant under the proposed license amendment would (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of an accident of a type different from any evaluated previously, or (3) involve a significant reduction in a margin of safety. 45 Fed. Reg. 20491, 20493 (1980).

practice be altered. Rather, it expresses approval of "prior practice," which involved, where appropriate, the making of an independent judgment on each individual appplication.

If the reracking reference in the Senate report is interpreted as an expression of intent to preclude reracking applications from obtaining no significant hazards consideration finding (which we submit it does not) and be taken as a congressional mandate, (which we submit it is not) this would, in effect, repeal the 1962 statute insofar as it relates to reracking amendments. Repeals by implication are not favored, even where the repeal is claimed to be effected by a later-enacted statute. TVA v. Hill, supra, 437 U.S. at 189-191. This is even more emphatically so where, as here, the repeal is claimed to have been made by the legislative history of a later-enacted statute. Consumer Product Safety Commission v. GTE Sylvania, Inc., supra, 477 U.S. at 118 n. 13; Financial Assistance to Intervenors in Proceedings of the Nuclear Regulatory Commission, 59 Comp. Gen. 228, 231 (1980).

III. CONCLUSION

From the foregoing, we maintain that Section 12(a)(2)(c) of the NRC Appropriations Act, the underlying statute in question, provides clear and unambiguous direction that based on its technical judgment, the Commission is to establish standards for identifying amendments which do not involve considerations of significant hazards. If Congress intended for the Commission to establish standards based on other criteria or to include as a separate standard all reracking applications, the statute would have so directed the Commission. Congress's failure to include such additional direction in the statute is dispositive of the issue. Further, in that Congress had before it the Commission's proposed standards during deliberations on the statute, we submit that congressional action reflects an implicit endorsement of the approach in the proposed standards, which did not include reracking as a separate category likely to involve significant hazards considerations. Accordingly, we maintain that in this instance it is unnecessary, and indeed inappropriate to look behind the statute to determine congressional intent.

Further, a review of that portion of the legislative history concurred with by both houses, i.e., the Conference Report, is clearly in accord with the plain meaning of the rule, and supports our position that binding congressional intent did not include placing rerackings in a special category likely to involve significant hazards

considerations. From a review of other portions of the legislative record not accepted by both houses, the only two statements which could be viewed as support for the Staff's position were ambiguous and clearly based on erroneous assumptions and, thus, cannot be relied upon to construe the intent of the statute.

Finally, to accept the Staff's position would result in the repeal by implication of the no significant hazards consideration legislation as it relates to amendments involving spent fuel pool rerackings.

Thus, we conclude that (1) congressional action did not bind the NRC to include reracking spent fuel pools as examples of licensing amendments that are likely to involve significant hazards considerations, and (2) in any event, the legislative history viewed as a whole does not support the Staff position that reracking of spent fuel pools should be generally listed as an example of amendments likely to involve significant hazards considerations. To find otherwise would give rise to a most bizarre result: Congress would be viewed as making a technical conclusion that reracking involves a significant safety hazards consideration and the Commission would be relegated to making a political decision that reracking involves a significant safety hazards consideration.

We appreciate the opportunity to provide you with our comments on this important issue and would welcome the opportunity to discuss this with you further if necessary.

Sincerely,

Debevoise & Liberman

by J. Michael McGarry, III

cc: Commissioner Gilinsky
Commissioner Ahearne
Commissioner Roberts
Commissioner Asselstine

bcc: V. Stello
J. Scinto
W.J. Dircks
G.H. Cunningham
M.G. Malsch