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

June 9, 1980

MEMORANDUM FOR: DL Assistant Directors
DL Branch Chiefs
DL Project Managers
DL Licensing Assistants

FROM: Darrell G. Eisenhut, Director
Division of Licensing

SUBJECT: NO SIGNIFICANT HAZARDS CONSIDERATION

On February 29, 1980, the Commission approved a Notice of Proposed Rulemaking to amend 10 CFR Parts 2 and 50 to specify criteria for determining when a proposed amendment to a construction permit or operating license involves no significant hazards consideration. The preamble of the proposed rule includes examples of amendments that are "likely" and "not likely" to involve significant hazards consideration. In approving the proposed rule, the Commission requested that NRR procedures be revised to conform to the examples in the notice. These examples will be incorporated in operating procedures being developed for the new Division of Licensing. In the meantime, this memorandum complies with the Commission's request by supplementing procedures concerning significant hazards consideration which are currently contained in DOR Memorandum No. 5 and PM Operating Procedure 219.

The summary of the proposed rule states, in part:

> "The Nuclear Regulatory Commission is proposing to amend its regulations to specify criteria for determining whether a proposed amendment to an operating license or to a construction permit for a commercial or large production or utilization facility involves no significant hazards consideration. If the Commission determines that no significant hazards consideration is involved, it may issue an amendment to an operating license or to a construction permit and then publish a notice of the amendment in the FEDERAL REGISTER. Otherwise, it must publish the notice at least 30 days before the amendment is issued."

Although the criteria specified in this rule, as now proposed, appear to apply only to amendments involving commercial or large production or utilization facilities, at this time the staff will apply the criteria to amendments for power, testing, research reactors and critical facilities.

In making a determination that a proposed amendment to a license or construction permit involves no significant hazards consideration, the staff will consider whether operation of the facility in accordance with the proposed 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. If the staff reaches a negative conclusion on all criteria set forth above, the proposed amendment shall be considered to involve no significant hazards consideration.

Examples of amendments that are likely to involve significant hazards considerations are listed in Enclosure 1. Enclosure 2 lists examples of amendments that are considered not likely to involve significant hazards considerations.

It should be noted that in the event an amendment to an operating license or construction permit involves no significant hazards consideration, the staff will cause a notice of proposed action to be published in the FEDERAL REGISTER prior to acting on the amendment when it is determined, pursuant to 2.105(a)(4), that an opportunity for a public hearing should be afforded.

Darrell G. Eisenhut, Director
Division of Licensing

Enclosures: As stated

EXAMPLES OF AMENDMENTS THAT ARE CONSIDERED LIKELY TO INVOLVE SIGNIFICANT HAZARDS CONSIDERATION

1. A significant relaxation of the criteria used to establish safety limits.
2. A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.
3. A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.
4. Renewal of an operating license.
5. For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.
6. A change to Technical Specifications involving a significant unreviewed safety question.

EXAMPLES OF AMENDMENTS THAT ARE CONSIDERED NOT LIKELY TO INVOLVE SIGNIFICANT HAZARDS CONSIDERATION

1. A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

2. A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example, a more stringent surveillance requirement.

3. For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

4. A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

5. A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

6. A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example, resulting from the application of a small refinement of a previously used calculational model or design method.

7. A change to make a license conform to changes in the regulations.

8. An extension of the date, in a construction permit, for the completion of construction.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 50

No Significant Hazards Consideration

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations to specify criteria for determining whether a proposed amendment to an operating license or to a construction permit for a commercial or large production or utilization facility involves no significant hazards consideration. If the Commission determines that no significant hazards consideration is involved, it may issue an amendment to an operating license or to a construction permit and then publish a notice of the amendment in the **Federal Register**. Otherwise, it must publish the notice at least 30 days before the amendment is issued.

The proposed amendments to the regulations are in response to a petition for rulemaking filed on May 7, 1976, by Mr. Robert Lowenstein on behalf of three petitioners (Boston Edison Company, Florida Power and Light Company, and Iowa Electric Light and Power Company) requesting that criteria be specified to determine when no significant hazards consideration is involved.

DATE: Comment period expires May 27, 1980.

ADDRESSES: All interested persons who desire to submit written comments or suggestions for consideration in connection with the proposed amendments should send them to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch, by May 27, 1980. Copies of comments received on the proposed rulemaking and comments received on the petition for rulemaking (PRM 50–17) may be examined in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Mr. W. E. Campbell, Jr., Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Phone 301–443–5913.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission has under consideration amendments to its regulations in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings," and 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities." The purpose of the amendments is to revise §§ 2.105(a)(3), 50.58(b) and 50.91 to specify criteria for determining whether a proposed amendment to an operating license or to a construction permit for a commercial or other large production or utilization facility (one licensed under section 103 or 104(b)); or a testing facility licensed under 104(c) of the Atomic Energy Act of 1954, as amended ("the Act"), involves no significant hazards consideration. The proposed amendments result from a petition for rulemaking (PRM 50–17) submitted by letter to the Secretary of the Commission on May 7, 1976, by Mr. Robert Lowenstein of the law offices of Lowenstein, Newman, Reis and Axelrad, acting on behalf of the Boston Edison Company, Florida Power and Light Company and Iowa Electric Light and Power Company. The petitioners request the Nuclear Regulatory Commission to amend 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings," and 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," with respect to the issuance of amendments to operating licenses for production and utilization facilities.

Section 189a of the Act provides that, upon thirty days notice published in the **Federal Register**, the Commission may issue an operating license or an amendment to an operating license or an amendment to a construction permit for a facility licensed under section 103 or 104(b), or a testing facility licensed under section 104(c) without a public hearing if no hearing is requested by any interested person. However, § 189a permits the Commission to dispense with such thirty days notice and **Federal Register** publication with respect to the issuance of 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. In cases where the Commission determines that there is no significant hazards consideration, the Commission may issue the amendment and then publish a notice in the **Federal Register**. In such cases, interested members of the public who wish to object to the amendment and request a hearing may do so, but a request for hearing does not, by itself, suspend the effectiveness of the amendment. Sections 50.58(b) and 50.91, 10 CFR, of the Commission's regulations implementing § 189a contain no criteria for determining when an amendment involves no significant hazards consideration.

The petitioners' proposed amendments to the regulations would require that the staff take into consideration, in determining whether a proposed amendment to an operating license involves a significant hazards consideration, whether operation of the plant under the proposed license amendment will (1) substantially increase the probability or consequences of a major credible reactor accident or (2) decrease the margins of safety substantially below those previously evaluated for the plant and below those approved for existing licenses. It is proposed that, if the staff reaches a negative conclusion as to both of these criteria, the proposed amendment shall be considered not to involve a significant hazards consideration.

The petition (Docket 50–17) was published for comment in the **Federal Register** on June 14, 1976 (41 FR 24006). Comments have been received from eight persons, four of whom are in favor of granting the petition and four of whom are opposed. Those in favor generally argued that the petitioners' proposed amendments, if adopted, would help eliminate unnecessary delays in effecting amendments to an operating license. Those opposed generally argued that the petitioners' proposed amendments would be contrary to congressional intent since they would tend to eliminate public participation. Opposing arguments were also made to the effect that the petitioners' proposed amendments would change the standard of review from one of finding "non-significance" to one of finding "substantial change," thus shifting the burden of proof. One opposing commenter also stated that the amendments could result in lengthy litigation over the meanings of the criteria proposed by the petitioners.

After consideration of the petitioners' proposed amendments and public comments received, the Commission believes that the licensing process can be improved by specifying criteria with respect to the meaning of "no significant hazards consideration." The Commission, however, does not agree with the petitioners' proposed criteria because of the limitation to "major credible reactor accidents" and their failure to include accidents of a type different from those previously evaluated.

During the past several years, the Staff has been guided in reaching its findings with respect to "no significant hazards consideration" by staff criteria and examples of amendments likely to involve, and not likely to involve,

significant hazards considerations. These criteria and examples have been promulgated within the Staff and have proven useful to the Staff. The Commission believes it would be useful to consider incorporating these criteria into the Commission's regulations for use in determining whether a proposed amendment to an operating license or to a construction permit of any production or utilization facility involves no significant hazards consideration. Subsequent to the resolution of the comments received on the proposed rule the Commission intends to incorporate into a Regulatory Guide the examples associated with the criteria.

Examples of amendments that are considered likely to involve significant hazards consideration are listed below.

(i) A significant relaxation of the criteria used to establish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.

(iv) Renewal of an operating license.

(v) For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.

(vi) A change to technical specifications involving a significant unreviewed safety question.

Examples of amendments that are considered not likely to involve significant hazards consideration are listed below.

(i) A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations.

(viii) An extension of the date, in a construction permit, for the completion of construction.

It should be noted that in the event an amendment to an operating license or construction permit involves no significant hazards consideration, the staff will cause a notice of proposed action to be published in the **Federal Register** prior to acting on the amendment when it is determined, pursuant to 2.105(a)(4), that an opportunity for a public hearing should be afforded.

Pursuant to the Atomic Energy Act of 1954, as amended, and section 553 of title 5 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Part 2 and 10 CFR Part 50 is contemplated.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDING

1. Paragraph 2.105(a)(3) of 10 CFR Part 2 is revised to read as follows:

§ 2.105 Notice of proposed action.

(a) * * *

(3) An amendment of a license specified in paragraph (a)(1) or (2) of this section and which involves a significant hazards consideration. The determination of significant hazards consideration for production and utilization facilities licensed under sections 103 and 104(b) of the Act or a testing facility licensed under section 104(c) shall be based on the criteria set forth in § 50.91(b) of this chapter; or".

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

§ 50.58 [Amended]

2. Paragraph 50.58(b) of 10 CFR Part 50 is amended by revising the last sentence to read: "If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, considering the criteria set forth in § 50.91(b), it may dispense with such notice and publication and may issue the amendment."

3. 10 CFR Part 50, § 50.91 is amended by redesignating the present paragraph as paragraph "(a)" and adding new paragraphs (b) and (c) to read as follows:

§ 50.91 Issuance of amendment.

(a) In determining whether * * *

(b) In making a determination that a proposed amendment to a license or construction permit involves no significant hazards consideration, the Commission will consider whether operation of the facility in accordance with the proposed 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.

(c) If the Commission reaches a negative conclusion on all criteria set forth in (b)(1), (2) and (3)of this section, the proposed amendment shall be considered to involve no significant hazards consideration.

(Secs. 161i, 189 as amended, Pub. L. 83-703, 68 Stat. 948, 955, Pub. L. 85-256, 71 Stat. 576 (42 U.S.C. 2201, 2239); Sec. 201, Pub. L. 93-438, 88 Stat. 1243 (42 U.S.C. 5841))

Dated at Washington, D.C., this 21st day of March, 1980.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 80-9292 Filed 3-27-80; 8:45 am]

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NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKET NUMBER
PROPOSED RULE PR-2,50 (3)
PRM 50-17 (45 FR 20491)

COMMENTS BY THE NATURAL RESOURCES DEFENSE COUNCIL AND THE UNION OF CONCERNED SCIENTISTS ON PROPOSED AMENDMENTS TO 10 CFR PARTS 2 AND 50: NO SIGNIFICANT HAZARDS CONSIDERATION

These comments on the NRC's proposed rulemaking to define "no significant hazards consideration" are offered by the Natural Resources Defense Council, Inc. (NRDC) and the Union of Concerned Scientists (UCS). NRDC is a non-profit public interest organization, with a membership of over 45,000 persons. NRDC is dedicated to the defense and preservation of the human environment and the wise use of natural resources. The organization has a strong interest in ensuring that the risks posed by nuclear energy are minimized and has actively participated in many proceedings before the NRC. UCS is a coalition of scientists, engineers and other professional, supported by the financial contributions of over 90,000 public sponsors. UCS has published a number of independent technical studies in the fiels of nuclear safety and energy policy and, like NRDC, has frequently participated in proceedings before the NRC. NRDC and UCS believe that the proposed rule is contrary to law and to sound policy.

The Atomic Energy Act, as amended, provides for a mandatory public hearing as a prerequisite to the issuance of a construction permit for a nuclear power plant. 42 USC §2239(a). Prior to the 1962 amendments to the Act, a hearing was also required in all cases before the issuance of an operating license.

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While P.L. 87-615(1962) removed the requirement of a hearing at the operating license stage, it balanced this by providing that amendments to the construction permit and operating license should be issued only after notice and the opportunity for hearing, except in cases involving "no significant hazards consideration." The statutory language is as follows:

> In any proceeding under this chapter, 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 . . . 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.
>
> 42 USC §2239(a)

Thus, the law provides the opportunity for a hearing on all amendments, but permits the Commission to dispense with the prior notice provisions only in cases involving no significant hazards consideration.

The legislative history of the 1952 amendments shows that Congress was fully aware of the potential damage to the public interest from removing the mandatory operating license hearing and Congress specifically viewed the strict provisions for prior notice and opportunity for hearing on amendments as a major means to ensure that the public interest would not be compromised by indiscriminate changes to the proposal after it had passed through the period of public scrutiny. The Senate Report addresses this issue as follows:

> This amendment although relaxing the mandatory hearing requirement, should not prejudice the public interest in reactor safety determinations. A mandatory hearing will still be held at the critical point in reactor licensing - the construction permit stage - where the suitability of the site is to be judged. Succeeding regulatory actions will take place only upon publication and sufficient advance notice to afford an interested party the opportunity to intervene.
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> * * *
>
> 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.
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> U.S. Code Cong. & Ad. News, 87th Cong., 2.d., Sess. 2207, 2214-2215 (1962). Emphasis added.

Further, the Senate Report took particular note that the possibilities for mischief are increased proportionally to the number of issues which remain unresolved at the time the construction permit is issued. In cases involving important post-construction permit unresolved safety problems, the legislators noted that the opportunity for a hearing on c.p. amendments is not enough; the Commission was directed to order hearings on its own motion in these circumstances.

> The Committee is cognizant of the provisional construction permit procedure which allows the issuance of a permit, subject to further research and development work, before becoming final.1/ When this research and development

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1/ Although the NRC no longer issues "provisional" construction permits, it continues the practice of issuing construction permits subject to the later resolution of unresolved safety problems. Gulf States Utilities Company, (River Bend Station Units 1 and 2) ALAB-444, 6 NRC 760, 766 (1977). Thus, the quoted comments from the Senate Report are still fully applicable.

See also, Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear-1) CLI _____, Dec. 12, 1979, Sl.op. at 3-4.

> work is directed toward the resolution of a difficult safety problem of unusual public importance it is expected that the Commission, on its own motion, would order a hearing before significant amendments or authorization of the final construction permit were issued.
>
> Id. at 2214.

The plain words of the statute, combined with its legislative history, envision an orderly, fair and open process which begins with public hearings on each construction permit application, followed by notice and the opportunity for hearing on all amendments and on the operation license and its later amendments. The only narrow exception is that the prior notice provision may be waived for a certain class of amendments, those involving no significant hazards consideration. In contrast to this statutorily mandated process, the Commission has developed a two-pronged practice which operates to frustrate public participation and is inconsistent with Congressional intent.

First, the staff has actively discouraged the holders of construction permits from filing for amendments when changes are made to the plant during the process of construction. Since such amendments tend to cause administrative problems and require the commitment of staff resources, it is well known that the utilities are encouraged to wait until the operating license review to seek post-hoc approval of modifications. The NRC has no regulations describing the situations which require filing for an amendment. The result is that no construction permits have ever been amended for a design change.

In a recent case, the Commission requested the staff to describe in detail its practice in such cases:

> The staff's response stressed the preliminary nature of the design information submitted at the construction permit stage, and the brevity and lack of specificity of the construction itself. It noted that the Commission's regulations specifically authorize the issuance of a construction permit even though not all technical information has been supplied. The staff contrasted the preliminary design information supplied at the construction permit stage with the far more detailed review of final design information at the operating license review stage. The staff observed that as neither the Atomic Energy Act nor the Commission's regulations spell out the commitment made by, or the authority granted to, holders of construction permits, design changes proposed after issuance of a construction permit have long been treated on an ad hoc basis by licensees and staff. The staff stated that it learns of design changes during construction through formal or informal notification by licensees; through the inspection and enforcement effort; and sometimes only when the facility is ready for operating license review. Depending on the degree of significance, a proposed change may receive detailed staff review, but more commonly, detailed review is deferred to the operating license review stage. Although a sufficiently major change could warrant a construction permit amendment, a review of 88 extant construction permits indicated that none had been amended for a design change, according to the staff's submission. Taken as a whole, the burden of the staff's submission was that the definitive safety review which must take place before the plant can be licensed to operate, and the opportunity for a public hearing at that time, are the principal mechanism for resolving issues, such as this one, which arise in the course of construction.
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> Northern Indiana Pacific Service Co. (Bailly Generating Station, Nuclear-1), CLI-_____, Dec. 12, 1979, Slip op. at 3-4.

It is self evident that the staff practice described above is one of systematic abuse of discretion and contravention of the statutory mandate with respect to construction

permit amendments. Unless and until the Commission addresses itself to the fundamental issue of requiring c.p. amendments when significant changes or additions are made to a design during construction, "refining" the criteria governing the prior notice provisions for non-existent amendments is a fraud on the public and patently meaningless.

It is true that the proposed regulations would also govern operating license amendments and it is at this point that the second prong of the staff's traditional practice become significant. The legislative history makes it abundantly clear that cases involving "no significant hazards consideration" were to be an exception from the general rule that notice and the opportunity for hearing should precede the authorization of amendments. The Commission was specifically directed to use the exception "with great care."2/ Instead, "no significant hazards consideration" has been so broadly interpreted as to stand this principle on its head. In essence, the presumption of the staff is that amendments do not involve a significant hazards consideration unless it can be shown otherwise. Operating license amendments are granted without prior notice as a matter of routine.

The proposed regulations incorporate and codify the staff's practice. They establish three criteria for judging whether an amendment requires prior notice: if it would

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2/ Supra, p.3.

> (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.

The application of these three criteria in many cases will necessarily require the resolution of substantial factual questions. Indeed, these questions largely overlap the issues which bear on the merits of the license amendment. That is, if the amendment involves a significant increase in the probability or consequences of an accident or significantly decreases a safety margin, presumably it ought not to be permitted. It is our view that the staff's confusion of the issues bearing on the merits with the issues bearing on whether prior notice is required accounts for its traditional misapplication of the "no significant hazards consideration" exception. The staff is apparently reluctant to suggest the existence of any serious questions about the propriety of an amendment and may view the finding that some significant hazards consideration is involved as carrying a negative connotation on the merits.

In any case, it is clear that "no significant hazards consideration" is only a threshold test governing exceptions to the prior notice rule. The use of criteria which govern the merits of the amendment is inappropriate, as is the resolution of substantial factual issues. The approach to this threshold question should be entirely different; the presumption should be that prior notice is required unless the amendment

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involves no significant previously unrevised safety issue. That is, the test should be completely neutral as to the merit of the amendment and keyed instead to whether or not it involves issues not previously reviewed in a proceeding subject to public participation. This would be in harmony with the legislative intent of 42 USC §2239(a) and with its clear language. Indeed, it is implicit in the use of the phrase "no significant hazards consideration" that the focus should be on whether a previously unreviewed issue exists, not on its resolution. Otherwise the phrase would have read "no significant hazards."

Finally, the criteria proposed by the Commission imply a level of detailed review of applications far beyond what is, in reality, the case. Specifically, criteria #1 inquires whether the amendment would "involve a significant increase in the probability or consequences of an accident previously evluated."3/ As a practical matter, neither license applications nor staff reviews contain any useful information on the probability of particular accidents sequences. Over the years, certain accidents have become included in the design basis as an exercise of what can best be described as the collective subjective judgment of the staff, utilities and vendors. To our knowledge, neither the PSAR, FSAR or SER's associate any

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3/ We note that this precludes consideration of the effects of an amendment on the probability or consequences of major reactor accidents which have not been "previously evaluated." It is NRDC's and UCS' view that this exclusion is contrary to law and has no rational basis or technical justification. This view is well known to the NRC and will not be discussed at length herein. If probability or consequences are to be considered, they must include the probability and consequences of the Class 9 accidents which the staff has not previously evaluated.

particular quantitative probability to any accidents. Therefore it is exceedingly unlikely that, without a substantial technical effort, any meaningful answer can be given to the question of whether and to what degree an amendment increases the probability of an accident. It should be remembered that even with the enormous technical effort involved in WASH-1400, the Risk Assessment Review Group found that the margins of uncertainty associated with the probability figures are very great. Even if the inquiry were susceptible of yielding a reasonably objective answer, the question is far too complex to be usefully addressed as a threshold test for providing prior notice of amendments. In sum, this criterion is inappropriate because it cannot possibly be addressed well with limited time and resources and arguably cannot be addressed well even with great time and resources, and because, to the extent it is relevant and useful, it goes to the merits of an amendment and not to whether prior notice is required. It can be reasonably predicted that, if adopted, the effect of this criterion will be to generate boilerplate in support of a finding that no significant hazards consideration exists.

Criterion #2 asks whether the amendment would "create the possibility of an accident of a type different from any evaluated previously." The meaning of this criterion is unclear. In particular, the rule does not refer to any grouping of accidents by "type" that would be employed as the benchmark for applying this criterion. It is further unclear whether the term "type" of accident refers to very broad groups (e.g., LOCA, loss of feedwater) or whether the level of detail of analyses

will be required to demonstrate that no new potential "type" of accident may be created by the amendment?

The third criterion addresses whether the amendment would "involve a significant reduction in a margin of safety." Without amplification, we find this standard essentially unintelligible. It lacks both quantitative and qualitative parameters. In the vast majority of situations, no quantitative margin of safety has been associated with a component or design. It is extremely difficult, therefore, to imagine how this criterion would be applied in most cases in any objective fashion and, similar to the other criteria, even in cases when it can be a useful tool for analysis, it is appropriate at the merits stage, not the threshold.

CONCLUSION

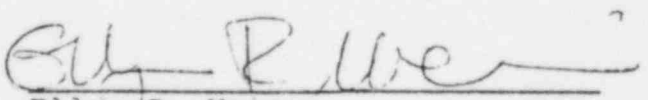
In conclusion, the proposed rule represents an attempt to codify historical staff practice which, while long-standing, is contrary to law and sound policy. First, the staff has perverted the intent of the statute by simply refusing to consider construction permit amendments. Licensees are routinely permitted to make changes and additions to the approved design without filing for construction permit amendments. By the time of the operating license review, these are literally cast in concrete. It becomes exceedingly expensive, if possible at all, to reverse the decisions made during construction. All of the fine words of the Commission with regard to its legal authority at the operating license stage, and even the existence of a few

exceptions, do not alter that fact. Not only does this policy frustrate public participation, it also fundamentally compromises the ability of the agency to do its job. The proposed rule would permit the practice to continue.

Second, the staff has traditionally confused the question of the ultimate propriety of an amendment with the question of whether prior notice can be waived. The proposed rule would codify that confusion. The criteria proposed effectively establish the unlawful presumption that notice can be waived except in unusual cases. The statutory languange and legislative history compel the opposite presumption. In addition, they inappropriately focus on the merits of the amendment.

The NRC should promulgate a rule holding that prior notice and opportunity for hearing should be provided for construction permit and operating licences amendments in all cases except those involving no significant previously-unreviewed safety issue. In contrast to present practice, such a role would be fully consonant with the Atomic Energy Act and with the objective of permitting meaningful public and NRC scrutiny of significant amendments without inhibiting the staff's ability to approve those amendments which are warranted.

Respectfully submitted:



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DATED; May 23, 1980

Counsel for Natural Resources Defense Council and Union of Concerned Scientists

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97TH CONGRESS, 1st Session } SENATE { REPORT No. 97-113

AUTHORIZING APPROPRIATIONS TO THE NUCLEAR REGULATORY COMMISSION

MAY 15, 1981.—Ordered to be printed

Filed under authority of the order of the Senate of MAY 13 (legislative day, APRIL 27), 1981

Mr. SIMPSON, from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 1207]

The Committee on Environment and Public Works, reports an original bill (S. 1207) to authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes and recommends that the bill do pass.

GENERAL STATEMENT

The bill, as reported, authorizes $495,700,000 for salaries and expenses of the Nuclear Regulatory Commission (NRC) for fiscal year 1982. The authorization is $5 million below the Commission's request for $500,700,000 for fiscal year 1982. The authorization included in the bill is an increase of $43.4 million over the fiscal year 1981 funding level for the agency of $452,300,000. The committee's recommendation will permit an increase of 96 permanent staff positions, from 3300 in fiscal year 1981 to 3396 in fiscal year 1982.

The bill also authorizes $530,000,000 for salaries and expenses for the agency for fiscal year 1983. This is the amount requested by the NRC for fiscal year 1983.

The committee recognizes the high priority of the nuclear regulatory program, including the need to assure the protection of the public health and safety. The committee also recognizes the need to address the present nuclear power plant licensing backlog. However, the committee also determined that the NRC must bear at least some of

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to create an additional lengthening of the hearing process, as well as to add further confusion to the process. The Committee intends to monitor the Commission's efforts to further expedite the licensing process by administrative means to assure that this statutory requirement is carried out.

Sholly Amendment (Section 202)

SUMMARY

The bill amends section 189 a. of the Atomic Energy Act of 1954, as amended, to authorize the NRC to issue and to make immediately effective an amendment to a license upon a determination by the Commission that the amendment involves no significant hazards consideration, notwithstanding the pendency before it of a request for a hearing.

DISCUSSION

The NRC, on March 11, 1981, submitted to the Committee proposed legislation that would expressly authorize the NRC to issue a license amendment involving no significant hazards consideration prior to holding a requested public hearing. The legislation was introduced by request as S. 912.

On November 19, 1980, the United States Court of Appeals for the District of Columbia Circuit, in *Sholly* v. *NRC*, * * * F.2d * * * held that the NRC may not issue a license amendment, even if it involves no significant hazards consideration, prior to holding a hearing requested by an interested person under section 189 a. of the Atomic Energy Act of 1954, as amended.

The case arose out of a determination by the NRC that a license amendment permitting the venting of krypton gas from the containment building at the Three Mile Island Unit 2 facility into the atmosphere involved no significant hazards consideration and therefore that the venting could take place notwithstanding a pending request for a hearing on the proposed order. Rejecting the NRC's interpretation of its authority under section 189 a., the U.S. Court of Appeals held that section 189 a. entitles a person who so requests to a hearing before a license amendment becomes effective, irrespective of whether the amendment involves no significant hazards consideration. The Committee provision, in effect, overrules the decision in *Sholly* v. *NRC*.

By including this provision, the Committee seeks to address the concern expressed by the Commission that a requirement that the NRC grant a requested hearing prior to making effective a license amendment involving no significant hazards consideration could result in unnecessary disruption or delay in the operation of a nuclear power plant and could impose unnecessary regulatory burdens upon the NRC that are not related to significant safety benefits. At the same time, the Committee expects the NRC to exercise its authority under this section only in the case of amendments not involving significant safety questions. Moreover, the Committee stresses its strong desire to preserve for the public a meaningful right to participate in decisions regarding the commercial use of nuclear power. Thus, the provision does not dispense with the requirement for a hearing, and the NRC, if requested, must conduct a hearing after the license amendment takes effect.

This provision should be read in conjunction with section 302 of the bill directing the NRC, within 90 days after enactment, to promulgate regulations establishing standards for determining whether an amendment to a license involves no significant hazards consideration, criteria for providing or dispensing with prior notice and public comment on such determination, and procedures for consultation on such determination with the State in which the facility is located. The authority granted the Commission under section 202 of the bill does not take effect until the Commission has promulgated the standards required by section 301 for determining whether a license amendment involves no significant hazards consideration.

The Committee recognizes that reasonable persons may differ on whether a license amendment involves a significant hazards consideration. Therefore, the Committee expects the Commission to develop and promulgate standards that, to the maximum extent practicable draw a clear distinction between license amendments that involve a significant hazards consideration and those that involve no significant hazards consideration. 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. Moreover, it expects that the Commission, to the extent practicable, will develop and promulgate standards shat can be applied with ease and certainty. In addition, he determination of "no significant hazards consideration" should represent a judgment on the nature of the issues raised by the license amendment rather than a conclusion about the merits of those issues.

Recognizing that the rulemaking process often can take a significant period of time, the Committee encourages the Commission to begin preparing its proposed standards as soon as possible, even prior to enactment of this provision. In that regard, the Committee notes that the Commission has already issued for public comment rules including standards for determining whether an amendment involves no significant hazards consideration. The Committee believes that the Commission should be able to build upon this past effort, and it expects the Commission to act expeditiously in promulgating the required standards within the time specified in section 301.

The requirement in section 301 that the Commission promulgate criteria for providing or dispensing with prior notice and public comment on a proposed determination that a license amendment involves no significant hazards consideration reflects the intent of the Committee that, wherever practicable, the Commission should publish notice of, and provide for public comment on, such a proposed determination. The Commission has advised the Committee that in some cases the need to issue the proposed amendment will arise quickly, and failure to act on the amendment may result in the shut-down or derating of the plant. The Committee recognizes that the need to act promptly in such situations may foreclose the opportunity for prior public notice and comment. However, in all other cases, the Committee expects the Commission to exercise its authority in a manner that will provide for prior public notice and comment.

Section 301 of the bill also requires the Commission to promulgate procedures for consulting with a State in which the relevant facility

is located on a determination that an amendment to the facility license involves no significant hazards consideration. The requirement complements the directive in section 202 that the Commission, in determining whether an amendment involves no significant hazards consideration, shall consult with the situs State. The Committee expects that the procedures for State consultation will include the following elements:

(1) The State would be notified of a licensee's request for an amendment;

(2) The State would be advised of the NRC's evaluation of the amendment request;

(3) The NRC's proposed determination on whether the license amendment involves no significant hazards consideration would be discussed with the State and the NRC's reasons for making that determination would be explained to the State;

(4) The NRC would listen to and consider any comments provided by the State official designated to consult with the NRC; and

(5) The NRC would make a good faith attempt to consult with the State prior to issuing the license amendment.

At the same time, however, the procedures for State consultation would not:

(1) Give the State a right to veto the proposed NRC determination;

(2) Give the State a right to a hearing on the NRC determination before the amendment becomes effective;

(3) Give the State the right to insist upon a postponement of the NRC determination or issuance of the amendment; or

(4) Alter present provisions of law that reserve to the NRC exclusive responsibility for setting and enforcing radiological health and safety requirements for nuclear power plants.

In requiring the NRC to exercise good faith in consulting with a state in determining whether a license amendment involves no significant hazards consideration, the Committee recognizes that a limited number of cases may arise when the NRC, depite its good faith efforts, cannot contact a responsible State official for purposes of prior consultation. Inability to consult with a responsible State official following good faith attempts should not prevent the NRC from making effective a license amendment involving no significant hazards consideration, if the NRC deems it necessary to avoid the shut-down of a power plant.

The Committee directs that the NRC report to it monthly on its determinations under section 202 of the bill.

Sabotage Amendment (Section 203)

summary

The bill amends section 236 of the Atomic Energy Act of 1954, as amended, by adding a new subsection b. that subjects to criminal penalties any person who intentionally and willfully causes or attempts to cause an interruption of the normal operation of any facility specified in subsection a. through the unauthorized use of, or tampering with, the machinery, components, or controls of such facility.

particularly if the Commission seeks to carry out its statutory authority to protect public health and safety and to keep the Congress "fully and currently informed."

Because of unresolved questions about the role the Commission should play during an emergency at a nuclear facility, the Committee decided to restrict the amount of funds available for establishing a nuclear data link system until the Commission has submitted a report to Congress which, among other things, discusses the specific role or roles of the NRC Operations Center personnel in responding to nuclear power plant accidents, the information needs of such personnel to carry out each such role, and the costs and benefits of alternative systems for satisfying such information needs.

Based on the Commission's testimony on this issue, the Committee supports the nuclear data link concept for several reasons. First, it will enable the NRC to monitor an accident from its Operations Center during the period (2 to 6 hours after notification of an accident) before the NRC Director of Site Operations arrives at the plant site. Second, it will enable a larger pool of experienced technicians to analyze data from a plant suffering an accident and to participate in discussions on appropriate measures to resolve the problems. Third, it will assist the Commission in fulfilling its responsibility to make recommendations on what, if any protective action, a state should take in response to an emergency at a nuclear facility. Fourth, because it can instantaneously transmit key plant paramenters to the NRC Operations Center, it can reduce the interference with site operations and the transmission of potentially inaccurate data that can occur when the Commission must rely upon telephone communication of information from its on-site representative. Finally, it will enable the NRC to exercise its statutory responsibility in those rare cases when a licensee, faced with a choice between damaging expensive equipment or releasing radiation into the environment that could harm the public, may wish to take the latter course even though the former alternative is an equally effective response.

Hearings

The Committee, and its Subcommittee on Nuclear Regulations, held four hearings and heard from 26 witnesses to develop a public record for committee review and action on the bill.

On February 26, 1981, the Committee held an authorization hearing to review the NRC's fiscal years 1982 and 1983 proposed budget. A broad overview of the NRC's fiscal years 1982 and 1983 programs was presented by then-Chairman John F. Ahearne, and Commissioners Joseph M. Hendrie, Victor Gilinsky, and Peter A. Bradford. Supporting testimony for the record was supplied by: William J. Dircks, Executive Director for Operations; Harold R. Denton, Director, Office of Nuclear Reactor Regulation; Victor Stello, Jr., Director, Office of Inspection and Enforcement; John G. Davis, Director, Office of Nuclear Material Safety and Safeguards; Robert B. Minogue, Director, Office of Nuclear Regulatory Research; and Learned W. Barry, Controller.

On March 31, 1981, the subcommittee held another authorization hearing, focusing on delays in the NRC licensing process and the impact of the *Sholly* v. *NRC* judicial decision. Testifying on behalf

of the Commission on both topics were Chairman Joseph M. Hendrie, and Commissioners John F. Ahearne, Victor Gilinsky, and Peter A. Bradford. William S. Lee, President and Chief Operating Officer, Duke Power Company, accompanied by Michael Miller, Chairman, Atomic Industrial Forum Lawyers Committee; and Ellyn R. Weiss, General Counsel, Union of Concerned Scientists, testified on delays in the NRC licensing process. Robert Hager, Christic Institute; Jay E. Silberg, Shaw, Pittman, Potts & Trowbridge; and John J. Brown, International Union of Operating Engineers, testified on the impact of the *Sholly* v. *NRC* judicial decision.

A third authorization hearing was held on April 27, 1981, focusing on State and local radiological emergency response planning and Federal radiological emergency response preparedness. Chairman Josepn M. Hendrie, accompanied by Victor Stello, Jr., Director, Office of Inspection and Enforcement, and Brian K. Grimes, Director, Division of Emergency Preparedness, testified on behalf of the Commission on both topics. John McConnell, Acting Director of the Federal Emergency Management Agency, accompanied by John Dickey, Director, Radiological Emergency Preparedness Division, and George Jett, General Counsel, testified on behalf of FEMA on both topics. Testifying on the subject of federal radiological emergency response preparedness were: Joseph P. Hile, Acting Assistant Administrator for Regulatory Affairs, Food and Drug Administration; and Edward F. Tuerk, Acting Assistant Administrator for Air, Noise, and Radiation, Environmental Protection Agency.

Finally, on April 29, 1981, the subcommittee held an authorization hearing focusing on the NRC's research program. Chairman Joseph M. Hendrie and J. Carson Mark, Chairman, Advisory Committee on Reactor Safeguards, testified for the Commission. Accompanying Chairman Hendrie were Robert B. Minogue, Director, Office of Nuclear Regulatory Research, and Denwood Ross, Deputy Director, Office of Nuclear Regulatory Research

Cost of Legislation

Section 252. (a)(1) of the Legislative Reorganization Act of 1970 requires publication of the Committee's estimate of the costs of reported legislation, together with estimates prepared by any Federal agency. The estimate for fiscal year 1982 is $495.7 million, 1 percent below the Commission's budget request of $500.7 million. The estimate for fiscal year 1983 is $530 million.

While it is contemplated that most programs will continue beyond fiscal year 1983, future funding levels depend upon decisions which have not yet been made. Following are estimates for projected NRC budget authority, based upon NRC information:

Fiscal years:	*Estimate (millions)*
1982	$495.7
1983	530
1984	530
1985	530
1986	530

Section 403 of the Congressional Budget and Impoundment Control Act requires each bill to contain a statement of the cost of such bill prepared by the Congressional Budget Office. That report follows:

The [temporary] *interim operating* license *shall become effective upon issuance and* shall contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for the extension thereof [and the requirement that the licensee not retire or dismantle any of its existing generating capacity on the ground of the availability of the capacity from the facility which is operating under the temporary license]. Any [decision or other document] *final order* authorizing the issuance of any [temporary] *interim operating* license pursuant to this section shall recite with specificity the reasons justifying the [issuance] *findings under this subsection, and shall be transmitted upon such issuance to the Committees on Interior and Insular Affairs and Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate.* The final order of the Commission with respect to the issuance of [a temporary] *an interim* operating license shall be subject to judicial review pursuant to the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129). *The requirements of section 189 a. of this Act with respect to the issuance or amendment of facility licenses shall not apply to the issuance or amendment of an interim operating license under this section.*

c. [The] *Any* hearing on the application for the final operating license *for a facility* otherwise required pursuant to section 189 a. shall be concluded as promptly as practicable. The Commission shall [vacate the temporary] *suspend the interim* operating license if it finds that the applicant is not prosecuting the application for the final operating license with due diligence. Issuance of [a temporary] *an interim* operating license [pursuant to] *under* subsection b. of this section shall be without prejudice to the [position] *right* of any party to [the proceeding in which] *raise any issue in* a hearing [is otherwise] required pursuant to section 189 a.; and failure to assert any ground for denial or limitation of [a temporary] *an interim* operating license shall not bar the assertion of such ground in connection with the issuance of a subsequent final operating license. *Any party to a hearing required pursuant to section 189 a. on the final operating license for a facility for which an interim operating license has been issued under subsection b., and any member of the Atomic Safety and Licensing Board conducting such hearing, shall promptly notify the Commission of any information made available as part of such hearing, that the terms and conditions of the interim operating license are not being met, or that such terms and conditions are not sufficient to comply with the provisions of paragraph (2) of subsection b.*

d. [The authority under this section shall expire on October 30, 1973.] *The Commission is authorized and directed to adopt such administrative remedies as the Commission deems appropriate to minimize the need for issuance of interim operating licenses pursuant to this section.*

e. The authority under this section shall expire on December 31, 1983.

2239. Hearings and Judicial Review.—

a. In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance

or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186 c., or 188, 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 construction 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 absense of a request therefore 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. *The Commission is authorized to issue and to make immediately effective an amendment to a a license upon a determination by the Commission that the amendment involves no significant hazards consideration, notwithstanding the pendency before it of a request for a hearing from any person. In determining under this subsection whether an amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility is located. The authority under this subsection to issue and to make immediately effective an amendment to a license shall take effect upon the promulgation by the Commission of standards for determining whether an amendment to a license involves no significant hazards consideration.*

* * * * * * *

2284. Sabotage of Nuclear Facilities or Fuel.—

a. Any person who intentionally and willfully destroys or causes physical damage to, or who intentionally and willfully attempts to destroy or cause physical damage to—

(1) any production facility or utilization facility licensed under this Act,

(3) any nuclear waste storage facility licensed under this Act, *or*

(3) any nuclear fuel for such a utilization facility, or any spent nuclear fuel from such a facility,

shall be fined not more than $10,000 or imprisoned for not more than ten years, or both.

b. Any person who intentionally and willfully causes or attempts to cause an interruption of normal operation of any such facility through the unauthorized use of or tampering with the machinery, components or controls of any such facility, shall be fined not more than $10,000 or imprisoned for not more than ten years, or both.

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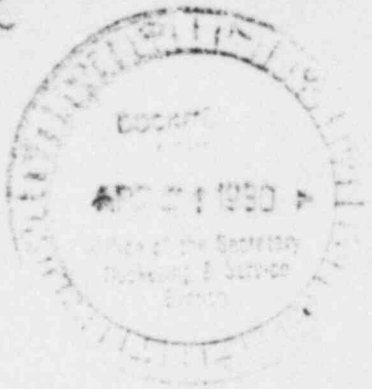
Portland General Electric Company



DOCKET NUMBER
PROPOSED RULE PR-2,50 (1)
(45 FR 20491)

April 17, 1980

Secretary of the Commission
ATTN: Docketing and Service Branch
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Sir:

We have reviewed the proposed amendments to 10 CFR Parts 2 and 50 pertaining to "No Significant hazards Consideration" (Federal Register Vol. 45, No. 62, March 28, 1980, Page 20491).

The following comment is offered on Section 50.91(b2):

> A Commission determination that no significant hazard consideration exists because operation in accordance with a proposed license amendment does not "create the possibility of an accident of a type different from any evaluated previously" could pose major problems of interpretation and litigation. There are infinite numbers of insignificant types of accidents that can be postulated for any license amendment, particularly by individuals whose interest is to needlessly delay nuclear plant operation and to utilize the public hearing process as a publicity forum for their broader objective of shutting down necessary generating plants. This provision of the proposed 10 CFR 50 amendment should be deleted. Alternatively, the phrase should be restated as follows:
>
> > "...(2) create the possibility of a credible accident of a type different from any evaluated previously, and having potential consequences approaching those specified in 10 CFR Part 100, or..."

Acknowledged by card. [illegible]

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The following comment is offered on Section 50.58(2):

> A provision should be added to state that proposed license amendments need not be prenoticed in the Federal Register if they result from conditions that are prescribed by an Atomic Safety and Licensing Board. Prior approvals by the Commission that must be granted for facility changes meeting established criteria that are prescribed by license conditions or Technical Specifications should also be exempt from prenoticing in the Federal Register.

Your serious consideration of these comments is appreciated.

Sincerely,

W. J. Lindblad
Vice President
Engineering-Construction

WJL/JWL/ma

DOCKET NUMBER
PROPOSED RULE PR-2,50 (2)
(45 FR 20491

Docketing and Service Branch US NRC
Samuel J. Chilik, Secty. of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

May 21, 1980

re: Proposed rule, Fed. Register Vol. 45, No. 62, Friday, Mar. 28, 1980
No Significant Hazards Consideration
10 CFR Parts 2 and 50

Dear Sirs:

The term "significant Hazard" appears repeatedly throughout the proposed rulemaking yet it is no where defined specifically, leaving "significant" to be anything that may be either politic or expeditions at any given time.

The proposed rule lists "examples of amendements" either likely or Not likely to involve significant hazards consideration. Amendements that are to be considered Not likely to involve significant hazards consideration, and so would be excluded from having a public hearing when the Commission issues an operating license or an amendment to an operating license or consturction permit for a facility, should be specifically stated in any "No Significant Hazards Consideration".

~~Objexxxix~~ Objection is hereby noted to example Not likely to involve significant hazards consideration

> (vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria;

The U.S. NRC, particularly after TMI, and with all the other problems of nuclear safety, should NOT accept a change, even "within regulation" that may increase the probability of an accident or reduce a safety margin. The nuclear industry has enough trouble trying to meet the requirements that now exist, in an attempt to ensure the health and safety of the public, without being permitted to downgrade this safety, even within "regulation acceptance criteria", when, in fact, these regulations need up-grading. The last thing the nuclear industry needs is another step backwards, and without a public hearing at that.

Anna E. Wasserbach
Box 2308 W. Saug. Rd.
Saugerties, N.Y. 12477

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKET NUMBER PR-2,50 (3)
PRM 50-17 PROPOSED RULE
(45 FR 20491)

COMMENTS BY THE NATURAL RESOURCES DEFENSE COUNCIL AND THE UNION OF CONCERNED SCIENTISTS ON PROPOSED AMENDMENTS TO 10 CFR PARTS 2 AND 50: NO SIGNIFICANT HAZARDS CONSIDERATION

These comments on the NRC's proposed rulemaking to define "no significant hazards consideration" are offered by the Natural Resources Defense Council, Inc. (NRDC) and the Union of Concerned Scientists (UCS). NRDC is a non-profit public interest organization, with a membership of over 45,000 persons. NRDC is dedicated to the defense and preservation of the human environment and the wise use of natural resources. The organization has a strong interest in ensuring that the risks posed by nuclear energy are minimized and has actively participated in many proceedings before the NRC. UCS is a coalition of scientists, engineers and other professional, supported by the financial contributions of over 90,000 public sponsors. UCS has published a number of independent technical studies in the fiels of nuclear safety and energy policy and, like NRDC, has frequently participated in proceedings before the NRC. NRDC and UCS believe that the proposed rule is contrary to law and to sound policy.

The Atomic Energy Act, as amended, provides for a mandatory public hearing as a prerequisite to the issuance of a construction permit for a nuclear power plant. 42 USC §2239(a). Prior to the 1962 amendments to the Act, a hearing was also required in all cases before the issuance of an operating license.

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While P.L. 87-615(1962) removed the requirement of a hearing at the operating license stage, it balanced this by providing that amendments to the construction permit and operating license should be issued only after notice and the opportunity for hearing, except in cases involving "no significant hazards consideration." The statutory language is as follows:

> In any proceeding under this chapter, 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 . . . 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.
>
> 42 USC §2239(a)

Thus, the law provides the opportunity for a hearing on all amendments, but permits the Commission to dispense with the prior notice provisions only in cases involving no significant hazards consideration.

The legislative history of the 1952 amendments shows that Congress was fully aware of the potential damage to the public interest from removing the mandatory operating license hearing and Congress specifically viewed the strict provisions for prior notice and opportunity for hearing on amendments as a major means to ensure that the public interest would not be compromised by indiscriminate changes to the proposal after it had passed through the period of public scrutiny. The Senate Report addresses this issue as follows:

> This amendment although relaxing the mandatory hearing requirement, should not prejudice the public interest in reactor safety determinations. A mandatory hearing will still be held at the critical point in reactor licensing - the construction permit stage - where the suitability of the site is to be judged. Succeeding regulatory actions will take place only upon publication and sufficient advance notice to afford an interested party the opportunity to intervene.
>
> * * *
>
> 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.
>
> U.S. Code Cong. & Ad. News, 87th Cong., 2.d., Sess. 2207, 2214-2215 (1962). Emphasis added.

Further, the Senate Report took particular note that the possibilities for mischief are increased proportionally to the number of issues which remain unresolved at the time the construction permit is issued. In cases involving important post-construction permit unresolved safety problems, the legislators noted that the opportunity for a hearing on c.p. amendments is not enough; the Commission was directed to order hearings on its own motion in these circumstances.

> The Committee is cognizant of the provisional construction permit procedure which allows the issuance of a permit, subject to further research and development work, before becoming final.1/ When this research and development

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1/ Although the NRC no longer issues "provisional" construction permits, it continues the practice of issuing construction permits subject to the later resolution of unresolved safety problems. Gulf States Utilities Company, (River Bend Station Units 1 and 2) ALAB-444, 6 NRC 760, 766 (1977). Thus, the quoted comments from the Senate Report are still fully applicable.

See also, Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear-1) CLI _____, Dec. 12, 1979, Sl.op. at 3-4.

> work is directed toward the resolution of a difficult safety problem of unusual public importance it is expected that the Commission, on its own motion, would order a hearing before significant amendments or authorization of the final construction permit were issued.
>
> Id. at 2214.

The plain words of the statute, combined with its legislative history, envision an orderly, fair and open process which begins with public hearings on each construction permit application, followed by notice and the opportunity for hearing on all amendments and on the operation license and its later amendments. The only narrow exception is that the prior notice provision may be waived for a certain class of amendments, those involving no significant hazards consideration. In contrast to this statutorily mandated process, the Commission has developed a two-pronged practice which operates to frustrate public participation and is inconsistent with Congressional intent.

First, the staff has actively discouraged the holders of construction permits from filing for amendments when changes are made to the plant during the process of construction. Since such amendments tend to cause administrative problems and require the commitment of staff resources, it is well known that the utilities are encouraged to wait until the operating license review to seek post-hoc approval of modifications. The NRC has no regulations describing the situations which require filing for an amendment. The result is that no construction permits have ever been amended for a design change.

In a recent case, the Commission requested the staff to describe in detail its practice in such cases:

> The staff's response stressed the preliminary nature of the design information submitted at the construction permit stage, and the brevity and lack of specificity of the construction itself. It noted that the Commission's regulations specifically authorize the issuance of a construction permit even though not all technical information has been supplied. The staff contrasted the preliminary design information supplied at the construction permit stage with the far more detailed review of final design information at the operating license review stage. The staff observed that as neither the Atomic Energy Act nor the Commission's regulations spell out the commitment made by, or the authority granted to, holders of construction permits, design changes proposed after issuance of a construction permit have long been treated on an ad hoc basis by licensees and staff. The staff stated that it learns of design changes during construction through formal or informal notification by licensees; through the inspection and enforcement effort; and sometimes only when the facility is ready for operating license review. Depending on [illegible]egree of significance, a proposed change may [illegible]ive detailed staff review, but more commonly, [illegible]tailed review is deferred to the operating lice[illegible]se review stage. Although a sufficiently major change could warrant a construction permit amendment, a review of 88 extant construction permits indicated that none had been amended for a design change, according to the staff's submission. Taken as a whole, the burden of the staff's submission was that the definitive safety review which must take place before the plant can be lice[illegible]sed to operate, and the opportunity for a public hearing at that time, are the principal mechanism for resolving issues, such as this one, which arise in the course of construction.
>
> Northern Indiana Pacific Service Co. (Bailly Generating Station, Nuclear-1), CLI-_____, Dec. 12, 1979, Slip op. at 3-4.

It is self evident that the staff practice described above is one of systematic abuse of discretion and contravention of the statutory mandate with respect to construction

permit amendments. Unless and until the Commission addresses itself to the fundamental issue of requiring c.p. amendments when significant changes or additions are made to a design during construction, "refining" the criteria governing the prior notice provisions for non-existent amendments is a fraud on the public and patently meaningless.

It is true that the proposed regulations would also govern operating license amendments and it is at this point that the second prong of the staff's traditional practice become significant. The legislative history makes it abundantly clear that cases involving "no significant hazards consideration" were to be an exception from the general rule that notice and the opportunity for hearing should precede the authorization of amendments. The Commission was specifically directed to use the exception "with great care."2/ Instead, "no significant hazards consideration" has been so broadly interpreted as to stand this principle on its head. In essence, the presumption of the staff is that amendments do not involve a significant hazards consideration unless it can be shown otherwise. Operating license amendments are granted without prior notice as a matter of routine.

The proposed regulations incorporate and codify the staff's practice. They establish three criteria for judging whether an amendment requires prior notice: if it would

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2/ Supra, p.3.

> (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.

The application of these three criteria in many cases will necessarily require the resolution of substantial factual questions. Indeed, these questions largely overlap the issues which bear on the merits of the license amendment. That is, if the amendment involves a significant increase in the probability or consequences of an accident or significantly decreases a safety margin, presumably it ought not to be permitted. It is our view that the staff's confusion of the issues bearing on the merits with the issues bearing on whether prior notice is required accounts for its traditional misapplication of the "no significant hazards consideration" exception. The staff is apparently reluctant to suggest the existence of any serious questions about the propriety of an amendment and may view the finding that some significant hazards consideration is involved as carrying a negative connotation on the merits.

In any cas. . it is clear that "no significant hazards consideration" is only a threshold test governing exceptions to the prior notice rule. The use of criteria which govern the merits of the amendment is inappropriate, as is the resolution of substantial factual issues. The approach to this threshold question should be entirely different; the presumption should be that prior notice is required unless the amendment

involves no significant previously unrevised safety issue. That is, the test should be completely neutral as to the merit of the amendment and keyed instead to whether or not it involves issues not previously reviewed in a proceeding subject to public participation. This would be in harmony with the legislative intent of 42 USC §2239(a) and with its clear language. Indeed, it is implicit in the use of the phrase "no significant hazards consideration" that the focus should be on whether a previously unreviewed issue exists, not on its resolution. Otherwise the phrase would have read "no significant hazards."

Finally, the criteria proposed by the Commission imply a level of detailed review of applications far beyond what is, in reality, the case. Specifically, criteria #1 inquires whether the amendment would "involve a significant increase in the probability or consequences of an accident previously evluated."3/ As a practical matter, neither license applications nor staff reviews contain any useful information on the probability of particular accidents sequences. Over the years, certain accidents have become included in the design basis as an exercise of what can best be described as the collective subjective judgment of the staff, utilities and vendors. To our knowledge, neither the PSAR, FSAR or SER's associate any

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3/ We note that this precludes consideration of the effects of an amendment on the probability or consequences of major reactor accidents which have not been "previously evaluated." It is NRDC's and UCS' view that this exclusion is contrary to law and has no rational basis or technical justification. This view is well known to the NRC and will not be discussed at length herein. If probability or consequences are to be considered, they must include the probability and consequences of the Class 9 accidents which the staff has not previously evaluated.

particular quantitative probability to any accidents. Therefore it is exceedingly unlikely that, without a substantial technical effort, any meaningful answer can be given to the question of whether and to what degree an amendment increases the probability of an accident. It should be remembered that even with the enormous technical effort involved in WASH-1400, the Risk Assessment Review Group found that the margins of uncertainty associated with the probability figures are very great. Even if the inquiry were susceptible of yielding a reasonably objective answer, the question is far too complex to be usefully addressed as a threshold test for providing prior notice of amendments. In sum, this criterion is inappropriate because it cannot possibly be addressed well with limited time and resources and arguably cannot be addressed well even with great time and resources, and because, to the extent it is relevant and useful, it goes to the merits of an amendment and not to whether prior notice is required. It can be reasonably predicted that, if adopted, the effect of this criterion will be to generate boilerplate in support of a finding that no significant hazards consideration exists.

Criterion #2 asks whether the amendment would "create the possibility of an accident of a type different from any evaluated previously." The meaning of this criterion is unclear. In particular, the rule does not refer to any grouping of accidents by "type" that would be employed as the benchmark for applying this criterion. It is further unclear whether the term "type" of accident refers to very broad groups (e.g., LOCA, loss of feedwater) or whether the level of detail of analyses

will be required to demonstrate that no new potential "type" of accident may be created by the amendment?

The third criterion addresses whether the amendment would "involve a significant reduction in a margin of safety." Without amplification, we find this standard essentially unintelligible. It lacks both quantitative and qualitative parameters. In the vast majority of situations, no quantitative margin of safety has been associated with a component or design. It is extremely difficult, therefore, to imagine how this criterion would be applied in most cases in any objective fashion and, similar to the other criteria, even in cases when it can be a useful tool for analysis, it is appropriate at the merits stage, not the threshold.

CONCLUSION

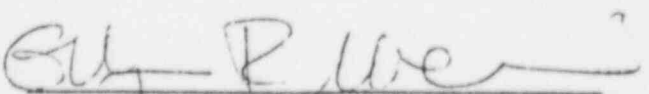
In conclusion, the proposed rule represents an attempt to codify historical staff practice which, while long-standing, is contrary to law and sound policy. First, the staff has perverted the intent of the statute by simply refusing to consider construction permit amendments. Licensees are routinely permitted to make changes and additions to the approved design without filing for construction permit amendments. By the time of the operating license review, these are literally cast in concrete. It becomes exceedingly expensive, if possible at all, to reverse the decisions made during construction. All of the fine words of the Commission with regard to its legal authority at the operating license stage, and even the existence of a few

exceptions, do not alter that fact. Not only does this policy frustrate public participation, it also fundamentally compromises the ability of the agency to do its job. The proposed rule would permit the practice to continue.

Second, the staff has traditionally confused the question of the ultimate propriety of an amendment with the question of whether prior notice can be waived. The proposed rule would codify that confusion. The criteria proposed effectively establish the unlawful presumption that notice can be waived except in unusual cases. The statutory languange and legislative history compel the opposite presumption. In addition, they inappropriately focus on the merits of the amendment.

The NRC should promulgate a rule holding that prior notice and opportunity for hearing should be provided for construction permit and operating licences amendments in all cases except those involving no significant previously-unreviewed safety issue. In contrast to present practice, such a role would be fully consonant with the Atomic Energy Act and with the objective of permitting meaningful public and NRC scrutiny of significant amendments without inhibiting the staff's ability to approve those amendments which are warranted.

Respectfully submitted:



Ellyn R. Weiss
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DATED; May 23, 1980

Counsel for Natural Resources Defense Council and Union of Concerned Scientists

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DOCKET NUMBER
PROPOSED RULE PR-2,50 (4)
(45 FR 20491)

May 27, 1980

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

ATTENTION: Docketing and Service Branch

Dear Sir:

This law firm has been requested by Commonwealth Edison Company to submit comments on its behalf in respect of the NRC's proposed rule on "Significant Hazards Considerations," 10 CFR §50.91. The proposed rule was published for comment on March 28, 1980 at 45 Fed. Reg. 20491.

In general we believe the proposed rule would be an improvement. At the outset, it is clear that Section 189a of the Atomic Energy Act of 1954 (the "Act") contemplates that while all licensing actions must be accompanied by the opportunity for a public hearing, only those involving "significant hazards considerations" must be preceded by such hearings, if requested. The Act itself strikes this balance between the competing policies of fostering public participation and the need for efficiency in the licensing process. Thus any criticism of the proposed rule on the grounds that it might tend to limit public participation is not well taken.

In the past, the Commission's interpretation of "significant hazards considerations" has seemed ad hoc, arbitrary and inscrutable; the proposed rule is a welcome attempt to increase the predicability of the NRC's decisions in this area. The parallelism between the definitions of "unreviewed safety question" in 10 CFR §50.59 and "significant hazards considerations" in the proposed rule seems appropriate, since a finding that the former exists requires the licensee to apply to the NRC for a license amendment, while the latter finding, that the requested change is "significant" from a safety standpoint, leads the NRC to

Acknowledged by card 5/30/80 mdv

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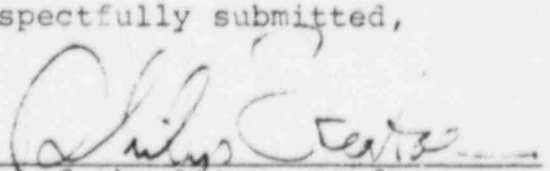
pre-r tice the issuance of the requested amendment. However, it is important that one point be clarified. Licensees make their judgments whether "unreviewed safety questions" exist based on the safety analysis reports and technical specifications for their individual facilities. The Commission, on the other hand, should be free to look at safety analyses previously done either generically or with respect to other facilities in determining whether a "significant hazards consideration" exists for purpose of proposed 10 CFR §50.91. Section 189a of the Act clearly calls for the Commission's best judgment as to whether significant hazards considerations exist. It would be artificial and counter-productive for the Commission to put on blinders in making this determination.

We support the Commission's intent to incorporate in a regulatory guide examples of significant hazards considerations. The particular examples set forth in the "supplementary information" accompanying the proposed rule are in some cases rather vague, and should be supplemented by more specific illustrations. In particular, we assume that NRC start-up orders following shutdown of facilities for lack of concurrence in state and local emergency plans pursuant to the proposed emergency planning rule, 44 Fed. Reg. 75167 (December 19, 1979) would fall within the category of

> "A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated,"

and therefore would not constitute a "significant hazards consideration." Similarly, NRC decisions not to require shutdowns despite nonconcurrence in state and local emergency plans should not constitute significant hazards considerations. We believe these and other reasonably foreseeable NRC actions should be specifically addressed in the proposed Regulatory Guide, since the purpose of such a document is to enhance the predictability of the regulatory process.

Respectfully submitted,



One of the Attorneys for
Commonwealth Edison Company

PS/kb

CONSUMERS POWER COMPANY

General Offices: 212 West Michigan Avenue, Jackson, Michigan 49201 • (517) 788-0550

May 27, 1980

DOCKET NUMBER
PROPOSED RULE PR-2, 50 (5)
(45 FR 20491)

Secretary of the Commission
U S Nuclear Regulatory Commission
Washington, DC 20555

Att Docketing and Service Branch

The following comment concerning the March 28, 1980, Federal Register notice dealing with 10 CFR Part 2 and 50, "No Significant Hazards Consideration", is presented for your consideration.

Consumers Power Company endorses the NRC's effort to clarify the meaning of the phrase, "no significant hazards", and to this end, suggests a change to the proposed wording of 50.91(b)(2). As currently stated, this criterion could be interpreted very broadly, thereby leading to entangled objections similar to those NRC is attempting to avoid. The following, more precise wording is suggested as a replacement for 50.91(b)(2):

> "create the possibility of an accident which would have significant consequences, a significant probability of occurrence and which is of a type different from any evaluated previously, or ..."

Please consider this comment in future actions concerning 10 CFR 50.

David P. Hoffman

David P Hoffman
Nuclear Licensing Administrator

DPH-66-80

Acknowledged by card. 5/30/80 mdv

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MISSISSIPPI POWER & LIGHT COMPANY
Helping Build Mississippi
P. O. BOX 1640, JACKSON, MISSISSIPPI 39205

PRODUCTION DEPARTMENT

DOCKET NUMBER
PROPOSED RULE PR-2,50(6)
(45 FR 20491)

May 28, 1980

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Attention: Docketing and Service Branch

SUBJECT: Grand Gulf Nuclear Station
File 0260/L-8600.0/16684
Proposed Rule Change Regarding Determination of No Significant Hazards Consideration in Amending an operating license or construction permit-
Federal Register
AECM-80/106

We feel that the NRC is capable of making this determination and that no public interest is served by requiring the 30 day wait before issuing such amendments to operating licenses or to construction permits when it is determined that no significant hazards consideration exists.

We favor the proposed rule change to 10CFR2.105, 10CFR50.58 and 10CFR50.91 as it appears in Federal Register/Vol. 45, No.62/Friday, March 28, 1980.

Yours truly,

L. F. Dale
Nuclear Project Manager

MRK/JDR;gks

cc: Mr. N. L. Stampley
Mr. R. B. McGehee
Mr. T. B. Conner

Mr. Victor Stello, Jr., Director
Division of Inspection & Enforcement
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Acknowledged by card. 6/4/80 mdv

8006110515 pkg dupe
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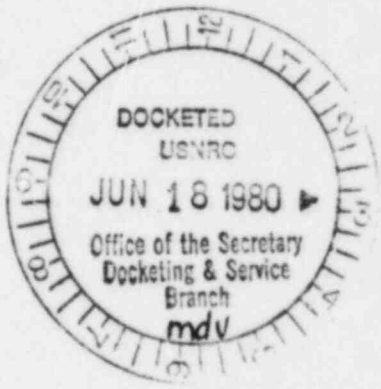
Westinghouse Electric Corporation
Water Reactor Divisions

Nuclear Technology Division
Box 355
Pittsburgh Pennsylvania 15230

DOCKET NUMBER
PROPOSED RULE PR-2, 50 (7)
(45 FR 20491)

June 13, 1980
NS-TMA-2263



Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

ATTN: Docketing and Service Branch

Subject: No Significant Hazards Consideration

Dear Mr. Chilk:

This is in response to the notice of the Commission's proposal to amend its regulations which appeared at 45 Fed. Reg. 20491. The proposed amendments to 10CFR Parts 2 and 50 would specify criteria for determining whether a proposed amendment to an operating license or to a construction permit for a commercial or large production or utilization facility involves no significant hazards consideration and therefore require no prior notice. Westinghouse believes that the specification of criteria is needed; however, the particular criteria as proposed are too broad and would require prior notice in many instances where such notice is unwarranted.

Pursuant to 10CFR50.59, the holder of an operating license may make changes in the factility or operating procedures and conduct tests or experiments without prior Commission approval unless the change test or experiment involves a change in a technical specification or an unreviewed safety question. It is clear from experience that not all unreviewed safety questions involve significant hazards considerations which would require prior notice. Yet, the criteria for an unreviewed safety question specified in 10CFR50.59 are essentially the same as those proposed for determining whether or not a significant hazards consideration exists. The obvious result is that every Commission decision involving any matter submitted to the Commission because it involves an unreviewed safety question would, under the proposed rules, require prior notice. This is unwarranted. Prior notice should not be required for approval of changes involving matters which did not require prior notice in the first place.

Acknowledged by card. 6/18/80. mdv.

Accordingly, Westinghouse recommends the following changes in the proposed criteria of paragraph 50.91:

> 50.91(b) should read: ". . . the Commission will consider whether the operation of the facility in accordance with the proposed amendment would be within acceptance criteria prescribed by the Commission's regulations which have been previously accepted or approved in connection with any construction permit or operating license proceeding."
>
> 50.91(c) should read: "If the Commission reaches a positive conclusion on the question set forth in (b) of this section, the proposed amendment shall be considered to involve no significant hazards consideration."

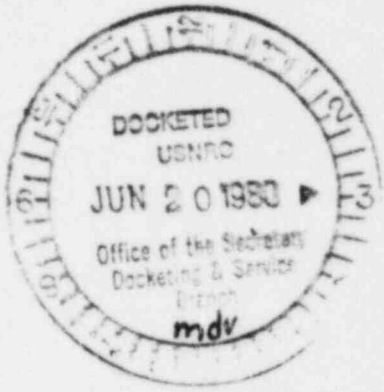
Westinghouse appreciates the opportunity to comment on these important matters and would be pleased to discuss our recommendations with the NRC Staff.

Very truly yours,

for T. M. Anderson, Manager
Nuclear Safety Department

/bek

Atomic Industrial Forum, Inc.
7101 Wisconsin Avenue
Washington, D.C. 20014
Telephone (301) 654-9260
Cable: Atomforum Washingtondc



June 18, 1980

DOCKET NUMBER
PROPOSED RULE PR-2, 50 (8) (45 FR 20491)

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Att: Docketing and Service Branch

Subject: Proposed Amendment to 10 CFR Parts 2 and 50 - No Significant Hazards Consideration 45 FR 20491

Dear Sir:

The Atomic Industrial Forum's Committee on Reactor Licensing and Safety has reviewed the subject proposed amendment and has the following comments:

PARAGRAPH 50.91

The word "significant" as used in sections b(1) and b(3) of this paragraph can be interpreted very broadly. The use of this word may therefore preclude consistency in NRC determinations that a proposed amendment to a construction permit or a license involves "no significant hazards consideration".

In addition, section b(2) which reads "create the possibility of an accident of a type different from any evaluated previously" may, in our judgment, cause major problems of interpretation. Any number of different types of accidents having consequences which fall well within regulation acceptance criteria may be postulated for virtually any construction permit or license amendment. The postulation of such accidents should not preclude a determination by NRC that a proposed amendment to a construction permit or license involves "no significant hazards consideration".

For the above reasons, we suggest that paragraph 50.91 be reworded as follows:

50.91 section (b) should read: "In making a determination that a proposed amendment to a license or construction permit involves no significant hazards consideration, the Commission will consider whether operation of the facility in accordance with the proposed amendment would be within applicable acceptance criteria prescribed by the Commission's regulations which have been previously accepted or approved in connection with any Construction Permit or Operating License Proceeding."

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Acknowledged by card. 6/20/80. mdv.

50.91 section (c) should read: "If the Commission reaches a positive conclusion on the criterion set forth in item (b) of this section, the proposed amendment shall be considered to involve no significant hazards consideration."

We thank you for the opportunity to comment on these proposed amendments and we would be pleased to answer any questions you may have on the above comments.

Sincerely,

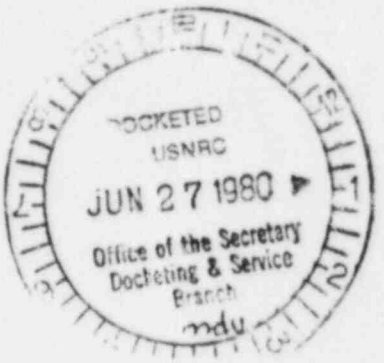
D. C. Gibbs, Chairman
Committee on Reactor Licensing
and Safety

DCG/jph

CONSUMERS POWER COMPANY

DOCKET NUMBER
PROPOSED RULE PR-2,50 (9)
(45 FR 20491)

General Offices: 212 West Michigan Avenue, Jackson, Michigan 49201 • (517) 788-0550



June 23, 1980

Secretary of the Commission
U S Nuclear Regulatory Commission
Washington, DC 20555

Attention Docketing and Service Branch

The following comments concerning the March 28, 1980, Federal Register Notice dealing with 10 CFR Parts 2 and 50, "No Significant Hazards Consideration", are presented for your consideration.

1. The first sentence of proposed paragraph 50.91(b) states that the subject criteria are intended to apply to both licenses and construction permits. However, the same sentence states that the basic "significant hazards" determination depends only on "whether operation of the facility...would" involve any of the three enumerated criteria. Consumers Power Company believes that the basic significant hazards determination should be based on construction and operation considerations. Therefore, Consumers Power Company suggests the following wording for 50.91(b):

   > "...the Commission will consider whether construction or operation of the facility in accordance with the proposed amendment would (1)..."

2. Item v under the examples of amendments that are considered likely to involve significant hazards consideration deals with increases in power levels which were "not previously publicly noticed". Consumers Power Company believes that the fact the increase in power level was not publicly noticed is not relevant to a significant hazards finding. Rather, the real basis is whether or not the technical arguments compel an affirmative determination. Therefore, Consumers Power Company suggests that the phrase "not previously publicly noticed" be replaced with the phrase "not previously reviewed by NRC".

These comments supplement those sent to you previously by Consumers Power Company by letter dated May 27, 1980. Even though they are submitted beyond the due date, please consider them in future actions concerning 10 CFR Part 50.

David P. Hoffman

David P Hoffman
Nuclear Licensing Administrator

DPH-82-80

Acknowledged by card. 6/27/80. mdu.

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DEBEVOISE & LIBERMAN

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WASHINGTON, D.C. 20036

TELEPHONE (202) 857-9800

~~DOCKET NUMBER PROPOSED RULE PR-20 (19)~~
~~(45 FR 20493)~~

DOCKET NUMBER PROPOSED RULE PR-250 (10)
(45 FR 20491)

May 27, 1980

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Comments on Proposed Rule Regarding No Significant Hazards Consideration
45 Fed.Reg. 20491 (March 28, 1980)

Dear Mr. Chilk:

I. INTRODUCTION

On March 28, 1980, the Nuclear Regulatory Commission ("NRC" or "Commission") published in the Federal Register (45 Fed.Reg. 20491-93) a proposed rule that would establish criteria for determining whether proposed amendments to power reactor construction permits or operating licenses "involve no significant hazards consideration" and consequently need not be noticed in the Federal Register prior to issuance pursuant to Section 189(a) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239(a). The Commission requested that interested persons who wish to file comments on the proposed rule do so by May 27, 1980. As a holder of construction permits for two power reactors, Texas Utilities Generating Company ("TUGCO") is vitally interested in the outcome of this proceeding and hereby submits its comments on the proposed rule.

~~8006110454~~ SPP (pkg dupe)

Acknowledged by card. 5/29/80 mdv

II. BACKGROUND

Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a), was amended in 1962 1/ to provide that if the Commission determines that a proposed amendment to a power reactor construction permit or operating license "involves no significant hazards consideration" the requirement that applications for such amendments be noticed in the Federal Register at least 30 days prior to issuance thereof is waived. This provision was implemented by promulgation of 10 C.F.R. §§50.58(b) and 50.91. The NRC has not, however, set forth any formal guidance as to the meaning of the term "no significant hazards consideration."

In response to a petition for rulemaking filed on May 7, 1976, requesting that criteria be specified for determining when no significant hazards consideration is involved in a proposed amendment to an operating license (with the consequence that prior notice and opportunity for hearing may be omitted) the NRC now proposes to establish three criteria to clarify the meaning of "no significant hazards consideration." The criteria would apply to both construction permit amendments and operating license amendments. These proposed criteria provide that unless operation of the facility in accordance with the proposed amendment would:

(1) involve a significant increase in the probability or consequences of an accident previously evaluated,

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1/ Section 2 of Public Law 87-615 (76 Stat. 409) (1962).

> (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 . . .
>
> * * * * *
>
> . . . the proposed amendment shall be considered to involve no significant hazards consideration. [Proposed 10 C.F.R. §50.91 (45 Fed.Reg. 20493)]

TUGCO questions whether these criteria in the form proposed, are consistent with Section 189(a) and whether they will materially assist the Commission in determining whether there is a significant hazards consideration. Accordingly, we set forth the following comments on the proposed rule.

III. COMMENTS

TUGCO believes that the Commission's present approach to determining whether a proposed amendment to a construction permit or operating license involves no significant hazards consideration, viz., use of informal guidance 2/ without strict criteria, has had the virtue of flexibility for case-by-case reviews. We would, however, support an amendment that would eliminate delays in the amendment approval process, improve predictability of pre- or post-notice decisions (by clarifying the applicable standards) and minimize unnecessary litigation.

2/ See, "Petition for Rulemaking (PRM) 50-17, 'No Significant Hazards Consideration,'" SECY-79-660 (December 13, 1979), at p. 6 and Enclosure H.

It appears, however, that the rule as proposed would not achieve those purposes. Accordingly, we urge that it not be adopted as presently drafted.

Our principal objection is to proposed Criterion 2. Criterion 2 was added by NRC to fill a gap it perceived in the approach of the petitioners. It would permit a determination that there is no significant hazards consideration only if operation of the facility in accordance with the proposed amendment would not "create the possibility of an accident of a type different from any evaluated previously." Proposed 10 C.F.R. §50.91(b)(2). We believe that Criterion 2 does not reflect the plain meaning 3/ of the no significant hazards consideration provision of Section 189(a). That section clearly embodies a concept of a class of amendments involving 'significant' hazards and a class of amendments not involving 'significant' hazards. The former must be "pre-noticed" with an opportunity for hearing; the latter are "post-noticed". Criterion 2 does not reflect in any way that distinction. We note that each of the other two criteria, proposed 10 C.F.R. §50.91(b)(1) and (3), requires a determination of "significance". Also, most of the examples of amendments likely to involve significant hazards consideration expressly incorporate that

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3/ The plain meaning of the language of a statute should govern the interpretation of its intent unless conclusive evidence to the contrary exists. See, Burns v. Alcala, 420 U.S. 575, 580-581 (1975); Banks v. Chicago Grain Trimmers Ass'n., 390 U.S. 459, 465 (1968); Minor v. Mechanics Bank of Alexandria, 26 U.S. (1 Pet.) 46, 64 (1828).

distinction, see 44 Fed.Reg. 20492. Criterion 2, however, could be read as embodying the erroneous assumption that "the possibility of an accident of a type different from any evaluated previously" automatically presents a significant hazards consideration. 4/ Hazards must involve risk, that is , probability and consequences. Clearly a low-probability accident that would have only minimal consequences cannot be said to involve a significant hazards consideration, whether or not the precise accident mechanism or sequence of events is of a type previously evaluated. Nevertheless, the proposed rule would apparently deem such a possibility a significant hazards consideration. To remedy this, we urge the Commission to revise Criterion 2 to read, as follows:

> (2) create a substantial likelihood of a significant accident of a type different from any evaluated previously, . . .

We note further that for many proposed amendments it would not seem difficult to hypothesize the possibility (no matter how remote) of an accident (regardless of how minor its consequences) that was not a type previously considered. As drafted, therefore, Criterion 2 invites administrative delays associated with an unbounded search for any accident not previously considered. Furthermore, Criterion 2 introduces

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4/ We note that while this interpretation of the intent and consequences of Criterion 2 may not be intended and is not necessarily compelled by the language thereof, such interpretation is nonetheless plausible and we urge the Commission to avoid the possibility of creating, by adoption of Criterion 2 as proposed, the problems that we have identified.

uncertainty and the potential for unnecessary litigation in that a person seeking to challenge a decision not to afford notice prior to issuance of an amendment might attempt to do so simply by postulating any 'possible' accident of a type not previously considered that could be argued to involve the proposed amendment. Also, the Staff might resort to frequent "pre-noticing" of amendment requests in order to avoid criticisms based on failure to deal with "possible" accident scenarios. Such a result would clearly frustrate the obvious intent of Congress that the provision be utilized by the Commission where expert engineering judgment concludes significant hazards are not implicated.

We should like to turn briefly to two secondary comments on the examples given in the Federal Register Notice (45 Fed. Reg. at 20492). First, it is not clear to us that every "renewal" of an operating license, regardless of the activities authorized under the renewal (e.g., possession only) or the duration of the renewal, necessarily involves significant hazards. The example should, at a minimum, be qualified as follows:

> "[iv] Renewal of an operating license authorizing operation at a significant fraction of full power for periods exceeding, in the aggregate, five years" 5/

Second, we would propose adding to the list of amendments to construction permits and operating licenses which do not involve significant hazards consideration a category

---

5/ A corresponding example of license renewal involving limited activities for a limited period might be included among those not likely to involve significant hazards.

to embrace minor changes in the ownership of facilities such as minor adjustments in percentage participation of owners already reflected in the construction permit or operating license, or the addition of new owners with minor interests (such that antitrust review is not required) involving only pro forma financial and related considerations as distinct from changes in the PSAR, FSAR or technical specifications. Such could be accomplished by inserting a new example as follows:

> "[ix] A change to a construction permit or operating license to reflect a minor adjustment in ownership shares among co-owners already shown in the permit or license or to reflect one or more additional co-owners whose generating capacity does not exceed that set forth in §50.33a(a)(3) of this Part."

Finally, TUGCO requests that the Commission be given an opportunity to reexamine this proposed rule and the comments submitted thereon, prior to issuance of the rule in final form. The NRC Staff apparently contemplates publication of the rule in final form if, in its opinion, "no significant adverse comments . . . have been received and no substantial changes in the text of the rule are indicated." 6/ We believe this rule is of sufficient importance to warrant Commission consideration of all comments received, regardless of the Staff's view as to their significance, prior to promulgation of the rule in final form.

6/ SECY-79-660, supra, at 7.

IV. CONCLUSION

TUGCO appreciates the opportunity to provide the Commission with our comments on this proposed rule, and urges the NRC to modify the proposed rule as recommended in the foregoing comments.

Sincerely,

Nicholas S. Reynolds
Counsel for Texas Utilities
Generating Company
Debevoise & Liberman
1200 Seventeenth Street, N.W.
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(202) 857-9800

AA61-2 PDR

(2)

Stenographic Transcript Of

HEARINGS

Before The

SUBCOMMITTEE ON NUCLEAR REGULATION
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

NUCLEAR POWERPLANT LICENSING DELAYS
AND THE IMPACT OF THE SHOLLY v.NRC DECISION

WASHINGTON, D.C.

March 31, 1981

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CONTENTS

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#01 NUCLEAR POWERPLANT LICENSING DELAYS AND THE IMPACT OF THE SHOLLY V. NRC DECISION

#02

#03 TUESDAY, MARCH 31, 1981

#04 Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works

#05 Washington, D. C.

The subcommittee met at 9:15 a.m. in room 4200, Dirksen Senate Office Building, Honorable Alan K. Simpson (chairman) presiding.

Present: Senators Simpson, Domenici, Symms, Stafford and Hart.

Senator Simpson. Well, I do apologize. I think it was just one of those days in Washington when everyone came to work, which is extraordinary because I left at 8:15. I owe you an apology and convey that.

I think it appropriate to just make a comment, I am sure that our prayers wing out to our President and to Jim Brady today and Agent McCarthy and Officer Delahanty. God bless them and their families and love them.

We meet today to continue hearings on these two important issues regarding the regulatory process. The first of these is the projected delay in the NRC issuance of operating license for plants that are expected to be completed within the next several years. The second of course is the impact of the

Commission's staff and divert its attention from more pressing matters." So there are serious concerns as well and we look forward to discussing with the Commission the NRC legislative proposal on the Sholly Decision during the hearing this morning, and we are fortunate indeed to have all of the members of the NRC with us this morning. I see that none of my colleagues are here so without further ado, I believe Chairman Hendrie, you have a statement on behalf of the Commission.

#08 U.S. NUCLEAR REGULATORY COMMISSION

#09 STATEMENT OF JOSEPH M. HENDRIE, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION

#10 ACCOMPANIED BY:

#11 VICTOR GILINSKY, COMMISSIONER

#11 PETER A. BRADFORD, COMMISSIONER

#11 JOHN F. AHEARNE, COMMISSIONER

Mr. Hendrie. Yes, Mr. Chairman, I do. Thank you very much.

We are pleased to be here with you today to urge enactment of two pieces of proposed legislation. The first of these is an amendment to Section 198(a) of the Atomic Energy Act to overturn the principal adverse ruling in the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Sholly vs. NRC, which you have referred to. That proposal was submitted to you by letter of March 11th and

I ask that the letter and the supporting memorandum be included in the record.

The second proposal which was submitted by letter on March 18th would authorize the Commission to issue an interim license for low power operation and testing in advance of any required hearing. Again I would ask that the letter be included in the record.

Senator Simpson. Without objections it is so ordered.

(The information to be furnished follows:)

COMMITTEE INSERT

Mr. Hendrie. With regard to the proposed legislation on licensing amendments involving no significant hazards consideration, that is the Sholly legislation, the situation that requires it is that a three-judge panel in the D. C. Circuit has ruled, erroneously in our view, that "the Commission must hold a prior hearing on demand from any interested person before it can issue any license amendment, even if that amendment involves no significant hazards consideration."

Now that phrase went into the law in Section 189(a) back in 1962 when the Congress enacted some amendments to the Atomic Energy Act. Their specific purpose as we understood it was to allow the Commission to act on matters that had no significant hazards consideration, license for such actions, without requiring the completion of a prior hearing when it was requested, if one was requested.

The D. C. Circuit presumes in Sholly to tell us that we are wrong. I understand that a copy of the Court's original decision as well as a copy of the recent statement of the four judges of the Circuit Bench who disagreed with the majority on a rehearing petition, that was supplied to you and I would expect that would make a useful object for the record as well.

The Solicitor General has filed a petition to the Supreme Court to take the case up and we will supply that to you too if we haven't already.

While we certainly believe that our view of the law is

correct, whether or not the Supreme Court will take the case and whether we will ultimately prevail is uncertain. In any event that is a year or more away. In the mean time the Sholly Decision raises the potential for real havoc with the regulatory process, and that is why we seek legislation at this time.

The main problem with the Sholly Decision for us is that the ruling is that NRC must hold a hearing on request before it can act on an amendment involving no significant hazards consideration. Now obviously if we do have an amendment that does involve a significant hazards consideration, then we agree that a hearing must be offered and if requested it must be held before we act on it. But we are dealing here with a rung of amendments that involve no safety questions in our view of any significance.

Now our practice is and our rules require that if the hearing is held it's an adjudicatory hearing and we seem unable to get through those things in much less than a year. I suppose on a fairly low key amendment you might manage it in 6 months if the people who wanted the hearing didn't litigate too fiercely. But if they do, why you are looking at a process that can run a year or more.

The practical effect of the Court's ruling is really to make it questionable whether we can continue to regulate in a sensible way the operating reactors that are out there. Over

the past four years we have issued something like 1600 amendments to operating license based on a determination that no significant hazards consideration was involved. Over the past few months we would have had 20 plants out of the 70 or so with operating license down for indefinite periods of time if this ruling had been operative.

And they would have been down for reasons which have little or nothing to do with safety in our view. The large number of license amendment actions of this kind which the Commission must act upon each year, something like 400 a year, comes about because of the kind of detailed license that we prescribe for these plants. A license like the one that the Court looked at in the Sholly case for instance is hundreds of pages long, highly detailed technical specifications. Any changes anywhere in those hundreds of pages is considered a license mandment, and you just run a number of those every year. A refueling for instance, the composition of the core changes slightly with the fresh fuel that is added, shuffling of the old fuel, the technical specifications may contain say for instance some flux ratio to limit operation to a safe region, and the ratio may be .117 in the current license. You refuel, you do the same calculation and find in a perfectly straightforward manner the ratio should be .115 for the next operating cycle. That is a license amendment. It is not a safety consideration, there is no significant hazards

consideration involved but under the Sholly Decisi[illegible]ou would have to notice a hearing and if anybody doesn't l[illegible]e plant, they may request a hearing and you can litiga[illegible] 15 from .117 for a year or more, together with all of the other issues that a "cleaver" counsel can bring into the case to extend it.

It is a result, the Court decision is a result which upsets 20 years of standard practice and acceptance throughout the business in terms of interpretation of the legislation, and is going to leave us if it stands darn near unable to operate. We just don't believe that the Congress intended nuclear regulation and the operation of these power plants to be subject to unpredictable interruptions every time the NRC receives a hearing request on a matter that doesn't have much to do with safety.

If that is the case, then we can't have this industry and if you apply the same rule anyplace else I would suggest in this society you can't have any other industry either. Yet such consequences are plainly possible under the Court's ruling. Of course we don't know how many hearing requests we will get if the ruling stands but the Court's opinion clearly provides an incentive for such rulings and for people with some reason not to like their local power plant it is a tool to be used to keep it shut down.

Another option that we might take to try to get out of the

situation is to take all those license documents, detailed technical specifications and say well, we now declare those not to be the license, the license is a piece of paper that just says "Smith Power Company you can operate this power plant," and that is the only thing that is the real license. Well in that case we wouldn't amend it very often I will agree and this wouldn't be a problem.

On the other hand we would also lose enforceability of all of those detailed technical specifications that we now propose for a plant and that we think are useful in closely defining the acceptable limits of operation of the plant, and thus in our view encouraging safe operation.

Now what we would propose in the amendment here to deal with the Sholly Case is simply to amend Section 189 of the Atomic Energy Act to make it clear that the Commission may in fact issue a license amendment which involves no significant hazards consideration and to do it without first holding a hearing. It would also clarify Section 189 in the sense that it would make clear that the Act does not limit the NRC's authority, or that section doesn't limit the NRC's authority to take immediate action by amendment to the order to protect the public health and safety and interest or the common defense and security.

I would like to note on Commissioner Gilinsky's behalf that he prefer the standard to be limited to public health and

safety. He believes the addition of public interest tends to broaden NRC authority and that his proposed language of public health and safety more precisely reflects the standard NRC actually employs. But the Commission unanimously believes that the legislation is needed to overturn the adverse effects of the Sholly Decision on our ability to regulate nuclear energy.

So let me turn now to the second piece, because there is another area in which we find we have to come to you for legislative help with the problem we have. The second piece of legislation is that asking that we be given authority to issue interim operating license for fuel loading and low power operation testing. This piece of legislation is a temporary cure for an extraordinary we hope temporary situation, namely the licensing bind that we have found ourselves in after Three Mile Island, the delays you have already referred to, Mr. Chairman.

As you know, we can't issue an operating license uncer the Atomic Energy Act unless we have completed a hearing if there has been a request for a hearing from any person whose interest may be affected. In the past we have managed to keep the reviews coming along at a rate that a hearing could be held if requested and the plant still would not be completed, construction would not be completed, the hearing would come to an end, an initial decision would issue about the same time

changes. And as you may detect as the day goes on there are obviously more substantial differences in the views the Commissioners take about these problems. The discovery rules probably are the ones which raise the most heat.

Senator Simpson. Let us come back to that. That will be the most controvercial one, with regard to the elimination of formal discovery by the NRC staff. I will come back to that but at this point let me ask Senator Hart if he wishes to participate in the questioning, and certainly he has made some extraordinary contributions to this subcommittee.

Senator Hart.

Senator Hart. Thank you, Mr. Chairman.

Chairman Hendrie, let me see if I can understand what the Commission is proposing in terms of changing the way in which it will go about issue license, because it seems to me it has the potential to be fairly dramatic.

You are suggesting two statutory amendments as I understand it, one which would permit you to issue license amendments without a public hearing if the Commission determines the amendment would involve no significant hazards consideration, whatever that means. And then would also grant you the authority to take immediate action by amendment or order to protect the public, health safety and interest. What I would like to pursue first of all is what those two phrases mean to you individually, perhaps each of you individually, and

whether or not this may be a fairly significant departure in the history of nuclear licensing in this country.

What does no significant hazards mean in practical terms?

Mr. Hendrie. It means no significant questions of public health and safety.

Senator Hart. As determined by whom?

Mr. Hendrie. The Commission.

Senator Hart. Without public participation?

Mr. Hendrie. Without hearing.

Senator Hart. Which is to say without public participation.

Mr. Hendrie. People can always write us letters to petition or whatever and present arguments that they may have one way or another and submissions to the staff and to the Commission, but without hearing.

Senator Hart. How will they know that you are considering an amendment so that they can write these letters? Will there be public notice?

Mr. Hendrie. We don't present notice on these things, that is right.

Senator Hart. What is going to cause somebody to sit down and write a letter?

Mr. Hendrie. If it is a trivial change it seems to me people are unlikely to write letters, unless of course their aim is simply delay for delay purposes and unrelated to public

health and safety.

Senator Hart. That didn't answer my question. My question is if there is no public notice what is going to trigger someone to sit down and write you a letter? How are they going to know you are considering amending the license?

Mr. Hendrie. I dare say they may not.

Senator Hart. So they can't obstruct the process by writing a letter because they won't know the process is under way.

Mr. Hendrie. They may or may not know. There would not be formal notice published in the Federal Register. In most of these cases people who are interested in them simply watch the flow of documents on the docket file which is maintained in the local public document room as well as here in Washington at the NRC public document room, they will see letters coming in from the applicant asking for a license amendment, some adjustment to the technical specifications perhaps on the occasion of fuel loading, something like that. So that they will know from the applicant's request to the Commission for amendment -- would you mind please moving out of the line? I am trying to talk to the Senator and you are flashing that light squarely in my eyes.

Senator Simpson. If you would please, remain out of the line.

Senator Hart. Let me try to put a finer point on the

question.

Mr. Hendrie. The point is you watch the docket file and you see an application come in from the applicant saying look, I need my technical specs and then following and indeed that is not a Federal Register notice but it is not precisely operating indeedly secret either I suggest.

Senator Hart. And there are not an awful lot of citizens who sit around reading those dockets either.

Senator Domenici. You would be surprised.

Senator Hart. Let me explore the philosophy of the Commission itself and tell me here if I am wrong, or Commission counsel can tell me if I am wrong, is there a precedent in the law for the Commission to make rather threshold judgments about what is or is not a hazard? Or has it not been the history of the Commission since its inception to have determinations of that sort made in public hearing with notice with the right of any individual or group to participate to indicate whether it thinks there is in fact a hazard involved? In other words would this statutory amendment not give the Commission an authority the first time than it has ever had in the past?

Mr. Hendrie. No, to the contrary. The Commission has always had that authority and in the case of license amendments has had it specifically since 1962 when the Congress made it explicit in Section 189 of the Atomic Energy Act. What

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we are asking for is an amendment which makes clear to all what in fact the law has been and the way we have operated for 20 years.

Senator Hart. You are saying you already have this authority and the amendment would be redundant.

Mr. Hendrie. I am saying that at least there are three judges on the Court of Appeals that need more explicit language.

Senator Hart. Well now, Mr. Chairman, what the Court needs and does not need it seems to me is a determination for Congress and not for the Nuclear Regulatory Commission.

Mr. Hendrie. I guess that is why we proposed this legislation instead of offering it for comment as a Commission rule, sir.

Senator Hart. How would you interpret the public interest as this amendment includes that phrase?

Mr. Hendrie. I think there are times when questions of reliability of the power supply, stability of an electrical grid and so on over some considerations that ought to be taken into account in the Commission's ability to order a licensee to shut down or do other things. I think it would be helpful to have that aspect there.

Senator Hart. Well it might be if one understood what it meant.

Mr. Hendrie. Let me remind you, Senator, of the fact I

can remember not all that long ago when I was down here and you and the members of this Committee were suggesting to this Commission the number of barrels of oil involved in the shut down of five plants because we thought the seismic design wasn't as good as it should be, a consideration we have been pretty cavalier about.

Senator Hart. Youdidn't hear it from me.

Mr. Hendrie. I certainly heard it in this Committee room and in my view it is a legitimate consideration for instance, and would come under the public interest thing.

Senator Hart. I want to hear from Commissioner Bradford or any other commissioners that want to comment here but I sense, regardless of your reading of the history of the Commission, a potential significant departure here in terms of the Commission's authority and apparently some members of the court believe so.

Commissioner Bradford.

Mr. Bradford. In terms of giving some contention to the phrase public health, safety and interest, I am most comfortable referring back to the case that in fact gave rise to this amendment, namely our effort to vent krypton at Three Mile Island last spring. It is that case on which a hearing was requested and we did not prevent the hearing because we felt we had done a thorough assessment of the process already and there was a significent public interest

including a health interest, but not exclusively a health interest in getting on with getting the krypton vented so we could get on with other aspects of the cleanup, and also getting it vented at the particular time last summer when for several reasons it seemed best to do so.

In a situation like that I am not uncomfortable with this public health, safety and interest test being applied. For my own part I had been much more loathe to go on and to apply it in a situation where the consideration was purely in barrels of oil, although I suppose it is not inconceivable that there might be some situation in which the barrels of oil weighed so heavily on the public health and safety so lightly one might go down that path.

Senator Simpson. Excuse me, Senator Hart.

Senator Domenici has to leave at 10:30 and has a very few questions. May I briefly -- what is your schedule?

Mr. Hart. I can wait. I would just like to complete this one question.

Senator Simpson. Do you want to do that? When do you have to leave?

Senator Domenici. I can stay until about 35 after. I only have five minutes, Senator.

Senator Hart. I only have one follow-up here.

Senator Simpson. Please go ahead.

Senator Hart. Commissioner Bradford, do you believe that

adding the phrase interest does not therefore statutorily expand the Commission's authority beyond public health and safety and economic considerations?

Mr. Bradford. It would certainly make more explicit our authority to weigh economic considerations together with public health and safety. My own concurrence in this is very definitely the title public health safety and interest, so we are not free to go off and make up some definition of the public interest that is independent of the public health and safety and apply that. If the phrase were public health safety or interest that would not be acceptable to me. I consider the three, public health safety and interest to be in effect a cumulative test and not one in which the Commission can hand a decision on any one of those three.

Senator Hart. Mr. Chairman, I want to ask the Committee Staff Counsel or whomever to advise us on the precedent for the NRC in effect to become an economic regulatory commission. I think the potential is there.

Senator Simpson. You certainly have that opportunity.

Senator Domenici, appreciate your participation.

Senator Domenici. I just have a few questions.

As I understand it one of the recommendations that you have made, Mr. Chairman and members of the Commission, has to do with clarifying the Sholly Decision. As I understand it for 20 years, practically 20 years you have been acting on the

kinds of decisions --

Mr. Hendrie. Precisely in the way we would propose to act if our legislative proposal were accepted and passed.

Senator Domenici. And as a matter of fact the decision that was appealed from was a unanimous decision of the Commission, wasn't it?

Mr. Hendrie. Our agreement to bring this legislative proposal --

Senator Domenici. I don't mean that. The decision that was taken up in Sholly was not anything you all disagreed upon.

Mr. Hendrie. As I recall it that is correct.

Senator Domenici. So are you, when you ask for this change have you asked for any authority that you didn't have before?

Mr. Hendrie. I don't believe we have.

Senator Domenici. And the only reason you don't have it now is because there is a court decision which is on appeal to the U. S. Supreme Court that for the first time challenged that authority that you have been using, is that correct?

Mr. Hendrie. Yes, sir, that is exactly correct.

Senator Domenici. And how long might it take in the typical appeals to the U. S. Supreme Court for a decision to be forthcoming?

Mr. Hendrie. My guess is a year or more but let me turn

there is a national emergency and we need those plants. I would rather, even though it might take Congress time to act, I would rather that situation come to Congress and say here is a national emergency, we need this authority.

Mr. Gilinsky. May I answer, Senator? I agree with those remarks. I think if we improve a general scheme for interim operating license we may find ourselves dealing with a great deal many more plants simply because the whole system will slide. Of course if it were done the way Chairman Hendrie suggested, actually naming plants, that would cure that.

I have some other remarks that pertain to your earlier question. I wonder if I could take a moment to address them.

Senator Hart. Please.

Mr. Gilinsky. You were asking about an amendment to deal with the Sholly Decision and I think it doesn't extent the Commission's authority except in possibly a small way, which is why I prefer to leave off the interest in the finding part of it. Generally it brings us back, or it leaves us doing what we are doing now. I think that is preferable to leaving the decision stand. However there are some problems with the way things are done now.

You asked about the no significant hazards finding. It doesn't exactly mean the way it is represented, that there isn't an important safety question. It tends to be interpreted that whatever is being done does not lower the safety of the

plants, whichisn't quite the same thing. I think we have got to go back and deal with that definition so it really says there is not an important safety question.

There is also I think a problem with who makes the finding. In practice it is made by the staff, not by the Commission. And the staff becomes a party to the hearing should there be a hearing, and I am not sure I know how to cure that but it is something that has troubled me.

Senator Hart. Well, I guess what I would like each of you to give me as specifically as you can is your definition of what an interest means because you are proposing changing the law. Future courts if challenged will want to know what Congress intended to change the law by language of this sort. Frankly I don't know if we were to adopt this amendment today what interest means. What we are giving to a regulatory commission is a big blank check. I think we have a responsibility to define for future courts if challenged what we meant when we gave that blank check, or at least put some limits on the check, and I don't have the foggiest idea. I gather each of you has in your minds what the phrase "an interest" means but if I were a judge sitting in a court looking at the congressional record, if this Committee were to pass that amendment today and take it to the floor and get it passed so you could get on with this, I would be mystified as to what Congress intended by giving you that authority. So

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I hope you will give us your ideas, each of you, what an interest means, as specifically as you can.

Mr. Ahearne. For myself, I would agree entirely with what Commissioner Bradford earlier described, with the stress on the end. For an expansion of it I would like to submit if I could a short letter which was submitted by 3 out of the 5 commissioners last April to the Chairman of the Appropriations Senate Committee, which at that time was proposing a modification of policy for the Commission. As it said, this was not intended to in their view expand the authority but confirm authority NRC now has to make prudent and sensible safety and national security judgments based upon safety or security as a paramount consideration, but also giving some consideration to appropriate public interest factors. In the definition it expanded that to indicate consideration to economic impacts and to meeting energy needs. If I could submit that.

(The document follows:)

Senator Hart. That would be very helpful. Any others want to take a crack at this?

Mr. Gilinsky. I had suggested leaving out --

Mr. Hendrie. You and I are on John's letter, the letter John submitted, so we get a little credit for that.

I am sorry, go ahead.

Mr. Gilinsky. It isn't I don't think the Commission ought to be able to take economic factors into account but because this proposed amendment is drafted to deal with a very specific problem, I thought in this case we would limit ourselves to the narrow question in the Sholly Decision and not use this as an investigation for modifying the license.

Senator Simpson. But I wouldn't quarrel it does modify the basic standards.

Mr. Gilinsky. Which is why I would leave off the end interest.

Senator Hart. Commissioner Bradford.

Mr. Bradford. I would intend the type of situation I could imagine using it is like the actual situation that occurred in TMI last spring, in which we were reluctant to say that the public health and safety in and of themselves required the immediate venting of the krypton, but in fact it did seem to us to be a good idea. Also there was no significant hazards involved and one could use the first sentence of this amendment alone to cure that problem. But it seemed that the public

we have with other major sources of power, the better nuclear power looks to this Senator. And I am glad the Commission is here this morning. I think it is important to get on with the business of reviewing and issuing license where that can properly be done.

Thank you.

Senator Simpson. Thank you very much, Mr. Chairman. I appreciate those comments from you. You have an extraordinary background in environmental legislation and a deep interest in it indeed.

I have some questions with regard to the Sholly Decision. In reaching that determination that a particular license amendment involves "no significant hazards consideration," what criteria has the Commission employed in the past and how do these criteria differ from those that the Commission had published in proposed form and was in the process of completing at the time of the Sholly Decision?

Mr. Hendrie. Could I ask the General Counsel to talk about this definition matters, Mr. Chairman?

Senator Simpson. Please.

Mr. Hendrie. Mr. Bickwit.

Mr. Bickwit. The proposed rule is helpful because it is in effect a codification of the practice that staff and the Commission have been using in reaching decisions on these issues. What the proposed rule would say is that the

Commission will consider in making a no significant hazards consideration finding whether the proposed amendment would one, involve a significant increase in the probability or consequences of an accident previously evaluated; two, create the possibility of an accident of a type different from any evaluated previously; or three, involve a significant reduction in a margin of safety. And that has been basically the criteria, those have been basically the criteria the Commission has been using.

Senator Simpson. And those would remain the principal criteria?

Mr. Bickwit. This is a proposed ruleing for which the comment period has closed. The Commission will now consider those comments and decide whether this is the practice that it will continue to adhere to.

Senator Simpson. To what extent if any will the Sholly Decision impair the NRC's supervision of operating nuclear power plants?

Mr. Hendrie. Well, if the decision were to stand, Mr. Chairman, then we would very rapidly begin to have very grave difficulties that undoubtedly are going to be in hearing on some fraction of those 400-odd amendments a year that have no significant hazards consideration associated with them. We very rapidly are going to saturate in terms of the ability of the staff engineers and staff lawyers to deal with

a number of specific divisions because once they move out of the formal documents into the informal documents it becomes very much harder to use them as a basis for enforcement action. My only difference with what the Commission said is I don't necessarily share the view of a community out there that is prepared to pounce in on all 70 plants. For me it is enough for the possibility of one or two plants to be held up in hearings that don't involve signifcant hazards, but I wouldn't urge you legislate on the basis that the industry would somehow be shut down or even 10 or 20 plants being shut down if theSholly Decision became final. I would like to avoid the possibility of even one plant being delayed.

Senator Simpson. Commissioner Gilinsky.

Mr. Gilinsky. I think it is worth saying that this analysis of what may happen may in fact be correct is based on a notion that the law requires that a hearing on an anemdnet no matter how minor has to be a fully adjudicatory hearing. That is what our lawyers seem to be telling us. I am not myself sure that is right.

Senator Simpson. We have all had those suspicions.

Mr. Gilinsky. Even then I would say it is an unreasonable burden that there should have to be hearings on matters which are truly not important.

Senator Simpson. One of the interesting things to me in reviewing the Sholly Decision was you developed that, that

really there was ever any advance notice required under previous considerations and now we are going to come up with what might be termed blanket request for hearings, and also this nebulous phrase "expression of interest". The Court rules in that case that there was a hearing required before a license amendment involving, and then this key phrase "no singificant hazards consideration" becomes effective if there is a request for a hearing or "expression of interest which is sufficient to constitute a request for a hearing." What sort of expression of interest would be sufficient in your mind to constitute a request for a hearing?

Mr. Hendrie. Well, it is always hard to know when the judges write an opinion, even when the Commission writes an opinion if it doesn't speak to a partiular point you can speculate on what they had in mind. It sounds to me however as though the court leaves open, if it doesn't outright declare, that there is a very broad class of expressions of interest which would have to be regarded by the Commission as either requests for hearings in advance sort of just generally in advance of the issue, or at least put us in a position where we feel it necessary to go and query those specific parties each time one of these no significant hazards amendments came up.

It is possible from a reading of the decision to infer that a party say at the initial licensing of a plant could

sent a letter to the NRC saying I hearby request a hearing on all icense amendments that may come up in the future on this plant as long as it operates or I am around. Then that is on file and the kind of language the court has used here, it is conceivable that could be regarded as a formal request for a hearing, which would automatically trigger a hearing every time one of these amendments came up. If there were the case, I don't know whether I am stretching here too much or not. Let me look over my shoulder and see what General Counsel has to say.

Mr. Bickwit. I think the hypothetical the Chairman posed is a little unlikely.

Mr. Hendrie. Unlikely or not in accordance with the decision?

Mr. Bickwit. I think probably it is unlikely that it is in accordance with the decision.

Senator Simpson. Mr. Bickwit, I have heard the Chairman recall against the brethren of the bar and I will leave it at that, and then see him turn and call upon you for the answer to the question. A terrible anomaly.

The court decision too stated that this phrase "any significant changes in the operation of a nuclear facility in itself consummates a license amendment." What in your view constitutes such a "significant change in the operation of a nuclear facility"?

AA61-2 PDR

Re 3/27/81

STATEMENT OF J.C. TURNER ON THE PROPOSED AMENDMENT TO SECTION 189 OF THE ATOMIC ENERGY ACT OF 1954 BEFORE THE SUBCOMMITTEE ON NUCLEAR REGULATION. MARCH 25, 1981

Mr. Chairman and members of the Committee on Nuclear Regulation, my name is J.C. Turner, General President for the International Union of Operating Engineers. I am appearing here today on behalf of the officers and members of the Operating Engineers Union. In addition, the views I will express at this hearing are endorsed by several other labor organizations:

The International Brotherhood of Electrical Workers, AFL-CIO

The International Union of Electrical, Radio and Machine Workers, AFL-CIO

The Laborers' International Union of North America, AFL-CIO

The Building and Construction Trades Department, AFL-CIO representing 4 million construction workers

On behalf of those organizations, I am here today to speak in favor of the proposed amendment to Section 189 of the Atomic Energy Act of 1954. The purpose of this amendment reflects what we believe to be the original intent of Congress that nuclear license amendments may be made effective without prior hearing.

Let me make it clear at the outset that safety for workers and the public is our first consideration in the development of nuclear energy. None of our

organizations would, under any circumstances, accept or support a measure that would create any unnecessary dangers to our members, to the public living near the site of a nuclear plant or to the environment.

We do not, however, find that the legislation under consideration here will create such dangers. The Sholly decision imposes an intolerable burden on the nuclear industry without creating any additional safety factors. Under the terms of this decision, any intervenor can, by questioning a nuclear licensee's proposed amendment, demand prior hearings before permission is granted to implement the amendment. Thus, for little more than the price of an 18-cent stamp multi-billion dollar construction jobs can be brought to a complete halt with severe consequences to workers and to the consumers of electrical power.

No engineering project is so thoroughly reviewed, from a safety standpoint, as a nuclear generating facility. The applicant must give detailed accounts of engineering safety responses to both high and low probability accident scenarios. These respones are reviewed by committees and subcommittees of the Nuclear Regulatory Commission before which the licensed applicant must defend his design repeatedly. Before a construction license is granted, the Nuclear Regulatory Commission will have assessed the reaction of the plant to any conceivable circumstance.

At the end of that process, the construction permit applies to a facility that has been examined down to the last valve. The construction permit, when issued, applies specifically to the engineering design which was so examined. This is the key to evaluating the Sholly case. Given such detailed examination, an amendment to a nuclear plant license may involve no more than a change in valves, or the pipe plan, or a rearrangement of wiring inside the plant. Yet, under the Sholly decision, each of these insignificant change orders could become the occasion for stopping work on the facility for periods ranging from six to nine months while public hearing and comment goes forward under the rules of the Administrative Procedures Act.

Our support for the proposed amendment, which will overturn the Sholly decision, is based on certain prime considerations.

The first is our view that U.S. energy policy demands the maximum production of all forms of domestic energy -- nuclear, oil, coal, gas, synthetic fuels and renewable sources. If we are to achieve energy independence, no one fuel source is sufficient. We need everything we can get. Nuclear power is clearly one major source of energy immediately available for development. It is clean, plentiful, relatively inexpensive and, in most regards, less damaging to the environment than

alternative sources involving fossil fuels. Clearly, it is in the public interest to assure the maximum safety precautions are taken by the nuclear power industry. It is also in the public interest that once the parameters of safety have been established, work go forward at the most rapid possible rate. The Sholly decision is an open invitation to violate this simple principle of the public interest.

The first obvious consequence of the Sholly decision is that it would greatly inflate the costs of nuclear plant construction. These are multi-billion dollar projects. On such projects, the irretrievable loss from construction delays amounts to hundreds of thousands and even millions of dollars a day. Repeated applications of the Sholly decision to routine change orders in the construction of the plant would impose severe cost on the ultimate consumer of electrical power without, in any way, guaranteeing additional safety.

As labor unions, we are, in addition, committed to protecting the jobs of our members. Most nuclear plants require the assembly of large numbers of construction workers in excess of what the local labor market can provide. When the work which atrracted these men is interrupted for long period of time, the assembled labor force scatters very quickly. Thus at the end of the public hearing period, the contractor would be obliged to recruit an entirely new labor force and engage in the training and security processes required by the NRC. This

not only interferes with the earning power of our members, but, again, imposes a large additional cost which will have to be met by the customers of the power company.

I have repeatedly stated that the application of the Sholly decision adds no increment to either the workers or public safety in the construction of a nuclear plant. In addition to that, I should point out that passage of this amendment will, in no way, reduce the public's ability to participate in safety discussions regarding the nuclear power facility. The NRC, even under the terms of this amendment, will still be required to hold public hearings on demand even with respect to amendments to a nuclear plant construction license. However, if this amendment is passed, work will proceed under the terms of the amendment where the NRC has found that "no significant hazard" is raised by the license amendment.

If this were any other situation than the construction of a nuclear power plant, the Sholly decision would be merely a curiosity and not the matter of serious concern that it is. Since it does apply to nuclear power construction, we may be sure it will be used to provide unending interruptions to construction projects. Opposition to nuclear power, we have observed, rises above any consideration of procedural or legislative safeguards or engineering assurances of safety. The

Sholly decision, if allowed to stand, could well spell the doom of nuclear power development in the United States. Certainly, we believe it would be used for this purpose in spite of the fact that no responsible commentator on our future energy needs has been able to draw a scenario that does not include extensive use of nuclear energy.

In closing, gentlemen, I wish to reiterate that our unions would in no way tolerate any denigration of worker and public safety by the nuclear power industry. If the Sholly decision in any way contributed a safety factor, I feel we would be adamant in our support for its implementation. We find, upon careful examination, however, that the rules stated in the Sholly case add only confusion, costs and the interruption of vitally necessary work without adding one single increment to safety in the nuclear power industry.

Thank you.

AA61-2 PDR

3/27/81

STATEMENT OF ROBERT HAGER
TO THE
SENATE SUBCOMMITTEE ON NUCLEAR REGULATION OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
MARCH 25, 1981

In June 1980 the NRC authorized the first step in the cleanup of the crippled Three Mile Island Unit 2 nuclear reactor by allowing its owner, Metropolitan Edison, to simply open the vents of the containment building and release the accident generated airborne radioactive materials into the ambient air.

At least four alternatives to this intentional release of radiation on the public had been considered by the NRC. However these alternatives which would have isolated these dangerous wastes from the environment were rejected on the principal ground that delay in the cleanup would cause psychological stress to the inhabitants neaby TMI-2. Implementation of the most practical of the alternatives was estimated by the NRC to take as much as a year. The NRC later ruled in a related TMI proceeding that the NRC had no jurisdiction to consider issues of psychological stress. In making its decision on which alternative to approve for decontaminating the TMI-2 atmosphere the NRC never undertook to apply the governing rule that emissions of radiation must be kept As Low As Reasonably Achievable (ALARA).

Shortly after the NRC's decision was announced, Steve Sholly and Don Hossler, two citizens of the TMI area, requested that the NRC grant a 30 days' notice period before implementing the decision to vent radiation from TMI-2. They claimed that the decision involved significant hazards considerations and therefore notice was required by statute. The NRC refused to provide the requested 30 days' notice before releasing the radioactive materials from TMI-2. Subsequently a group representing citizens living within about five miles of TMI-2, People Against Nuclear Energy, requested a public hearing on the venting decision. When the requested hearing was denied by the NRC this group filed a suit in the

United States Court of Appeals requesting that the NRC be ordered to hold hearings before implementing its decision to vent radioactive materials from TMI-2.

The NRC had divided its decision to vent into two separate orders designed to avoid public participation in the decision to vent radiation from TMI-2. The first order permitted venting within the radiation release limits fixed in the operating license and the second permitted venting at rates of release exceeding even those for an operating reactor. PANE alleged that both of these orders were license amendments, although only the second was acknowledged as such by the NRC. Therefore under § 189(a) of the Atomic Energy Act a prior hearing was required as a matter of law on the license amendment effected by the orders. Before the venting occurred the Department of Justice filed a formal document in the Court of Appeals agreeing that a hearing was legally required on the acknowledged license amendment even though the NRC had made a finding that this amendment involved no significant hazards consideration. The Court of Appeals had directly so ruled seven years before in Brooks v Atomic Energy Commission, 499 F.2d 1069 (D.C. Cir. 1973); the language of § 189 was clear and unambiguous; and the Justice Department's own detailed investigation into the legislative history of § 189 would support no other conclusion. Accordingly the Department gave formal notice that the NRC's refusal to grant a hearing would be a violation of law. Notwithstanding this authoritative interpretation of its obligations, the NRC lived up to its reputation as one of the most arrogant and autocratic agencies in the federal bureaucracy by blatantly violating its governing statute and venting radiation upon unwilling citizens without a lawfully required prior hearing. After the fact the Court of Appeals entered a declaratory judgment that the NRC's action had been unlawful.

The NRC has consistently attempted to cover-up its blatant violation of settled law by contending that the Court of Appeals has imposed a new requirement

for public hearings not previously contemplated by existing law. To lend a note of dramatic urgency to this transparently false cover-up before it is exposed in light of experience, the NRC has made wholly unsupported assertions that the Court of Appeals decision in PANE's case will lead to an intolerable drain on its resources and to shutdowns of as many as 20 reactors.

The NRC,while highly critical of the Court of Appeals,studiously avoids any reference to the facts of the case decided by the Court of Appeals. The NRC chooses to discuss "prospects" of hypothetical cases which have not and never will occur rather than focus any attention on its own blatantly illegal actions on an issue of pressing concern to the injured and increasingly alienated citizens of Three Mile Island. A quick look at the facts will reveal the NRC's assertions to be a sham and its proposed legislation as an attempt by an agency already "virtually unique" in its freedom from control to aggrandize even more power at the expense of due process of law and democracy.

Question 1 : What is the likely impact of the Sholly decision in terms of resources and time needed to process reactor license amendments, the potential for the shutdown of operating reactors until any required hearings on license amendments have been completed, and the adequacy of NRC health and safety reviews?

The "Sholly" decision will have no impact whatsoever on the NRC's legal obligations. The Court of Appeals' decision was a declaratory judgment that the NRC's actions were illegal. But since the action of releasing radiation is irrevocable the NRC is not required by the Court's decision to take any remedial action whatsoever. The "Sholly" decision doesnot set any new precedent or make any new law. The statute itself has been clear and unambiguous for many years. The same Court in Brooks made the very same ruling of law seven years ago. Any effects that the "Sholly" case might have as precedent would already have been experienced

over the past seven years. But the NRC has failed to provide any examples of the claimed ill-effects of § 189 as interpreted in Brooks.

The NRC's claims that the "Sholly" decision will require a change in NRC administrative practices rest on the totally false assumptions that either a) the Court's decision actually states law that did not already clearly exist under § 189 and the Court's previous decision in Brooks or b) that the NRC had a practice of violating the law stated in Brooks which it will now discontinue in light of the "Sholly" decision. The first assumption is revealed as simply untenable by the Department of Justice's statement of the prevailing law before the Court of Appeals' ruling. If the Court of Appeals made new law in the "Sholly" decision then why was the Justice Department unable to support the NRC's contentions even before the "Sholly" decision was rendered? As for the NRC's practice before the "Sholly" decision, the agency has entirely failed to support its assertions concerning its prior practices with a single example. Although repeatedly challenged in the course of litigation to show that the Commission had on even one previous occasion denied a requested hearing on the grounds that "no significant hazards consideration" was involved, it was unable to do so. While the public, like the Justice Department, had every reason to believe before the "Sholly" decision that an affected person was entitled to a hearing on a license amendment notwithstanding a "no significant hazards consideration" finding, the NRC had never before had occasion to deny a requested hearing on this ground. The "Sholly" decision will have no effect on the number of hearings requested on license amendments, the number of such hearings granted, or the total time and resources spent on such hearings. As for the NRC's fanciful suggestion that it will force the shutdown of operating reactors for hearings on issues that involve truly no significant hazards consideration, the easy answer which would save this Subcommittee's valuable time is to let the NRC come to Congress after such events actually occur.

Even if the "Sholly" decision was novel and did represent a departure from established law and precedent, it would not have the grave impact wildly claimed

by the NRC. Compared to the huge amount of subsidies which the government has given nuclear power the resources devoted to assuring public participation and due process are miniscule. Public participation provides independent scientific and other information to the decision makers by way of private not public resources. Studies have shown that regulation has not been the most significant cause of delay. Where time is important, surely the NRC is capable of holding an expedited hearing. In the NRC's example of changing fuel, such a change can surely be anticipated and approved sufficiently in advance that any brief hearing would not interfere in the operation of a plant. Moreover in the imagined case where a hearing is requested on an issue that truly involves trivial matters of no health and safety consequence, the NRC has ample means, other than expedition and control of its own procedures, to deny a hearing or prevent a hearing from interfering with plant operation. The NRC applies a rigorous standing requirement to any party desiring to participate in its proceedings. Such a party must show an interest that may be injured in fact as a result of the proceeding and that the interest is protected by the Atomic Energy Act. See Washington Public Power Supply System, 5 NRC 650 (1977); Portland General Electric Co., 4 NRC 610,613-14 (1976). Mere economic concerns for example are not sufficient to obtain standing before the NRC. In re TVA 5 NRC 1418,1421 (1977). See also In re Consumers Power Co., 10 NRC 108 (1979); 10 CFR § 2.714(2). The NRC's rigorous standing requirements have been frequently used to deny the public participation in NRC proceedings. They are more than adequate for weeding out those imagined hearing requests on issues that do not legitimately affect the public.

Question 2 : Of the total number of reactor license amendments considered by the NRC in a given year how many are classified as involving no significant hazards consideration? Of these, how many typically involve hearing requests by interested persons? What types of reactor license amendments are included within the no significant hazards consideration classification? To what extent if at all do

these types of amendments involve significant public health and safety questions?

Before Congress undertakes to deliberate whether or not citizens all over the country will be denied due process of law and rights to democratic participation in decisions that will have irremediable effect on public health & safety concerns, the NRC should be required to submit detailed statistical substantiation of its wild claims about the impact of license amendment hearings on its regulatory procedures. In a letter to the Subcommittee dated February 20,1981 the writer has listed the data that should be furnished by the NRC to Congress so that its assertions may be measured against reality. From the little information that the NRC has made available it appears that in 1980, for example, the NRC processed about 470 operating license amendments. Of these perhaps half or more were held to involve no significant hazards consideration. Of the total number of 470, only eleven involved requested hearings. Of these eleven, seven requests were either withdrawn or dismissed by the NRC.

Though undoubtedly most of the NRC's findings of "no significant hazards consideration" are legitimate, the NRC's handling of the radiation venting at TMI-2 shows that it will use such a finding to avoid public hearings on issues that are controversial and do involve serious concerns of hazards to public health.

Question 3 : What are your views on the adequacy of the standards used by the NRC to determine whether a particular reactor license amendment involves no significant hazards consideration?

Other than PANE's request for a hearing on a matter deemed to involve no significant hazards consideration by the NRC in 1980, there have been virtually no requests for hearings by the public in cases where such findings have been made that have been denied by the NRC. Accordingly such findings are usually uncontested. The only known contested finding was that involved in the TMI venting. Here the NRC standard for determining a significant hazards consideration was grossly inadequate. The NRC waived a limitation on the rate of radiation releases

from the crippled TMI-2 reactor. This increase in rate of release certainly involved significant considerations of hazards to public health. Both before and after the release the NRC obtained independent scientific information that the releases could injure and kill persons exposed to them.

It is difficult to say how many other issues involving serious health considerations have escaped notice under the cloak of an NRC "no significant hazards consideration" finding. But it is clear that if Congress validates the NRC's approach in the Three Mile Island venting situation by amending § 189 in response to the "Sholly" decision it can be confidently predicted that the NRC will in the future use this technique for denying hearings to the public on serious questions involving health and safety concerns.

Question 4 : What public policy if any is served by the requirements of § 189(a) of the Atomic Energy Act with respect to license amendments involving no significant hazards consideration as those requirments have been interpreted in "Sholly?" Specifically, should there be a hearing upon request that the NRC determines involves no significant hazards consideration? If such a hearing is requested should it stay the effectiveness of the license amendment?

The hearing requirements serve the most fundamental of all public policies - those of democracy and due process of law. Persons affected by NRC decisions are accorded the right under § 189(a), not to mention the Constitution, to be heard before they are injured in their persons or property by NRC actions. If the NRC had applied the law as interpreted by the Justice Department and the Court of Appeals in "Sholly," the people around Three Mile Island would have had an opportunity to be heard before they were exposed to the deadly radiation released pursuant to the NRC orders.

The "Sholly" case reveals that the NRC will on occasion make a "no significant hazards consideration" finding for the purpose of avoiding a hearing on a contro-

versial issue of legitimate concern to the public and which raises legitimate questions of public safety. It has also been seen that seldom if ever has anyone requested a hearing on issues other than those that raise questions of legitimate public concern. Interventions are extremely expensive. Aligned against the public intervenors are not only government attorneys financed from the public treasury, but also attorneys from some of the largest law firms representing some of the largest corporations in the country. A company capable of raising $ 3 billion dollars or so necessary to build a nuclear reactor is capable of spending a sizable amount in the legal proceedings necessary to obtain the license from which it hopes to profit. These corporations are typically public utility monopolies which can charge such expenses ultimately to ratepayers. By way of contrast the public intervenors have no means to transfer the costs of their intervention nor do they have any means to financially profit from any victory. These citizens spend their own resources on attempts to correct or avoid conditions that will adversely affect their health and safety. The NRC has provided no evidence and there is no reason to believe that any citizens would spend their own resources attempting to litigate issues that have no bearing on their health and safety.

By way of contrast there is every reason to believe from the past history of the NRC in the "Sholly" case and numerous other cases that the NRC will use any technique available to it to avoid public participation in issues irrespective of whether they involve mattersraising serious health and safety concerns. The NRC has established a consistent pattern of secretiveness and arrogance that has frustrated and thwarted public participation in its decision making. One of the present Commissioners, Bradford, has frequently commented on this pattern. E.g. In the Matter of Nuclear Fuel Services, Inc. CCH, 2 Nuc. Reg. Rep. 29,470-71.

The public policy impact of the NRC's proposal to limit the public's right to a hearing on demand on license amendments is clear. It will not eliminate any abuse by the public of this right because there is not one shred of evidence

that this right has ever been or is now being abused. The NRC does not even attempt to assert that it would have been an abuse of this right if a hearing had been ordered in "Sholly" before rather than declared after the venting. The clear impact of the NRC's requested legislation will be to foster additional litigation over what is a "significant hazards consideration" - the very issue that is the subject of the NRC hearing desired. The NRC would be given one more weapon to deter public participation in its proceedings. When it desires, the NRC could force poorly financed public intervenors to litigate the question of "significant hazards consideration" before they could obtain a public hearing where they might adduce evidence as to the extent of the hazards. It only compounds the predicament of such intervenors that the litigation must be brought not in a U.S. District Court but rather in a Court of Appeals which is unaccustomed to fact finding proceedings.

The NRC has never hesitated to use the taxpayers' money to finance litigation against public interest intervenors. The "Sholly" case is a good example of how the NRC wins even when it blatantly violates the law and "loses" in Court. Public participation was successfully frustrated in "Sholly" at no cost to the agency but that of litigation. The threat of litigation alone is usually sufficient deterrent to prevent most under-financed public interest groups from seeking to enforce their right to intervention. The NRC's proposed changes would create one more barrier to enforcement of legitimate hearing rights and foster new litigation.

In the circumstance of the Shelly case, where the action taken by the NRC was irreversible, the hearing request should clearly have stayed the effectiveness of the orders. There may be instances where actions are reversible and a prior hearing would not be absolutely required to serve due process interests. The Courts are sensitive to all of the variables involved in making the determination as to when a prior hearing is required to serve due process interests. It would serve little purpose for Congress to enter this area by attempting to spell out each circumstance where a prior hearing is and is not

required. Such decisions are best left to the case by case application of the general principles of equity with which the courts are well experienced. It should be clear however that any decisions involving releases of radiation and the As Low As Reasonably Achievable (ALARA) rule - such as was the case with the TMI venting - require a prior hearing if requested, notwithstanding any findings by the NRC concerning significant hazards.

The NRC and its predecessor the AEC has constantly underestimated the hazards of radiation. The NRC has continued the AEC's practice of serving as an adversary of the nuclear industry's interests by minimizing those hazards. It is putting the fox in charge of the chicken coop to permit the NRC to foreclose discussion on the question of radiation hazards by determining ahead of time that "no significant hazards" are involved in one of its decisions. The very purpose of a hearing is to permit the public at least the chance of overcoming this presumption which underlies most of the NRC's activities.

Question 5 : Is there a need to amend § 189(a) of the Atomic Energy Act with respect to the consideration of reactor license amendments involving no significant hazards consideration as that section has been interpreted in the Sholly decision? If so what amendment would you recommend?

Since § 189(a) has existed for many years on the statute books in its present form, and with the exact meaning that the "Sholly" decision accorded to it, and has not caused any problems except in the fertile imaginations of the NRC lawyers, there is no reason to amend the statute at the present time.

Testimony

before the

Subcommittee on Nuclear Regulation

of the

Senate Committee on Environment and Public Works

By

Jay E. Silberg

Shaw, Pittman, Potts & Trowbridge

March 25, 1981

Mr. Chairman and Members of the Committee

Good afternoon. I am Jay Silberg, a partner in the law firm of Shaw, Pittman, Potts & Trowbridge here in Washington, D. C.

Among other clients, my law firm represents some twenty electric utility companies with nuclear power plants in operation or under construction. In addition to other activities, we represent these utilities in federal and state regulatory and licensing proceedings as well as in court cases. Three of these utilities are Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, the co-owners of the Three Mile Island Nuclear Station. On their behalf, we have been participating in Sholly v. U.S. Nuclear Regulatory Commission.[1]

The November 19, 1980 decision of the U. S. Court of Appeals for the District of Columbia Circuit in Sholly overturned twenty years of consistent administrative practice by the NRC and its predecessor agency, the Atomic Energy Commission. Since 1962, when Congress amended section 189.a of

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1 Sholly v. United States Nuclear Regulatory Commission, ____ F.2d ____, No. 80-1691 (D. C. Cir. 1980).

the Atomic Energy Act to reduce the number of hearings which the AEC was required to hold,[2] the Commission has consistently exercised its discretion to issue amendments to reactor operating licenses without prior notice and without prior hearing where it has determined that the amendment had, in the language of the statute, "no significant hazards consideration." The Sholly decision held that Section 189.a requires NRC to hold a hearing prior to issuing a license amendment whenever an interested party requests one, even if the Commission has properly determined that the amendment involves no significant hazards consideration. This ruling was not, however without its critics on the court. Four of the eleven sitting judges on the D. C. Circuit sharply dissented from the Sholly decision, charging that it "ignored logic", "distorted the legislative history", and "eviscerated the Congressional mandate".[3] According to these judges:

> The panel's interpretation of Section 189(a), taken as a whole, renders it virtually impossible for the NRC faithfully to follow the implicit congressional directives found in that section.[4]

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2 Pub. L. 87-615, 76 Stat. 409 (1962).

3 Sholly v. United States Nuclear Regulatory Commission, Statement on Denial of Rehearing En Banc (March 4, 1981) (Judges Tamm, MacKinnon, Robb and Wilkey).

4 Id., slip op. at 11.

I would request that a copy of the Court's decision and the statement by the four judges be included in the record of this proceeding.

While the Sholly case purported to decide a number of interesting issues (including some which were not even briefed by the parties),[5] the most important immediate impact of the decision--should it go into effect--is that it could result in lengthy and costly hearings precipitated by a simple request and having the potential for shutting down many of the nuclear power reactors now operating in this country. These shut downs could easily last for nine months or more. The economic impact of these shut downs on utilities and their customers would be dramatic--typical costs for replacing the power generated by a nuclear plant range between $250,000 to $500,000 per day.[6] Over nine months, this would amount to $67.5 to $135 million. Equally significant would be the effect on oil imports. In some parts of the country--particularly the

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5 For example, the Court decided that petitioners in Sholly had requested a hearing notwithstanding the fact that this issue "was not argued by the parties." Slip op. at 19, fn. 25.

6 Affidavit of Roger S. Boyd, dated December 3, 1980, attached as Exhibit A to Metropolitan Edison Company's Petition for Rehearing and Suggestion for Rehearing En Banc (December 3, 1980) ("Boyd Aff."), p. 14. Mr. Boyd is a former Director of NRC's Division of Project Management, with 18 years experience in the NRC and AEC licensing process.

Northeast--replacement power comes in large part from imported oil--about 30,000 barrels each day for a 1000 megawatt nuclear plant.[7]

How could a license amendment which does not involve significant hazards consideration bring about the shutdown of a nuclear power plant? To understand this, some background in NRC licensing practices is helpful. An NRC license typically includes a number of license conditions. It also includes what are known as Technical Specifications. For current plants, these are some 400 pages of very detailed technical requirements, including plant design features, safety limits, safety system settings, limiting conditions for operation, surveillance requirements, environmental technical specifications, and administrative controls.[8]

Because they are so detailed, Technical Specifications and other license provisions must frequently be modified. All of these amendments require NRC approval. As of last December, there were some 750 to 800 license amendment actions pending before NRC. Many of these would be expected to be approved based upon a no significant hazards consideration finding.

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7 Boyd Aff., p. 14.

8 Boyd Aff., p. 2; NRC Motion to Stay Issuance of Mandate (December 10, 1980) ("NRC Stay Motion"), pp. 3-4.

Over the past 4 years, NRC issued 1500 to 1600 license amendments involving no significant hazards considerations.[9]

While most of these license amendments are not needed for continued plant operation, some are. The NRC has estimated that if license amendments involving no significant hazards considerations are not issued in a timely manner, over the next few months some twenty nuclear power plants would either have to shut down or operate at reduced power levels.[10] A typical case might involve a reactor's annual refueling. In many cases, minor adjustments need to be made in the Technical Specifications to reflect the characteristics of the new fuel. Even though these changes may meet the tests used by the NRC to determine whether there are significant hazards considerations, i.e.

-- is there significant new safety information not previously considered;

-- is there a significant increase in the probability or consequences of an accident;

-- is there a significant decrease of a safety margin;[11]

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9 Boyd Aff., pp. ; NRC Stay Motion, p.2.

10 NRC Stay Motion, pp. 2-3.

11 Boyd Aff., p. 3.

a license amendment is still required. If that amendment is delayed because of a hearing, the plant cannot be refueled and it remains shut down.

I would request that two documents which set forth many of these facts be included in the record of this hearing--first the December 3, 1980 Affidavit of Roger Boyd which was part of Metropolitan Edison's Petition for Rehearing to the Court of Appeals. And second, the NRC's Motion to Stay Issuance of Mandate, filed with the Court of Appeals on December 10, 1980.

Getting to the substance of the issue presented by the Sholly decision, I do not think that this hearing is the proper forum to argue whether the Court of Appeals was right or wrong. That question will be presented to--and we hope decided by--the U. S. Supreme Court. Suffice it to say that it is our opinion that the Court of Appeals misinterpretted the intent of Congress and ignored the Commission's consistent interpretation over almost twenty years of its governing statute. The Court's opinion quotes--and then ignores--the legislative history which states that the 1962 amendment adding the "no significant hazards consideration" language

> in no way limits the right of an interested party to intervene and request a hearing [and these are the key words] at some later stage...[12]

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12 Sholly v. USNRC, slip op. at 19 (emphasis added).

The policy issue which this Committee should consider is whether the NRC should be able to issue license amendments having no significant hazards consideration without a prior hearing. Let me focus on two questions:

1. Are more hearings in and of themselves a good thing? and;

2. Should Congress allow the technical staff of the Commission to apply its expertise to determine whether some activities are sufficiently routine that they may be allowed to proceed without a prior public hearing?

As to the issue of more hearings, there can be no argument that evidentiary hearings and their associated trappings can take significant periods of time. The Commission's request to Congress last week for authority to issue low power operating licenses while hearings are still underway is ample testimony that NRC hearings tend to be prolonged.[13] It is difficult to conceive of a hearing being completed in less than nine months after the request is made, even if the issue is a fairly narrow one.[14] Certainly where a license amendment is needed quickly

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13 NRC Press Release No. 81-46, "NRC Proposes Interim Licensing Legislation" (March 19, 1981).

14 The NRC's recently proposed amendments to its rules of practice use eight months as the goal for the period of time from the issuance of the last Staff document to the initial decision in an operating license proceeding. 46 Fed. Reg. 17216 (March 18, 1981). That eight month period excludes most of the prehearing procedures.

and can not be applied for far in advance--as is often the case with amendments needed for refueling--a hearing would force the reactor out of operation.

The NRC is already having difficulty staffing its existing hearing load.[15] There are shortages of Staff lawyers and Atomic Safety and Licensing Board members. More hearings will only make matters worse. Hearings on matters of no safety significance will necessarily detract Staff efforts from matters which do have safety significance. While it is impossible to predict how many hearings might result each year from the Sholly decision, there is no reason to believe that the number would not be significant. I would expect this to be the case even though there were few requests for hearings on no significant hazard consideration amendments before Sholly. Should the Sholly decision go into effect, the word will soon go out that there is now an easy way to shut reactors down.

While some might welcome the idea that more hearings would further delay NRC licensing or cause plant shutdowns, I do not believe that this result is in anyone's best interests. It is certainly not a result which Congress could have intended in 1962 or should intend today.

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15 See letter from Joseph M. Hendrie, Chairman, NRC, to Honorable George H. W. Bush, President of the Senate (March 18, 1981) transmitting proposed legislation for interim licensing.

Nor is there any evidence that prior hearings on the kind of narrow technical issues involved in no significant hazards amendments are likely to produce useful results. What are involved are specific technical matters--such as adjustments to maximum average planar linear heat generation rate, changes to minimum critical power ratio, and variations in moderator coefficients.[16]

Hearings with all the judicial trappings are not necessarily the best way to reach decisions on highly technical issues. Despite a lawyer's natural inclination to think that his or her skills are crucial to the search for the truth--as it may arguably be in personal injury litigation or criminal cases--there is a much smaller likelihood that this is the case where purely technical questions are involved.[17] And where the issues involve "no significant hazards consideration", there is even less of a chance that a hearing would serve a useful purpose.

It is perhaps ironic that the issue of prior hearings for this category of license amendments arose in the context of the krypton venting at TMI. That activity had perhaps more public

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16 See NRC Stay Motion, p. 4; Boyd Aff., pp. 4-5.

17 See International Harvestor Co. v. Ruckelshaus, 478 F.2d 615,631 (D. C. Cir. 1973).

comment and input that any other license amendment the Commission has ever issued. NRC published a draft environmental assessment and solicited public comments.[18] Some 800 written comments were received. NRC held public meetings and met with citizens groups. It consulted or received comments from six federal agencies, the Commonwealth of Pennsylvania, Oak Ridge National Laboratory, the National Council on Radiation Protection and Measurements and the Union of Concerned Scientists.[19] NRC then issued a final environmental assessment[20] and considered it in two public meetings and a meeting with the Advisory Committee on Reactor Safeguards. All this occurred before the orders which led to the Sholly decision were issued. It is hard to imagine what additional public participation was necessary.

Even in a more typical case, the absence of a prior hearing does not foreclose public input. Our position has not been that Section 189.a prohibits hearings on no significant hazards consideration amendments--only that it authorizes those

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18 NUREG-0662, Draft Environmental Assessment for the Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere (March 1980); 45 Fed. Reg. 20265 (March 27, 1980).

19 NUREG-0662, Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere (May, 1980), vol. II.

20 Id., vol. I.

amendments to be made effective before a hearing. Most of these amendments are reversible. A surveillance interval which has been shortened can be lengthened. A calculational technique which is modified can be returned to its original form. For these amendments, a hearing which takes place after the license amendment is effective would be more than adequate. Even for the exceptional, irreversible amendment like the TMI venting, an after-the-fact hearing would let the NRC Staff know that an outside party was looking over its shoulder.

Other methods besides prior hearings are available for providing input on license amendments involving no significant hazards considerations. Of course, the application for the amendment and the Staff's disposition are all on the public record. Interested persons can communicate their comments to the Staff; they can file requests for orders to show cause;[21] they can seek reconsideration from the Commission; and they can ask the courts for injunctive relief.[22]

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21 10 C.F.R. §2.206. Denial of requests for orders to show cause are judicially reviewable. See, e.g., Porter County Chapter of Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 606 F.2d 1363 (D. C. Cir. 1979).

22 The Sholly petitioners sought to stop the krypton venting at TMI by filing for injunctive relief in the U. S. Court of Appeals for the Third Circuit as well as the D. C. Circuit. These attempts were denied.

I think that we must reasonably conclude that additional hearings on these types of amendments are not necessarily desirable as an end in itself.

The second question which I posed is whether Congress ought to allow the technical expertise of the NRC to determine that some amendments can be made immediately effective notwithstanding a request for a hearing. Congress has charged the NRC with responsibility for regulating the nuclear power industry.[23] The NRC Staff routinely oversees the highly technical questions surrounding the design, construction and operation of power reactors. The Commission has shut plants down when it felt that safety so required.[24] It has ordered design changes and procedural modifications.[25] This is not to say that NRC is free from criticism in the way that it has carried out its mandate.[26] But these criticisms hardly justify the creation of a "shadow" NRC Staff to duplicate the Staff's work.

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23 See Energy Reorganization Act of 1974, secs. 201(f), 203(b), 42 U.S.C. §§5841(f), 5843(b).

24 See, e.g., Order to Show Cause, NRC Docket No. 50-334, 44 Fed. Reg. 16505 (March 19, 1979).

25 See, e.g., Order for Modification of License, NRC Docket No. 50-321, 46 Fed. Reg. 9279 (January 28, 1981) (modification to BWR containment system).

26 See, e.g., Report of The President's Commission on the Accident at Three Mile Island (1979); Nuclear Regulatory Commission Special Inquiry Group, Three Mile Island: A Report to the Commissioners and to the Public (January, 1980).

If the NRC can not be relied upon to categorize those license amendments which raise significant safety questions from those which do not, then there is no basis for respecting the NRC's judgments on any questions involving the public health and safety. I know that some would argue that the Commission's technical expertise should not be trusted. These individuals can rattle off a laundry list of accidents, abnormal occurrences, and the like. Nonetheless, when the actual record of the nuclear power industry is examined and compared with the alternatives[27] (or indeed with any other technology), the end result of the NRC's technical judgment is difficult to criticize.

With this review of the impact of Sholly and the underlying policy issues, there can be no question that the decision should be reversed. But is legislation appropriate? Since the Court purported to interpret what Congress intended in 1962, it is certainly appropriate for the Congress to correct the Court's conclusion.

If legislation is called for, what should that legislation say? The NRC has proposed a bill to Congress which would reverse Sholly.[28] The operative language would simply add a

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27 See, Committee on Nuclear and Alternative Energy Systems (CONAES) of the National Research Council, Energy in Transition, 1985-2010 (1979).

28 Letter from Joseph M. Hendrie, Chairman, NRC, to Honorable Alan Simpson, Chairman Subcomm.

(continued next page)

new sentence to Section 189.a authorizing the Commission to issue and make immediately effective a license on a no significant hazards determination, notwithstanding the pendency before it of a hearing request. This language would make it clear that no prior hearing was required, but would allow for hearings after license issuance. This language is reasonably straightforward and would accomplish its purpose.

The NRC's proposed legislative would also add a second new sentence to Section 189.a which in NRC's view would clarify that Section 189.a does not limit NRC's authority to take immediate action where necessary to protect the public health, safety and interest. It is not clear that any such clarification is necessary. The NRC has told the Court of Appeals that it does not interpret the Sholly decision as interfering which its authority to act when the public health, safety and interest requires.[29] I would agree with the NRC that this is

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(continued)
on Nuclear Regulation, Senate Comm. on Environment and Public Works. (March 11, 1981).

29 In a December 10, 1980 filing with the D. C. Circuit, the Commission discussed its

> authority to issue immediately effective orders where the public health, safety and interest so requires. We do not read the Court's decision as restricting that authority or the Commission's rulemaking authority.

Motion to Stay Issuance of Mandate, p.2.

the proper reading of Sholly. If that is the case, the second sentence is not needed.

Thank you for the opportunity to testify before you today.