ADJUDICATORY ISSUE

(Affirmation)

June 19, 1986 SECY-86-188

For: The Commissioners

From: Martin G. Malsch
Acting General Counsel

Subject: COMMISSION REVIEW OF SHOREHAM APPEAL BOARD DECISION ON THE REALISM AND IMMATERIALITY ISSUES (ALAB-818, OCTOBER 18, 1985)

Prior History: SECY-85-391 ("Petition for Review of Appeal Board Decision on Shoreham Emergency Planning/Legal Authority Issues (ALAB-818)") (Dec. 6, 1985); Commission Order (Dec. 19, 1985) (taking review of ALAB-818 but deferring briefing); SECY-86-131 ("Procedures for Litigation of Shoreham Emergency Planning Issues...") (April 28, 19

Purpose: To evaluate the Appeal Board's rejection in ALAB-818 of LILCO's "realism" and "immateriality" theories; to propose a draft Commission decision reversing the merits decisions on those theories, and directing the Appeal Board to reconsider its decision to defer its review of LILCO's other pending emergency planning appeals. Two major issues are presented for Commission decision:

1. Where a radiological emergency plan must of necessity be implemented in part by State and County officials who refuse to participate in pre-emergency planning, is it ever possible to find that a utility plan provides reasonable assurance that adequate protective measures can and will be taken in an emergency?

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2. Do the Commission's regulations require emergency plans to provide for traffic control, e.g., for directing traffic, towing disabled vehicles, and providing fuel to stranded vehicles?

Summary:

In ALAB-818, the Appeal Board ruled that LILCO's emergency plan was fatally defective as a matter of law, based upon LILCO's presumed lack of legal authority to control traffic, to control access to certain areas and to alert and inform the public in an emergency. The Board rejected LILCO's arguments that 1) its plan was adequate because State and local authorities will respond in an emergency, and 2) most of the functions which LILCO might not be permitted to perform were not NRC requirements. We attach a draft Commission order reversing ALAB-818, and remanding to permit LILCO the opportunity to show that the defects in its plan are not significant.

Discussion:

Background

After having initially supported the licensing of Shoreham in the licensing proceeding, Suffolk County withdrew its support and moved the Shoreham Licensing Board to terminate the proceeding on the ground that the NRC could not grant a license for Shoreham in the absence of a government-sponsored emergency plan. The Board denied the motion, reasoning that the agency was required to afford the applicant an opportunity to show that its plan was an adequate one. The Commission affirmed, adding that the agency was obligated to consider a utility-only plan (CLI-83-13, 17 NRC 741, 743), and that "the [emergency planning] issues do not appear to us to be categorically unresolvable." (CLI 83-17, 17 NRC 1032, 1034).

Subsequently, LILCO submitted its plan for NRC consideration, and Suffolk County responded with its contentions, among them Contentions 1-10, asserting that LILCO lacks the legal authority to implement certain features of its radiological emergency plan, including the authority to control traffic and to inform the public.[1] From December 1983 until August 1984, the parties and the Licensing Board operated under an agreement that no evidentiary hearings were required on these "legal contentions." Then, in August 1984, LILCO submitted a Motion for Summary Disposition on the contentions,[2] arguing that it should prevail on these contentions based on three arguments: first, that State and local laws were preempted by federal law to the extent that the State and local laws deprived LILCO of authority to plan for and implement a radiological emergency plan ("Preemption"); second, that even if LILCO lacked legal authority, the State and the County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan ("Realism");[3] and third, that most of the traffic control and public information

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[1]Contentions 1-10 are set forth in full at 17 NRC 958 ff.

[2]Summary disposition is used to resolve issues involving no disputed, material facts. See 10 C.F.R. § 2.749.

[3]LILCO's basis for its realism argument before the Licensing Board was a December 1983 press release by Governor Cuomo stating that "if the plant were to operate and a misadventure were to occur, the state and county would help to the extent possible;" before the Appeal Board, LILCO's asserted basis was "the undeniable truth" that in an emergency the State and County would respond and would permit LILCO to implement its plan. Appeal Brief at 45 (June 3, 1985).

functions which LILCO purportedly lacked authority to implement were not NRC requirements in any event ("immateriality").

The NRC staff and Intervenors opposed the motion, and the Licensing Board denied it, concluding: that LILCO did not gain via preemption the legal authority it otherwise lacked; that even assuming a response to an actual accident by the State and the County, there was no assurance that the response would be other than ad hoc and uncoordinated with LILCO's actions, contrary to the very reason for the emergency planning regulations; while few of the actions listed in Contentions 1-10 were explicitly required by the regulations, these actions nonetheless were necessary to comply with the explicit requirement in section 50.47(b)(10) for plan features which will permit "a range of protective actions" in the event of an emergency;[4] that the defects in LILCO's plan were significant; that LILCO's plan couldn't be considered an "adequate interim compensating measure" under section 50.47(c)(1) because there was nothing in the record to indicate that the State or local governments would ever participate in Shoreham emergency planning, and the Board couldn't speculate on what the governments might do if and when Shoreham began full power operation. LBP-85-12, 21 NRC 644 (1985). In every important respect, the

[4] The Licensing Board found that an uncontrolled evacuation would take longer than a controlled evacuation (about 2½ hours more in good weather, about three hours in inclement weather). From this it concluded that the range of protective actions was impermissibly restricted because sheltering would be required in some fast-breaking events, when otherwise evacuation might have been possible.

Appeal Board in ALAB-818 agreed with the Licensing Board.[5] 22 NRC 651 (1985).

LILCO petitioned for Commission review of ALAB-818, and the Commission granted the petition but deferred any necessary briefing until the Appeal Board rendered its decision on then-pending Intervenor appeals. Order dated Dec. 19, 1985. Recently, in ALAB-832 (March 26, 1986), the Appeal Board resolved all remaining Intervenor appeals, reversing and remanding a few issues to the Licensing Board, but staying the remand until the Commission completed its review of ALAB-818 or directed otherwise. The Appeal Board also left undecided LILCO's appeals on three emergency planning issues.

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[5] The Appeal Board added:

> [T]he Board properly rejected LILCO's "immateriality" argument. We recognize that the Commission's regulations do not spell out the precise manner in which an evacuation is to be conducted if necessary. Nonetheless, the Commission has construed its emergency planning regulations to require "provisions for evacuating the public in times of radiological emergencies." We have likewise observed that the Commission's emergency planning scheme contemplates that emergency evacuation procedures be developed [for the 10-mile EPZ]. LILCO included traffic control as part of its proposed evacuation procedures in light such requirements. We believe that such inclusion was proper. In the context of this case, at least, something more is needed than an aspiration that the public will be able to fend for itself in the event an evacuation is required.

ALAB-818, 22 NRC at 677 (footnotes omitted, emphasis added by the Appeal Board).

Positions of the Parties

In Attachment A we summarize LILCO's appeals on the realism and immateriality decisions, having agreed with Commissioner staffs to leave for a later time review of the preemption issues. Also, Attachment B is a draft Memorandum and Order which reverses on realism and immateriality, which orders further hearings, and which directs the Appeal Board to reconsider its decision not to complete action on pending LILCO appeals.

OGC ANALYSIS

Realism - the Issue

As both boards correctly observed, the Commission's emergency planning requirements were established to prevent a recurrence of the type of situation that occurred during the TMI accident in 1979, where there was inadequate planning and coordination between the utility and the relevant governments. To the extent that there is no coordination and joint planning between the governments and the utility, we agree with the Boards that the LILCO plan does not comply, and indeed cannot comply with some of the Part 50 emergency planning standards.[6]

But the statutes (e.g., section 5 of Pub. Law 97-415, requiring NRC consideration of a utility emergency plan) and NRC regulations (50.47(c)) provide that failure to meet all the standards does not necessarily require license denial; applicants may show that the deficiencies are not significant, that there are adequate interim compensating measures, or that there are other compelling reasons to allow plant operation.

The central issue presented by this paper is whether, as a matter of safety, the LILCO emergency plan can ever be accepted under section 50.47(c), where the State and County response to an actual accident would be unplanned, and LILCO is prohibited from performing the State or County roles in:

(1) guiding traffic;

(2) blocking roadways, erecting barriers in roadways, and channeling traffic;

(3) posting traffic signs on roadways;

(4) removing obstructions from public roadways, including towing private vehicles;

(5) activating sirens and directing the broadcasting of emergency broadcast system messages;

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[6] For example, Part 50 requires licensees to demonstrate that State and local officials "have the capability to make a public notification decision promptly upon being informed ... of an emergency ...." App. E, § D.3.

(6) making decisions and recommendations to the public concerning protective actions;

(7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathways;

(8) making decisions and recommendations to the public concerning recovery and reentry;

(9) dispensing fuel from tank trucks to automobiles along the roadsides; and

(10) performing access control at the Emergency Operations Center, the relocation centers, and the EPZ perimeters.

We regard this as the critical emergency planning safety issue for Shoreham. If the Commission believes that the answer must be "no", then there is little sense in prolonging LILCO's struggle to license Shoreham; the Commission should affirm ALAB-818, leaving LILCO's preemption argument as the only remaining basis under current law for a full power license (LILCO concedes that its immateriality argument, without realism or preemption, will not support a full power license). If the answer is "yes" or "maybe", then LILCO's realism argument is or may be viable.

Realism - Factual Framework

We agree with LILCO that the Commission should presume that State and local officials will act to protect the public in an actual emergency. Common sense and State law dictate such a presumption. The Conference Report on the HUD-Independent Agencies Appropriations bill,[7] also supports this presumption.

While we agree with LILCO on this point, the State and local response would still be ad hoc, contravening the section 50.47(b) standards which require planning. Further, LILCO doesn't point to evidence of what an ad hoc response by the State and County might actually be, or evidence that would support a conclusion that the utility plan could adequately accommodate an ad hoc response. The Appeal Board adopted a particularly pessimistic view of the adequacy of an ad hoc response as follows:[8]

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[7] H.R. Rep. No. 99-212, 99th Cong., 1st Sess. (1985).

[8] 22 NRC 675-676 (footnote omitted).

In this regard, LILCO has failed to make any demonstration that its plan is amenable to ad hoc adoption by the appropriate governmental units at the time of an emergency. The inch-thick volume of the transition plan itself, plus two volumes of implementing procedures, each at least two inches thick, and another, three and one-half inch volume, labeled "Appendix A -- Evacuation Plan," do not lend themselves to quick review and implementation if the State or County is called upon to act. The plan establishes more than 50 different position titles and as many separate functions. It is designed to evacuate up to 160,000 residents from a 160-square mile area that is encompassed within an approximately 10-mile radius from the plant. Among the facilities to be evacuated are three hospitals, eight major nursing and adult homes, and two correctional facilities. At other plants, extensive coordination and rehearsal have been required for such a substantial undertaking. In short, there is simply no reasonable basis for assuming that the State or County could realistically step in at the last moment and execute the LILCO plan.

Realism -- the Safety Standard

Whether LILCO can possibly succeed in showing that an ad hoc response by State and local authorities will be adequate in the 10 areas where LILCO lacks authority depends, of course, on the criteria for adequacy.

Section 50.47(c) provides for licensing, notwithstanding noncompliance with the standards of section 50.47(b), under three circumstances: (1) if the defects are "not significant"; (2) if there are "adequate interim compensating actions", and (3) if there are "other compelling reasons". The Commission has never defined (1), but the term "significant" can be read broadly to mean "important" or "weighty". It would not be unreasonable for the Commission to conclude simply that a defect which did not prevent a plan from providing adequate protection is "not significant".

"Adequate interim compensating actions" have also not been defined, but the Commission held in Indian Point[9] that an interim compensating action to be adequate need not offer protection equivalent to that which would be afforded by a permanent plan

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[9] See, e.g., Consolidated Edison Co. (Indian Point), CLI-83-16, 17 NRC 1006, 1010 (1983).

which is in full compliance. Thus LILCO's plan should satisfy (2) if it is both "adequate", in the sense of adequately protecting the public, and "interim", in the sense of being applicable only for some interval until the State and local governments agree to cooperate. This latter point causes some difficulty, for the State and County assert that there is no evidence here that the governments will ever cooperate, other than speculation about their possible actions should Shoreham go into operation. However, should Shoreham be licensed for full power operation, we think it reasonable to assume that the governments would at least initiate discussions with LILCO with a view to some level of cooperation. Moreover, the governments may change their positions sometime during the license term. Thus, we do not see any substantial difficulty in calling the LILCO plan interim". This would leave "adequacy" as the principal standard for LILCO's plan under (2).

The "compelling reasons" that would permit plant operation notwithstanding noncompliance with the section 50.47(b) standards are not defined, but the NRC may have had in mind national security, urgent power needs, or similar "compelling reasons. Whatever the compelling reasons might be, the Commission presumably intended that there still be some minimum but adequate level of protection in the event of an accident.

This brief analysis brings us to the issue of what is meant by an "adequate" plan -- in the section 50.47(c) context. The regulations themselves suggest a partial answer. Section 50.47(c) only excuses from the 50.47(b) planning standards. There is still the unexcused and more general requirement in section 50.47(a) that "no operating license ... will be issued unless a finding is made that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." Thus a plan with non-significant defects, or an interim compensating action, must still provide reasonable assurance that there will be adequate protective measures.[10] However, the answer is only partial, for the term "adequate" appears again in this general emergency planning requirement. Thus the root issue becomes can the LILCO plan, with an unplanned ad hoc governmental response in the ten areas where LILCO lacks authority, provide for "adequate protective measures ... in the event of a radiological emergency?"

This root question is not answerable as a strict legal matter. Rather, it presents first of all a question of safety approach or philosophy. There are three conceivable options. First, if as

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[10] The Commission has stated generally that emergency preparedness is an "essential aspect" of protecting the public. 45 Fed. Reg. § 55403, col. 3, 55404, col. 1.

the Commission has stated,[11] the fundamental philosophy or approach of emergency planning is prudent risk reduction, and if prudent is understood in the sense of what is reasonable and feasible for the utility to accomplish under the circumstances, then LILCO has very likely done pretty much all that it prudently can. To be sure, more could likely be done with governmental cooperation, but this is not LILCO's fault. If this sort of prudent risk reduction is all that underlies the emergency planning rule, then the LILCO plan probably provides for "adequate protective measures".

On the other hand, we might regard as adequate only that degree of prudent and reasonable risk reduction that can ordinarily be achieved with substantial governmental cooperation in planning. If this is what underlies the emergency planning rule, then the LILCO plan may fail, because it will be difficult for any utility plan to match what can reasonably and prudently be accomplished with governmental cooperation.

Finally, some of the LILCO plan defects go to the heart of emergency planning -- for example, the ability to notify the public of an accident and advise as to protective actions. In issuing the emergency planning regulations the Commission could have had in mind certain minimum requirements such as these that would have to be met no matter the feasibility or level of governmental cooperation. The requirement for "adequate" protective measures might suggest this approach whereby the public is guaranteed some minimum level of emergency response. However, if some minimum level of protection is required, how can it be that NRC has never specified any minimum acceptable evacuation times? And even under this strict approach, clear criteria are hard to develop. For example, if hypothetically the lack of governmental cooperation in the LILCO plan is likely to result in several hours delay in the governmental authorities' notifying the public of an accident and recommending proper protective action, is this fatal to the LILCO plan? Is the lack of traffic control fatal, even though the estimated evacuation time is increased by only 1½ to 3 hours? The unplanned nature of ad hoc governmental response seems, in general, to cause some (how much is unclear) delay in responding to an accident. How much delay is acceptable?

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[11] Southern California Edison Co. (San Onofre), CLI-83-10, 17 NRC 528, 533 (1983).

Conclusion

The Commission first needs to decide what is the fundamental safety approach or philosophy of its emergency planning rule. We see at least three options:

Option A: If the utility does all that is reasonable and feasible under the circumstances to reduce public risk, then the plan is adequate. The LILCO plan would very likely pass this test. The public would not be assured any particular minimum level of safety in the sense of reasonably assured minimum dose reduction, but the emergency planning rule would no longer provide any State or local veto over a nuclear plant. The additional protection afforded by governmental cooperation would be regarded as highly desirable, but optional if the governments refuse to cooperate in providing it.

Option B: An adequate plan is one which provides all those reasonable and feasible public risk reduction measures that can ordinarily be achieved with governmental cooperation. The LILCO plan, and indeed any utility plan, will face great difficulty meeting this test. As in Option A, the public would not be assured any particular minimum level of safety, but the protection would be greater than that likely to be afforded by Option A. However, State and local governments have a strong say, and perhaps a virtual veto role over plant operation. Option B reflects the current FEMA and staff approach and the approach of the Boards below on Shoreham.

Option C: An adequate plan is one which provides reasonable assurance that, in the event of a serious accident, a certain degree of dose savings will be accomplished. This is the most strict approach, but is at odds with NRC and FEMA practice which does not use preset levels of minimally necessary dose savings. With any reasonable standard, the State and local governments will have as strong a role as in Option B.

We are prepared to draft an order which reflects any of these options, but for purposes of further discussion have assumed that Option B is adopted, as it most closely follows current practice.

Assuming Option B, the issue becomes can the LILCO plan accomplish all those reasonable and feasible risk reduction measures that are usually achieved with government cooperation? We noted that it would be very difficult for the LILCO plan to meet this test, but is it impossible? The Boards below thought so. It seems to us that the answer depends on how much leeway one is willing to give to the LILCO plan.

The ten areas where LILCO's lack of authority causes noncompliance are listed on pages 7-8. They can be broken into three categories: (1) traffic control in an evacuation; (2) public notification and recommendation on protective measures, such as evacuation; and (3) access control for the EPZ perimeter, emergency operations center, and relocation center. In all three areas LILCO has pretty much done all that it can under the circumstances. But LILCO would have the Commission simply assume an adequate State and local response. We are willing to assume a response, and we are even willing to assume that the governments would likely try to follow the LILCO plan, because any plan is better than none. But the record does not tell us what the effects of LILCO's lack of authority actually are, except that the effect of the lack of traffic control is on the order of 1½ to 3 hours delay in EPZ evacuation. There is no evidence in the record of what an ad hoc response by the State or County might be, or how the LILCO plan might possibly accommodate an ad hoc response. For example, we don't know how much delay in public notification would result from the lack of governmental participation in the LILCO plan, or how access control might be diminished.

We see two suboptions here. The Commission could decide (Option B-1) that there should be little leeway in applying Option B, and that the LILCO plan must provide protection essentially equal to that which could be provided with government cooperation. This Option B-1 is the one adopted implicitly by the Boards below. It poses a high standard on the LILCO plan and requires affirming ALAB-818.

If the Commission is willing to allow more leeway, and approve a LILCO plan if it provided similar, but not necessarily equal protection as compared to a plan with government cooperation (Option B-2), then the LILCO plan might pass muster. But we recommend further hearings to develop the facts on exactly how the LILCO plan will accommodate an ad hoc government response.[12]

We are prepared to draft an Order along the lines of Option B-1, but based on discussions with Commissioner staffs, have included with this paper a draft order along the lines of Option B-2.

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[12] We should not minimize the difficulties in such hearings. LILCO may be forced to seek subpoenas to compel the testimony of State and local government officials as to what they would do if LILCO went into operation and there was an accident. The officials would very likely resist having to answer such hypothetical questions.

Immateriality

LILCO's immateriality argument relates only to LILCO's lack of authority over traffic control in the event of an accident. This argument does not address any of the other areas where LILCO cannot implement its plan. In rejecting LILCO's immateriality argument, the Boards ruled, as a matter of law, that while traffic control is not mentioned explicitly in the regulations, it always is required because it preserves a range of protective actions in accordance with section 50.47(b)(10), i.e., evacuation is available to achieve dose reductions in fast-breaking accidents. For similar reasons, i.e., because evacuation would not be a practical alternative in some scenarios, the Boards also decided as a matter of law that the lack of traffic control was a significant defect. This is not unreasonable but, as a safety policy matter, the Commission could decide that while traffic control is desirable, its absence is not a fatal defect since evacuation times are only delayed from 1½ to 3 hours.

In our view, the Board's rejection of LILCO's materiality argument is consistent with their implicit adoption of Option B-1. If the Commission agrees with Option B-1, then ALAB-818 should be affirmed. If the Commission agrees with Option B-2, then the question is whether a delay in LPZ evacuation of from 1½ to 3 hours is too much leeway to give to a utility plan.

The Commission could decide this more or less intuitively on the basis of the current record. Or the Commission could ask the parties to give more information on how such delays might actually affect the public. It would be interesting to know for what range of accidents would a 1½-3 hour delay affect dose reduction, and by how much. In the remand hearings required by Option B-2, we have asked for this information.

Recommendation: Issue the attached draft Order, which would reverse the Appeal Board's rejection of LILCO's realism and immateriality arguments as a matter of law. This reversal would have the effect of permitting LILCO the opportunity to show that the Commission should grant a full power license under section 50.47(c) notwithstanding the defects in its plan.

We also recommend asking the Appeal Board to reconsider its decision not to take action on LILCO's other emergency planning

appeals. As much of this case should be completed prior to completion of the remand hearing as is feasible.

Martin G. Malsch
Acting General Counsel

Attachments:
A. Summary of Parties' Arguments
B. Draft Memorandum and Order
C. Listing of Relevant Decisions*

*In view of their bulk, a complete package of the pleadings has been provided to SECY.

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b Monday, July 7, 1986.

Commission Staff Office comments, if any, should be submitteed to the Commissioners NLT Friday, June 27, 1986, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of July 7, 1986. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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Attachment A

Attachment A

LILCO'S APPEALS

We here recite LILCO's arguments in its papers appealing the Licensing Board's decision, the replies to these arguments by the staff and intervenors, and the Appeal Board's resolution of these issues.

Realism

LILCO's Arguments

According to LILCO, the decisions below decide the issues against it on purely legal grounds, disregarding the quality of the plan and thus reading utility plans out of the Commission's rules. As an example, LILCO cites the Licensing Board's conclusion that "the provisions of 10 C.F.R. 50.47(c)(1) for adequate interim compensating measures were not intended to stretch as far as LILCO urges in this case where no participation whatever from state and local authorities can be counted on." 21 NRC at 884.

LILCO argues that the Board's holding would permit only utility plans which fill minor gaps in state and local government participation, and that this conflicts with the Commission's denial of the County's 1983 motion to terminate the proceeding, a motion based on the absence of any local government participation in Shoreham planning. The Commission there stated that it was "obligated to consider a utility plan submitted in the absence of state and local government-approved plans ...." CLI-83-13, 17 NRC at 743.

If only minor gap fillers are permitted, asks licensee, then what was the purpose of the provisions in the NRC Appropriations Authorization Acts beginning in 1980 permitting NRC consideration of utility plans? The answer, says LILCO, is that the Authorizations evidence Congress' intent to permit utility-only plans, and that no legislation would have been necessary to permit minor gap fillers. The practical effect of the Boards' decisions, LILCO continues, is that there never will be an acceptable utility-only plan, because virtually every state has laws similar to those now being interpreted to prohibit licensee's implementation of its plan. Petition for Review at 9-10 (11/4/85).

LILCO also argues that the Board erred by failing to presume that State and local officials would fulfill their duties by responding in an emergency, citing New York Executive Law Article 2.b.

which, LILCO asserts, requires such response,[1] and language in the FY 1985 HUD-Independent Agencies Appropriations Act Conference Report favoring such presumptions.[2]

Moreover, says LILCO, the Board erred in deciding the summary disposition motion by raising sua sponte the question whether a State and local response, if there were one, would be coordinated with LILCO's. The only issue raised by Contentions 1-10 and by the motion was legal authority. The factual issue of coordination was not raised by the motion or by Contentions 1-10, but by Contention 92, which was not then before the Board.[3] However, even if coordination were a proper question, LILCO asserts that the record shows that the plan is designed to accommodate previously uncooperative government personnel. Appeal Brief at 47.

Staff's and Intervenors' Arguments

Staff and Intervenors oppose LILCO's realism arguments, citing in support of their position New York Supreme Court Justice Geiler's decision in Cuomo v. LILCO, holding that LILCO cannot under New York law perform certain key functions of its plan, but rather that only the State and County may do so. See No. 84-4615, slip op. at 18 (Feb. 20, 1985).

Further, argue the staff and Intervenors, the Governor's press release relied upon by applicant is "extra-record." Even assuming that the State and local authorities might themselves respond in an emergency or delegate some functions to LILCO, the regulations require comprehensive, cooperative, and detailed preplanning which includes various governmental groups. The current

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[1] "Upon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered and shall use any and all facilities, equipment, supplies [and] personnel ... in such manner as may be necessary or appropriate. ..." Section 25, Article 2.b. (emphasis added).

[2] "[I]n its review [of emergency plans], FEMA should presume that Federal, State and local governments will abide by the legal duties to protect public health and safety in an actual emergency ...."

H.R. Rep. No. 99-212, 99th Cong., 1st Sess., Reprinted in Cong. Rec. at 15358 (11/13/85).

[3] The Licensing Board decided Contention 92 against LILCO; LILCO's appeal on it is pending before the Appeal Board.

evidentiary record does not reveal what the nature of a local governmental response might be, and thus the Board correctly denied the motion.

As to LILCO's argument that the Board shouldn't have considered the coordination issue in ruling on the summary disposition motion, staff argues that LILCO's motion itself raised factual issues, and that it was necessary for the Board to resolve the coordination question in the course of ruling on the motion.

Staff and Intervenors also argue that realism and immateriality could have been rejected on procedural grounds, since LILCO and the other parties had litigated since 1983 on the assumption that LILCO alone would implement its plan. Thus LILCO's assertion of the realism theory late in the game was an attempt to prosecute its case on a different theory than that which the parties had litigated, and it was necessary to offer those parties an opportunity to submit evidence on the new theory.

LILCO's Reply to Staff and Intervenors

First, LILCO argues, the Governor's press release statement that the State and County would respond in an emergency supports a finding in LILCO's favor on this issue because the press release is in the evidentiary record, no one has attempted to refute it, there's a presumption that governmental officials will perform their legal duties, and an inference should be drawn against a party who fails to produce evidence in his control which could refute evidence in the record.

Second, contrary to the Board's conclusion, the County's response in an emergency would not be ad hoc and uncoordinated because the County Executive has directed County employees to study the plan so as to give advice to the County Legislature.[4] Thus relevant county employees will be familiar with the plan.

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[4] At oral argument before the Appeal Board on August 12, 1985, when the County Executive was at odds with the Legislature over Shoreham, counsel representing the Executive supported this LILCO argument, adding that County personnel were already familiar with plans to deal with natural disasters. Furthermore, despite Justice Geiler's opinion that police powers could not be delegated to private companies, Counsel noted as well that the County charter provides for the appointment of special patrolmen in emergencies, and that state law provides for the appointment in emergencies of special deputy sheriffs. Transcript at 83-88.

Third, LILCO asserts that it is not prosecuting its case on a theory different from that litigated initially, having sought at the outset of the evidentiary hearing to litigate several variations of its plan, including a "principle offsite plan" based upon County implementation; at the same time, applicant noted that the plan was flexible enough to incorporate county personnel after the onset on an emergency. Appeal Board Reply Brief at 5, note 3 (July 24, 1985). Despite LILCO's request, the Board permitted LILCO to litigate only the LILCO-implemented variation. Id.

Immateriality

LILCO's Appeals

As noted above, Intervenors asserted in Contentions 1-10 that LILCO lacks legal authority to implement certain features of its plan, including controlling traffic, imposing security measures at the EOC and relocation centers, and alerting and broadcasting instructions to the public. LILCO argues that with the exception of the alerting and broadcasting functions, the features mentioned in the legal authority Contentions are not required by the regulations -- it's immaterial that LILCO might lack authority to implement them. Thus LILCO isn't required to guarantee the best possible evacuation, especially when the obstacles are beyond its control.

Staff and Intervenors' Arguments

Staff and Intervenors opposed this argument on the ground that the inability to impose traffic control would impermissibly restrict "the range of protective actions" available in an emergency. Moreover, LILCO's plan is based on assertions that these functions will be implemented, and if it seeks to delete these functions from its plan, LILCO must seek to litigate a new plan without these features. Intervenors also asserted that the immateriality theory was essentially factual in nature, and thus required further evidentiary hearings. See PID, 21 NRC at 914. Curiously, staff argued that the theory raised only issues of law, but that it had been offered so late in the proceeding that staff and Intervenors should be afforded an opportunity to offer additional evidence to rebut it. Id., 21 NRC at 914-15.

Attachment B

Shoreham decision
MGM3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Frederick M. Bernthal
Lando W. Zech, Jr.

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322 OL-3

DECISION

CLI-86-

Before us is Long Island Lighting Company (LILCO) petition for review of the October 18, 1985 Appeal Board decision holding inadequate as a matter of law LILCO's emergency plan for the Shoreham Nuclear Power Plant. ALAB-818, 22 NRC 651. The Appeal Board based its decision largely on the refusal of New York State and Suffolk County to participate in the planning, and on LILCO's lack of legal authority to implement certain features of its plan. For the reasons explained below, we reverse and remand for further evidentiary hearings on LILCO's so-called "realism" and "materiality" arguments. We do not address ~~LILCO legal authority~~ issues at this time.

BACKGROUND

After having initially supported the licensing of Shoreham, Suffolk County later withdrew its support and moved the Shoreham Licensing Board to terminate the proceeding on the ground that the NRC could not grant a license for Shoreham in the absence of a government-sponsored emergency plan. The Board denied the motion, reasoning that the agency was required to afford LILCO an opportunity to show that its plan was an adequate one. The Commission affirmed, stating that the agency was obligated to consider a utility-only plan. (CLI-83-13, 17 NRC 741, 743). In a later order we also observed that "the [emergency planning] issues do not appear to us to be categorically unresolvable." (CLI 83-17, 17 NRC 1032, 1034).

Subsequently, LILCO submitted its plan for NRC consideration, and Suffolk County responded with its 1'3 pages of 97 contentions. Contentions 1-10 asserted that LILCO lacked the legal authority to implement certain features of its radiological emergency plan, including the authority to control traffic and to inform the public.[1] From December 1983 until August 1984, the parties and the Licensing Board operated under an agreement that no evidentiary hearings were required on these "legal contentions." Then, in August 1984, LILCO submitted a Motion for Summary Disposition on the legal authority contentions, arguing that it should prevail on these contentions for three reasons: first, that State and local law were preempted by federal law to the extent that the State and local laws deprived LILCO of authority to plan for and implement its radiological emergency plan ("Preemption");

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[1]Contentions 1-10 are set forth in full at 17 NRC 958 ff.

second, that even if LILCO lacked legal authority, the State and the County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan ("Realism");[2] and third, that some of the functions which LILCO purportedly lacked authority to implement were not NRC requirements in any event ("Immateriality").

The NRC staff and Intervenors opposed the motion, and the Licensing Board denied it, concluding: that LILCO did not gain via preemption the legal authority it otherwise lacked; that even assuming an emergency response by the State and the County, there was no assurance that the response would be other than ad hoc and uncoordinated with LILCO's actions, contrary to the very reason for the emergency planning regulations which require advance planning; that while few of the actions listed in Contentions 1-10 were explicitly required by the regulations, these actions were nonetheless necessary to comply with the explicit requirement in section 50.47(b)(10) for plan features which will permit "a range of protective actions" in the event of an emergency;[3] and that LILCO's plan couldn't be considered an "adequate interim compensating measure" under section 50.47(c)(1) because there was

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[2] LILCO's basis for its realism argument before the Licensing Board was a December 1983 press release by Governor Cuomo stating that "if the plant were to operate and a misadventure were to occur, the State and County would help to the extent possible;" before the Appeal Board, the basis was "the undeniable truth" that in an emergency the State and County would respond and would permit LILCO to implement its plan. Appeal Brief at 45, (June 3, 1985).

[3] The Licensing Board found that an uncontrolled evacuation would take longer than a controlled evacuation (about 1½ hours more in good weather, about three hours in inclement weather). From this it concluded that the range of protective actions was impermissibly restricted because sheltering would have to be used in some fast-breaking events, when otherwise evacuation might have been possible.

nothing in the record to indicate that the State or local governments would ever participate in Shoreham emergency planning, and the Board couldn't speculate on what the governments might do if and when Shoreham began full power operation. LBP-85-12, 21 NRC 644 (1985)(hereinafter cited as PID). In every important respect, the Appeal Board in ALAB-818 agreed with the Licensing Board. 22 NRC 651 (1985).[4]

LILCO petitioned for Commission review of ALAB-818, and we granted the petition but deferred any further action until the Appeal Board rendered its decision on then-pending Intervenor appeals. Order dated Dec. 19, 1985. Recently, in ALAB-832 (March 26, 1986), the Appeal Board resolved all remaining Intervenor appeals, reversing and remanding a few issues to the Licensing Board but staying the remand until the Commission completed its review of ALAB-818 or directed otherwise. The Appeal Board also left undecided LILCO's appeals on three other emergency planning issues.

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[4]The Appeal Board added that

> [T]he Board properly rejected LILCO's "immateriality" argument. We recognize that the Commission's regulations do not spell out the precise manner in which an evacuation is to be conducted if necessary. Nonetheless, the Commission has construed its emergency planning regulations to require "provisions for evacuating the public in times of radiological emergencies." We have likewise observed that the Commission's emergency planning scheme contemplates that emergency evacuation procedures be developed [for the 10-mile EPZ]. LILCO included traffic control as part of its proposed evacuation procedures in light of such requirements. We believe that such inclusion was proper. In the context of this case, at least, something more is needed than an aspiration that the public will be able to fend for itself in the event an evacuation is required.

ALAB-818, 22 NRC at 677 (footnotes omitted, emphasis added by the Appeal Board)

Below we analyze LILCO's petition for Commission review on the realism and immateriality decisions, leaving for a later time review of the legal authority preemption issues. In doing our review we have carefully reviewed both Boards' decisions, and all of the extensive briefs that have been filed with both Boards on the realism and materiality issues. We are convinced that further legal briefing would reveal no new arguments or authorities, and so have not requested additional briefing.

REALISM

LILCO's Arguments

LILCO argues essentially that the Board's holding would approve only those utility plans which fill minor gaps in State and local government participation, and this cannot be correct in light of the Commission's denial of the County's 1983 motion to terminate the proceeding, a motion based on the absence of any local government participation in Shoreham planning. The Commission stated in its denial that it was "obligated to consider a utility plan submitted in the absence of state and local government-approved plans ...." CLI-83-13, 17 NRC at 743 (emphasis added).

If only minor gap fillers are permitted, asks licensee, then what was the purpose of the provisions in the NRC Authorization Appropriations Acts beginning in 1980 permitting NRC consideration of utility plans? The answer, says LILCO, is that these statutes evidence Congress' intent to permit utility-only plans, and that no legislation would have been necessary to permit minor gap fillers.

LILCO also argues that the Board erred by failing to presume that State and local officials would fulfill their duties by responding in an emergency, citing New York Executive Law Article 2.b. which requires such response,[5] and language in the Conference Report accompanying the FY 1985 HUD-Independent Agencies Appropriations Act favoring such a presumption.[6]

Moreover, says LILCO, the Board erred in deciding the summary disposition motion by raising sua sponte the question whether a State and local response, if there were one, would be coordinated with LILCO's. The only issue raised by Contentions 1-10 and by the motion was legal authority. The factual issue of coordination was not raised by the motion or by Contentions 1-10, but by Contention 92, which was not then before the Board. However, even if coordination were a proper question, the record shows that the plan is designed to accommodate previously uncooperative government personnel.

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[5] See, e.g., Section 25 of the Executive Law, which provides that "[u]pon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom."

[6] "[I]n its review [of emergency plans], FEMA should presume that Federal, State and local governments will abide by their legal duties to protect public health and safety in an actual emergency...."

H.R. Rep. No. 99-212, 99th Cong., 1st Sess., Reprinted in Cong. Rec. at 15358 (11/13/85).

Staff's and Intervenors' Arguments

Staff and Intervenors argue that even assuming that the State and local authorities might themselves respond in an emergency or delegate some functions to LILCO, the regulations require comprehensive, cooperative, and detailed preplanning which includes various governmental groups. The current evidentiary record does not reveal what the nature of a local governmental response might be, and thus the Board correctly denied the motion.

As to LILCO's argument that the Board shouldn't have considered the coordination issue in ruling on the summary disposition motion, staff argues that LILCO's motion itself raised factual issues necessary for the Board to resolve, one of them being the coordination question.

Staff and Intervenors also argue that realism and immateriality could have been rejected on procedural grounds since LILCO and the other parties had litigated from December 1983 to August 1984 on the assumption that LILCO alone would implement its plan. Thus LILCO's assertion of the realism theory late in the game was an attempt to prosecute its case on a theory different from that which the parties had litigated, and it was necessary to offer those parties an opportunity to submit evidence on the new theory.

LILCO's Reply to Staff and Intervenors

First, the utility argues, the Governor's press release statement that the State and County would respond in an emergency supports a finding in LILCO's favor on this issue because the press release is in the evidentiary record, no one has attempted to refute it, there's a presumption that governmental officials will perform their legal duties, and an inference should be

drawn against a party who fails to produce evidence in his control which could refute evidence in the record.

Second, LILCO asserts that the County's response in an emergency would not be ad hoc and uncoordinated because the County Executive has directed county employees to study the plan with an eye to giving advice and assistance to the County Legislature. Thus relevant county employees will be familiar with the plan.[7]

Third, LILCO asserts that it is not prosecuting its case on a theory different from that litigated initially. At the outset of the evidentiary hearing, applicant sought to litigate several variations of its plan, including a "principle offsite plan" involving County implementation; at the same time, applicant noted that the plan was flexible enough to incorporate county personnel after the onset on an emergency. Despite LILCO's request, the Board permitted LILCO to litigate only the LILCO-implemented variation.

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[7] At oral argument before the Appeal Board on August 12, 1985, when the County Executive was at odds with the Legislature over Shoreham, counsel representing the Executive supported this LILCO argument, adding that County personnel were already familiar with plans to deal with natural disasters. Furthermore, despite Justice Geller's opinion that police powers could not be delegated to private companies, Counsel noted as well that the County charter

[Footnote Continued]

Commission Decision

There is no doubt that the Commission's emergency planning regulations were generally intended to prevent a recurrence of the situation that arose shortly after the TMI-2 accident when, based on the facts as they then appeared, some emergency response was called for but the prior planning and coordination between the utility and local governments proved inadequate. The emergency planning standards in 10 CFR 50.47(b) and Part 50, Appendix E are premised upon a high level of coordination between the utility and State and local governments. It should come as no surprise that without governmental cooperation LILCO has encountered great difficulty complying with all of these detailed planning standards.

However, we intended our rules to be flexible. As we have stated before, we are legally obligated to consider whether a utility plan, prepared without government cooperation, can pass muster. A utility plan might pass muster under 10 CFR 50.47(c). Section 50.47(c) provides for licensing notwithstanding noncompliance with the NRC's detailed planning standards under three circumstances: (1) if the defects are "not significant"; (2) if there are "adequate interim compensating actions"; and (3) if there are "other compelling reasons". The decisions below focus on (1) and (2) and we do likewise.

The measure of significance under (1) and adequacy under (2) is the fundamental emergency planning licensing standard of section 50.47(a) that

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[Footnote Continued]

provides for the appointment of special patrolmen in emergencies, and that state law provides for the appointment in emergencies of special deputy sheriffs. Transcript at 83-88.

"no operating license ... will be issued unless a finding is made that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." But this only begins the analysis of a utility plan for the term "adequate" appears again in this general emergency planning requirement. The root question becomes can the LILCO plan provide for "adequate protective measures ... in the event of a radiological emergency?"[8]

This root question cannot be answered without some discussion of what is meant by "adequate protective measures". Our emergency planning regulations are an important part of the regulatory framework for protecting the public health and safety. But they differ in character from most of our siting and engineering design requirements which are directed at achieving or maintaining a minimum level of public safety protection. See e.g., 10 CFR 100.11. Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a minimum evacuation time for the plume exposure pathway emergency planning zone in the event of a serious accident. Rather, they attempt to achieve reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another. And, in the past, what is reasonable and feasible in a given case was defined by the cooperative planning efforts of the utility and State and local governments. But what should we

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[8] Under section 50.47(c) a compensating action should be "interim". We have no difficulty calling the LILCO plan "interim". Certainly LILCO intends it as such because it stands ready to cooperate with the governments in preparing a fully coordinated plan. Moreover, there has got to be some likelihood that should Shoreham go into operation, the governments would seek to improve the protection of their citizens by working with LILCO to improve its plan or to prepare a better one.

regard as reasonable and feasible for Shoreham, where the governments refuse to cooperate?

In addressing this question the Boards below presumed that the LILCO plan must essentially achieve all that a fully coodinated plan can achieve. In essence, the Boards defined what is reasonable and feasible for Shoreham solely in terms of the nature of the site and environs without regard for the degree of possible government cooperation. This inexorably led the Boards to rejection of the LILCO plan on the ground that LILCO could not lawfully accomplish all that cooperating governments might in the event of an accident.

We believe that a little more flexibility is called for by the legal requirement that we consider a utility emergency plan. It is very unlikely that any utility plan could ever pass such a strict test. We could conceivably define what is reasonable and feasible dose reduction for Shoreham solely in terms of what LILCO itself can reasonably and feasibly achieve, but we are not prepared to do so. Rather, we would approve the LILCO plan if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation. And we would approve of the LILCO plan even if some protective action options, such as evacuation, were practically foreclosed so long as such foreclosure was confined to a few, very unlikely accident scenarios. With this in mind, we turn to LILCO's realism argument.

We assume that LILCO is prohibited from performing the State or County roles in the following areas:

(1) guiding traffic;

(2) blocking roadways, erecting barriers in roadways, and channeling

traffic;

(3) posting traffic signs on roadways;

(4) removing obstructions from public roadways, including towing private vehicles;

(5) activating sirens and directing the broadcasting of emergency broadcast system messages;

(6) making decisions and recommendations to the public concerning protective actions;

(7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathways;

(8) making decisions and recommendations to the public concerning recovery and reentry;

(9) dispensing fuel from tank trucks to automobiles along roadsides; and

(10) performing access control at the Emergency Operations Center, the relocation centers, and the EPZ perimeters.

Some of these areas, such as making decisions and recommendations to the public on protective actions, are fundamental to emergency planning. However, if Shoreham were to go into operation and there were to be a serious accident requiring consideration of protective actions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. See also H.R. Rep. No. 99-212, 99th Cong., 1st Sess. (1985). Thus, in evaluating the LILCO plan, we believe that we can reasonably assume some "best effort" State and County response in the event of an accident. We also believe that their "best effort" would utilize the LILCO plan as the best source for emergency planning information and options. After all, when faced with a serious

accident, the State and County must recognize that the LILCO plan is clearly superior to no plan at all.

Nevertheless, we are unwilling to assume, as LILCO would have us, that this kind of best effort government response would necessarily be adequate as we have defined adequacy. In point of fact, how familiar are State and County officials with the LILCO plan? How much delay can be expected in alerting the public and in making decisions and recommendations on protective actions, or in making decisions and recommendations on recovery and reentry, or in achieving effective access controls? The record tells us that an evacuation without traffic controls would be delayed from 1½ to 3 hours, but how important is this time delay? Is it important only for a few highly unlikely accidents, or for a wide range of possible accidents?

To answer these questions we need more information about the shortcomings of the LILCO plan in terms of possible lesser dose savings and protective actions foreclosed, assuming a best effort State and County response using the LILCO plan as the source for basic emergency planning information and options. Accordingly, we remand LILCO's realism argument back to the Licensing Board for further proceedings in accord with this Decision. The Board should use the existing evidentiary record to the maximum extent possible, but should take additional evidence where necessary.[9]

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[9]Since LILCO raised factual issues in its summary disposition papers, it was entirely appropriate for the Board itself to have discussed them by addressing coordination issues in its ruling. However, given the pleadings that have been filed on realism, and the further proceedings directed by this Decision, there can be no prejudice to the parties even assuming arguendo that LILCO's argument rested on some new "theory" not previously disclosed to the parties.

IMMATERIALITY

As noted above, Intervenors asserted in Contentions 1-10 that LILCO lacks legal authority to implement certain features of its plan, including controlling traffic. LILCO argues that with the exception of the alerting and broadcasting functions, the features mentioned in the legal authority Contentions are not required by the regulations -- it is immaterial that LILCO might lack authority to implement them.

Staff and Intervenors opposed the immateriality argument principally on the ground that the inability to impose traffic control would impermissibly restrict "the range of protective actions" available in an emergency. Intervenors also asserted that the immateriality theory was essentially factual in nature, and thus required further evidentiary hearings.

Commission Decision

While NRC regulations may make no explicit mention of some of these emergency planning measures, they may nevertheless be required in order that there be reasonable assurance of adequate protective measures, as we have defined them above. LILCO's materiality argument presents issues that are primarily factual rather than legal. The factual issues are subsumed within the scope of factual issues presented by LILCO's realism argument and can be considered by the Board in the remanded proceeding on realism.

CONCLUSION

In sum, we conclude that LILCO's plan should be measured against a standard that would require protective measures that are generally comparable, but not necessarily identical, to what might be accomplished with governmental cooperation. The LILCO plan would be acceptable even if some protective action that might be feasible and reasonable with governmental cooperation are practically foreclosed, so long as this applies only to a few very unlikely accidents.

We also conclude that we need more information from the Licensing Board to decide how the LILCO plan measures up to this standard. In applying additional information to the analysis of the LILCO plan, the Board should assume that the State and County would in fact respond to an accident at Shoreham on a best effort basis that would use the LILCO plan as the only available comprehensive compendium of emergency planning information and options.

Finally, we direct the Appeal Board to reconsider its deferral of LILCO's other emergency planning appeals in light of this Decision.

It is so ORDERED.

For the Commission

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
this day of June, 1986.

Attachment C

Pleadings Related To Review of ALAB-818

LILCO's Response To Intervenors' Request For An Extension Of Time And Page limits Including A Motion For Referral To The Commission Or, Alternatively, Severance And Expedited Review Of Legal Authority Issues. May 13, 1985

Suffolk County And State Of New York Response To LILCO Motion For Referral To The Commission Or Alternatively Severance And Expedited Review Of Legal Authority Issues. May 15, 1985

LILCO's Brief Supporting Its Position On Appeal From The "Partial Initial Decision On Emergency Planning" On April 17, 1985. June 3, 1985

Brief Of Suffolk County And The State Of New York In Opposition To LILCO's Appeal from The Atomic Safety And Licensing Board's Partial Initial Decision On Emergency Planning. July 11, 1985

NRC Staff's Brief In Response To Long Island Lighting Company's Appeal From The Partial Initial Decision On Emergency Planning On April 17, 1985. July 19, 1985

LILCO's Motion For Leave To File Reply Brief. July 24, 1985

LILCO's Petition For Review Of ALAB-818. November 4, 1985

Intervenors' Answer Opposing LILCO's Petition For Review Of ALAB-818. November 14, 1985

Petition For Review Of Appeal Board Decision On Shoreham Emergency Planning/Legal Authority Issues (ALAB-818). November 18, 1985

DR. ROSS' COMMENTS

Proposal:

- Allow issuance of full-power license ever when there is lack of cooperation by State and/or local governments in development or implementation of offsite EP.

Provided that:

1) non-compliance could be remedial or adequately compensated by reasonable State or local government cooperation,

2) good faith and sustained effort by applicant to get cooperation,

3) offsite EP includes all effective measures to compensate which are reasonable, feasible, and take into account of possible State or local response, and

4) State or local government have been provided with copies of the plan and been assured applicant is ready to cooperate.

Special emphasis

1) Policy--not new science

2) Policy issue--Is it essential that we find that some protective measures will be taken, as part of a FPL?

3) Minimum change

4) Informal rulemaking

5) Get FEMA views during comment period.

Existing 10 CFR 50.47

Para. (c)(1) has some loopholes--

- "deficiencies...not significant"
- "adequate unknown compensating actions"
- "other compelling reasons"

Nuggets from 50.47 and Appendix E

(a)(1) "adequate protective measures can and will be taken"

(a)(2) FEMA: whether State and local emergency plans as adequate
(b)(1) responsibility of State and local organizations assigned.
Principle response organization has staff to respond.

(b)(5) procedures for notification of S&L officials established.

(b)(6) exercises conducted

Appendix E

A.8 Identification of State, local officials

B Assessment actions--agreed on by State and Local

D Notification

1. Administrative and Physical means

2. Notify S&L in 15 min. S&L will determine whether to activate entire system

3. Exercise with S&L

4. S&L in remedial exercise.

Dose Perspective
(see figures)

A • for SST-1, w/o evacuation, can get 200 rem at 5 miles in 2-3 hours

B • For SST-1, in shelter, at 5 miles, probability of exceeding 200 rem is 10 percent. Probability is 50 percent of exceeding 200 rem at 3 miles.

D • At Zion, at 3 miles, probability is ~50 percent of exceeding 200 rem, with normal activity. Could reduce to~10 percent w/shelter, essentially zero with prompt evacuation.

F • At Surry, at 5 miles, get 70 rem whole dose in plume. EP can reduce this~0.

Observation, conclusion

• See p. 14 of paper; the new proposed Para. 6 to Section F of Appendix E to Part 50 does not clean up the other portions of Appendix E (Sections A,B,D, for example).

- p. 5 of paper: states that adequate offsite emergency planning is feasible, and all other aspects of foregoing criteria are satisfied; what does the mean about Appendix E?

- p. 7 of paper: states that regulatory flexibility is warranted for EP--less important than ECCS (e.g.)

- No minimum dose savings is established as standard for EP. This is consistent with the bottom of p. 7 of 0396. However, the last sentence of p. 5 should be considered. The recommended planning basis (p. 11-13) should t re-read. Emphasis on pre-determined action.

- The principle purpose of the plume exposure EPZ is to provide for substantial reduction in early severe health effects (0654, p. 10). Implies mutually supportive S&L planning (p. 16).

- Local government plans are particularly important (p. 17)). Plans should not be developed is isolation (p. 20.) Weaknesses can be compensated (p. 20).

- Advance arrangements with S&L by utility is <u>necessary</u> (p. 22).

- Response organizations which receive notifications should have authority and capability to take immediate predetermined actions.

- Utility <u>cannot</u> compensate for lack of predeterminal actions by S&L.

- Little on prudent and feasible dose reduction can be achieved by utility along; nearby residents could shelter (not too effective ~3 mi., gets better w/distance) but evacuation is unthinkable by utility alone.

- p. 10, bottom para. of paper, speaks of best-efforts utility plan for <u>possible</u> S&L cooperation; surely this is speculatative.

Summary:

- Doses near-in (~3 miles or so) can be life-threatening

- No predetermined actions can be assumed by utility alone, thus no projected dose savings of significance can be assured

- Fabric of 0654 is unwoven

- Appendix E ~~is~~ would be riddled with inconsistencies

- This action should not be approved, unless the utility agrees to an analysis that prompt notification directly to affected people (as determined by <u>new</u> risk info., keyhole within a few miles), <u>will</u> result in prompt evacuation, as <u>directed</u> by people under control of utility (probably not feasible).

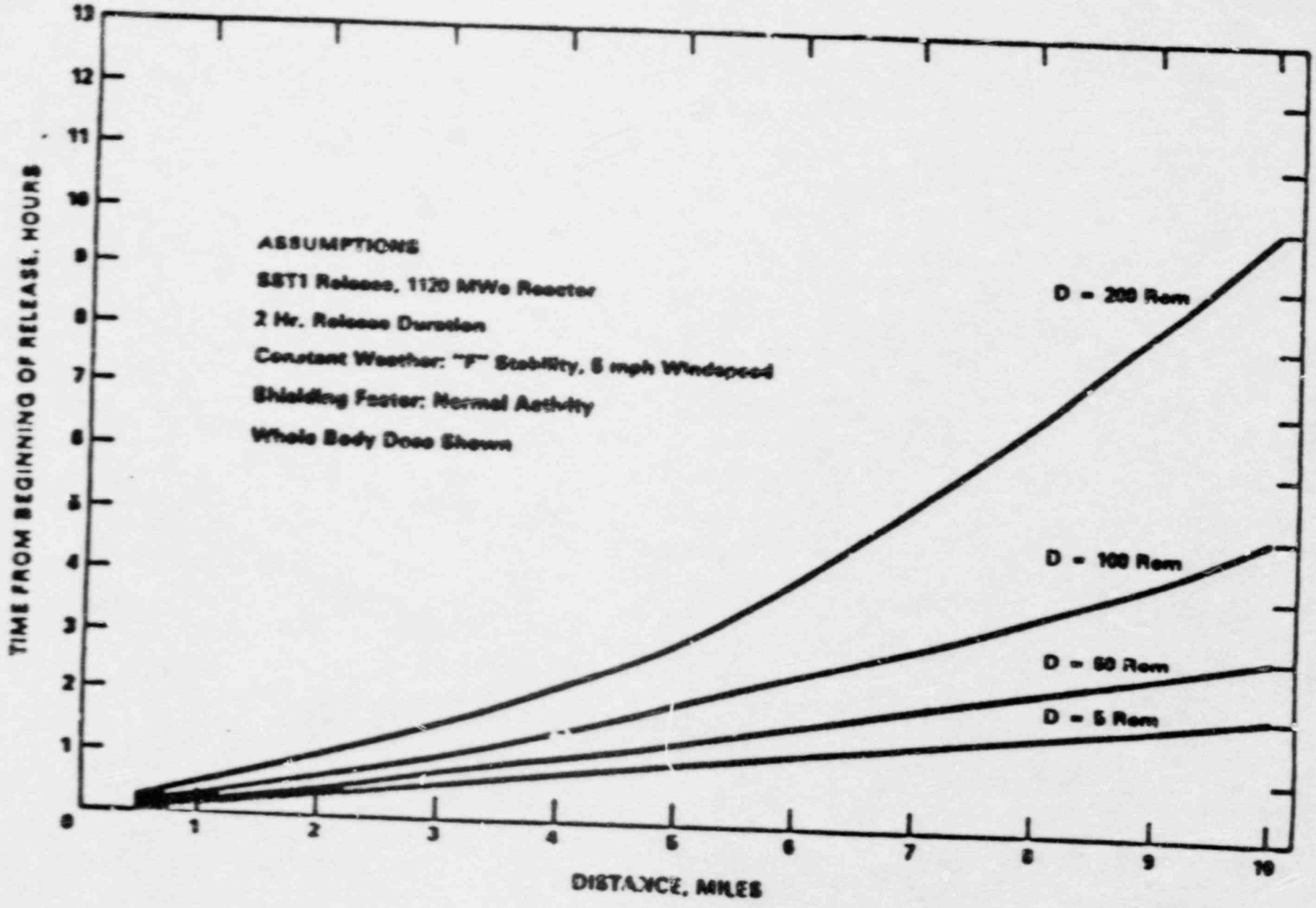


Figure 4 TIME-DOSE-DISTANCE RELATIONSHIP

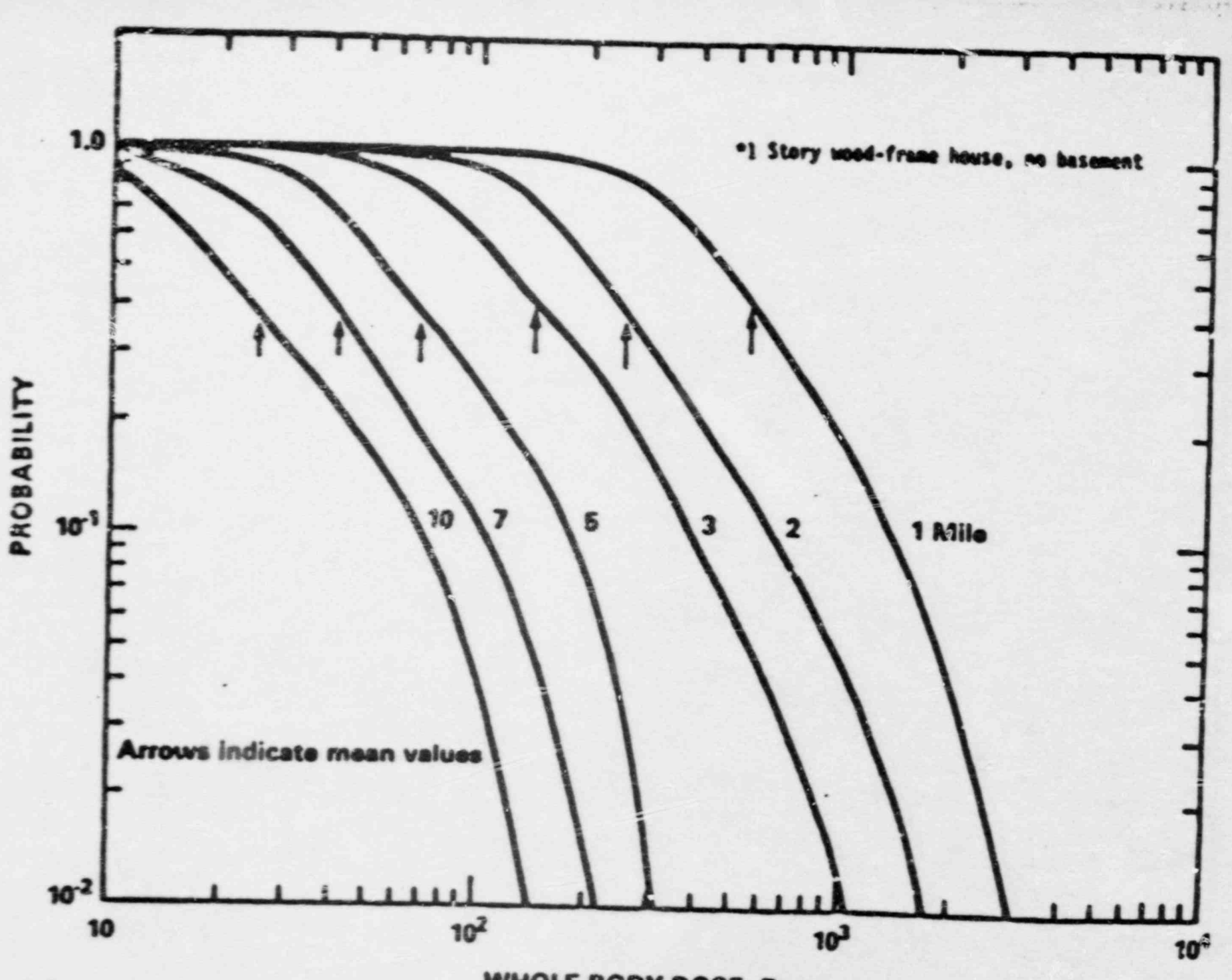


Figure B

Probability of an Individual at a Given Distance Receiving a Whole Body Dose in Excess of the Value Shown, Conditional Upon Occurrence of an SST1 Release and Shelter* Plus 4 Hrs. Ground Exposure

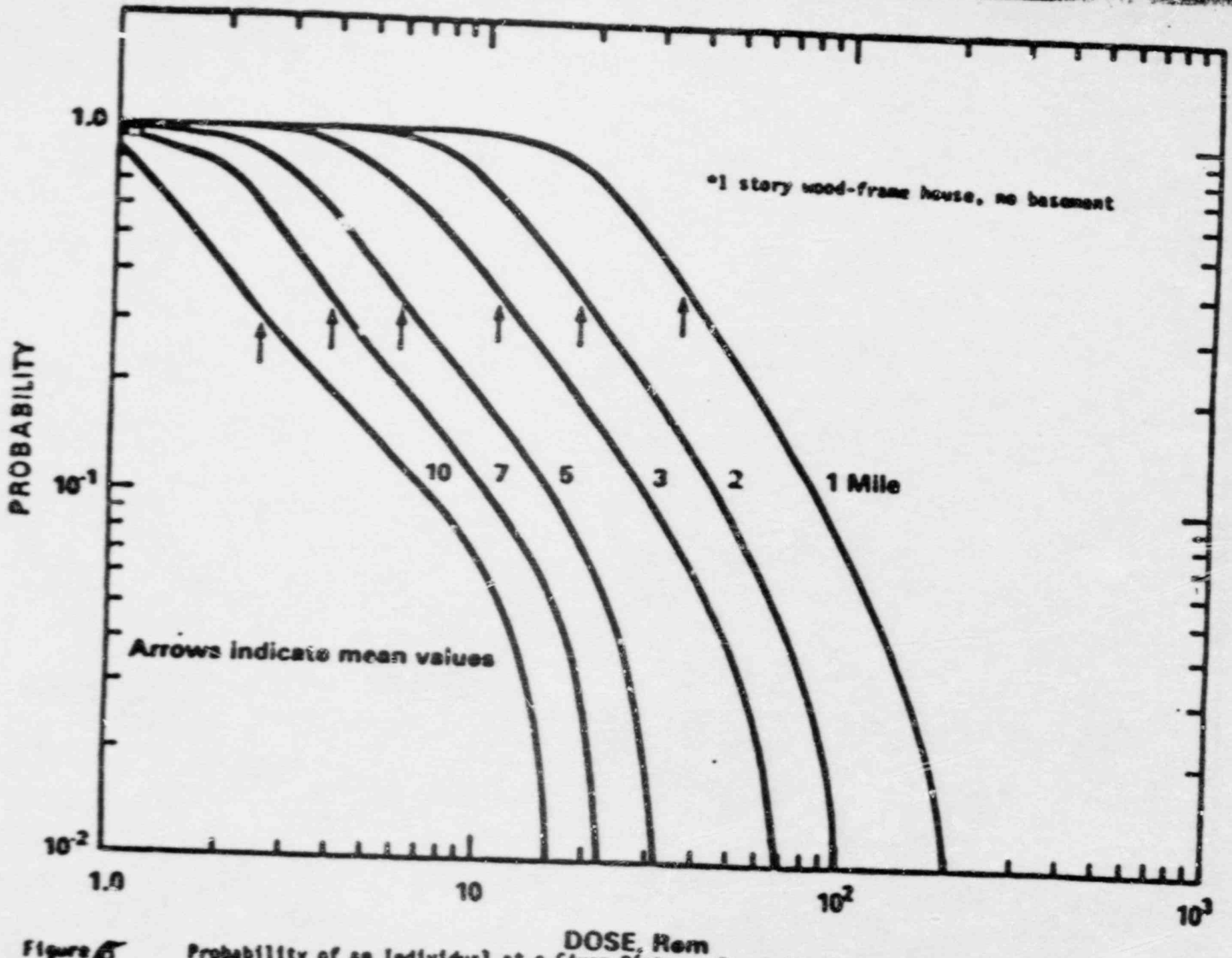
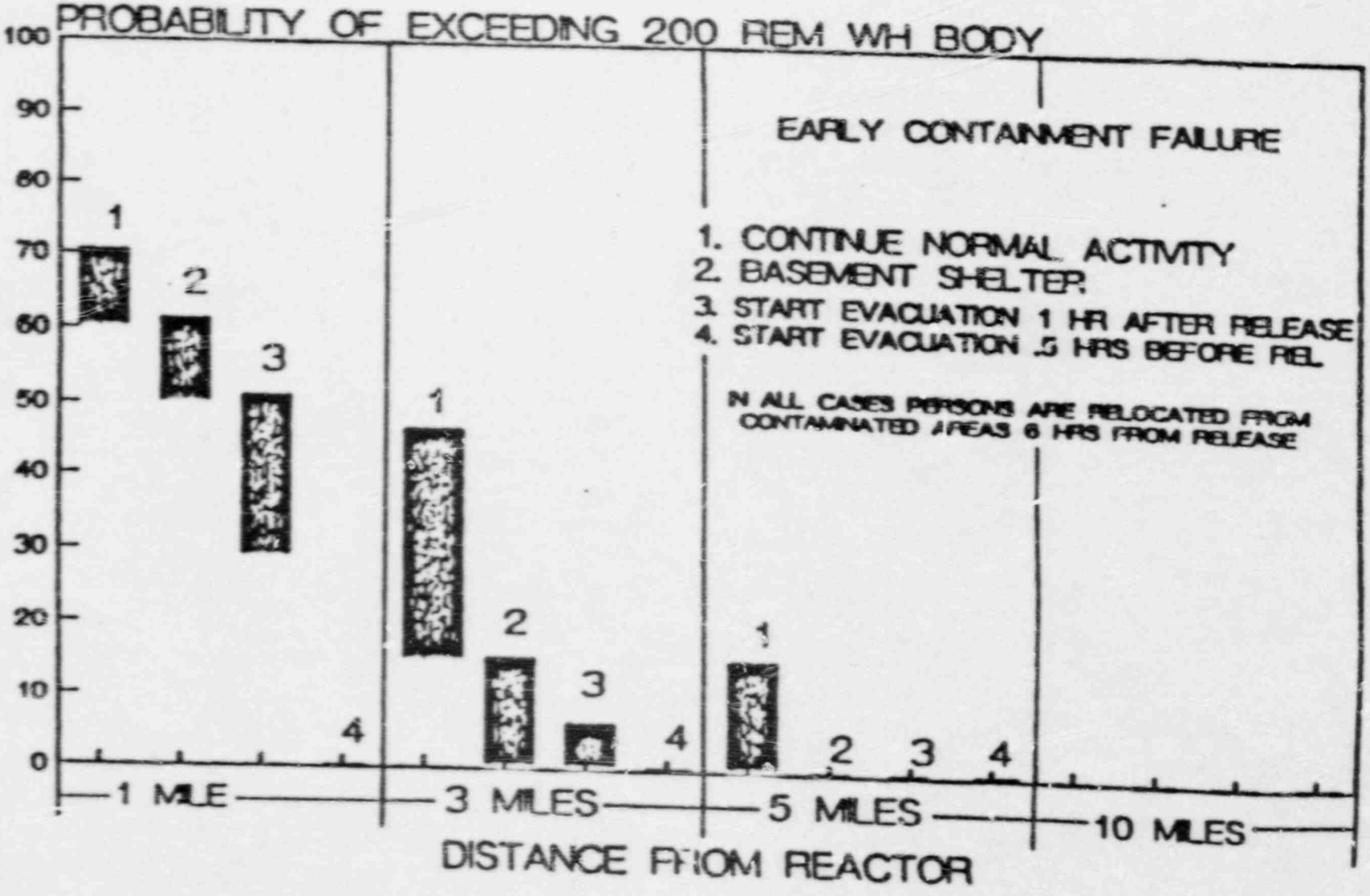
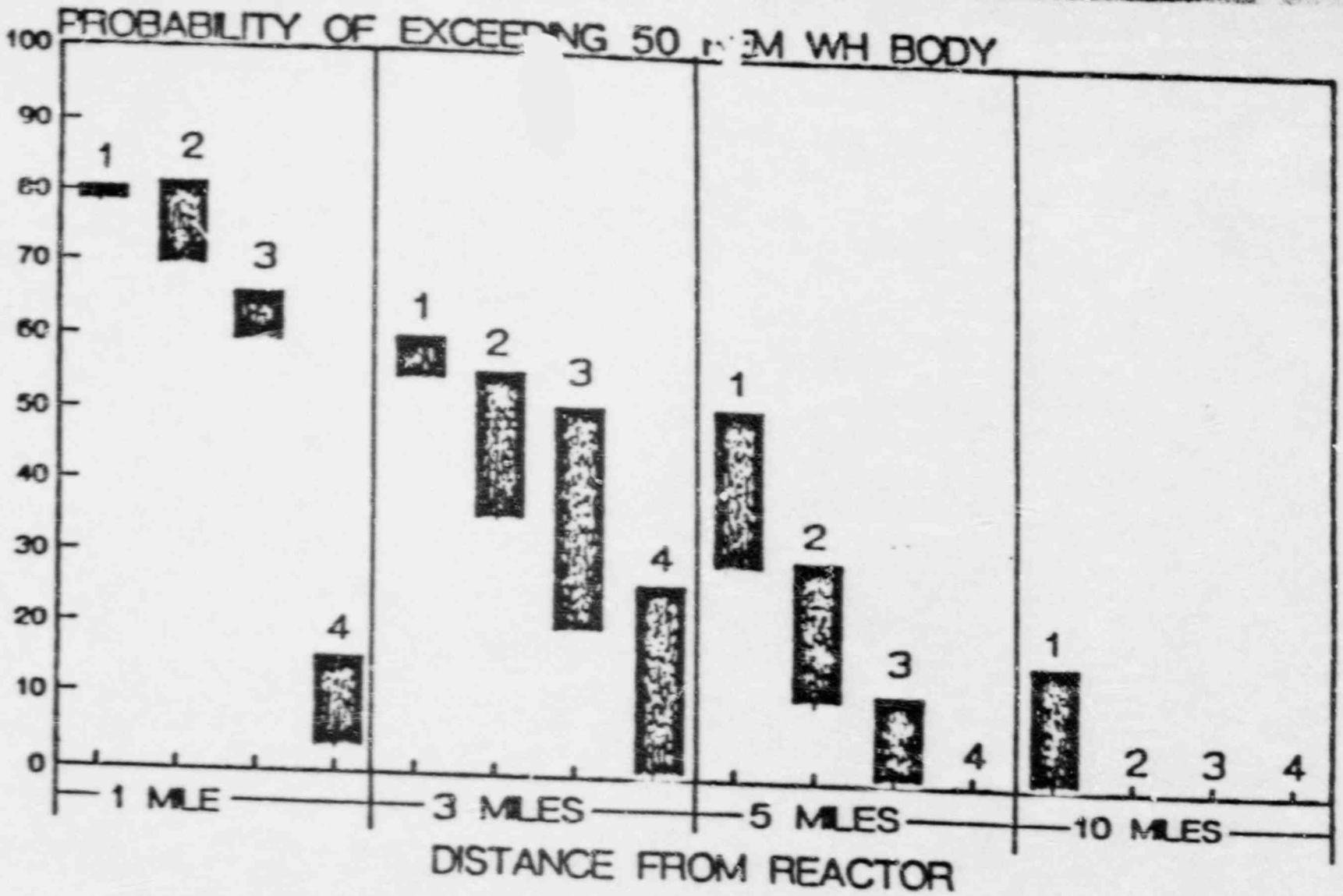


Figure 5 Probability of an Individual at a Given Distance Receiving a Whole Body Dose in Excess of the Value Shown, Conditional Upon Occurrence of an SST2 Release and Shelter* Plus 4 Hrs. Ground Exposure

EFFECTIVENESS OF EMERGENCY RESPONSE ACTIONS: ZION

D

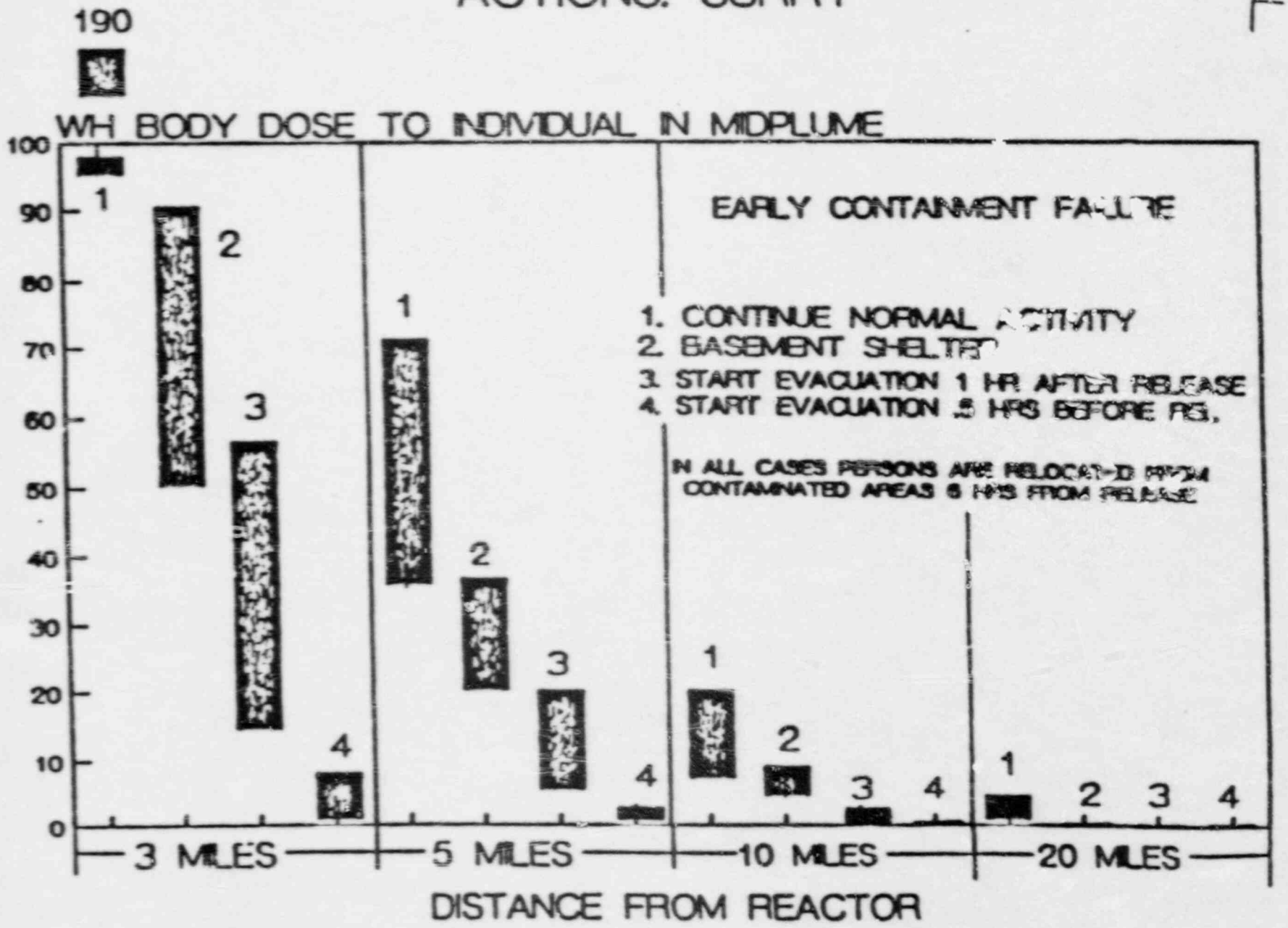



PROBABILITY OF EXCEEDING 50 REM WH BODY
100
90
80
70
60
50
40
30
20
10
0
1
2
3
4
1 MILE
3 MILES
5 MILES
10 MILES
DISTANCE FROM REACTOR

E

EFFECTIVENESS OF EMERGENCY RESPONSE ACTIONS: SURRY

F



SCINTO

The Proposal For Public Comment

The proposed rule fairly set forth the general policy alternatives and seeks public comment on these basic questions and on the proposed rule. I would support this approach.

However, p.7 should be tempered. The attempt to draw distinctions between one aspect of what the regulations require and other aspects treated as "really important" is artificial. I know of no "bright lines" anymore which define the boundary between safe and unsafe - or between really important and less important. For example, the Commission is clearly currently at the stage where it may well permit extended grace periods or even major changes to ECCS requirements; the rather extended period involved in correcting the open purge line problem and the extended time involving in correcting the hydrodynamic loads problem undercut the assertions that NRC wouldn't allow grace periods if the problem involved containment or the ECCS.

The general point can be made but should less strident.

The Underlying Proposed Rule

1) As the paper points out there are two potential ways to view the subject of emergency planning as an essential ingredient in "adequate safety" or as "an important second level" the paper then asks for comment on which way it should be viewed and treats this as if it were simply a matter of philosophical preference without a related technical underpinning. I don't agree. Facing up to the technical interrelationship between emergency response and risk and safety is essential for NRC to choose among the proffered philosophies. The papers choice of philosophies is offered without an assessment of the risk or safety impact of the choice.

2) Although there may be a number of different rationales underlying the NRC's (AEC's) requirements for emergency planning in public environment around a reactor [can and will be taken for 10 miles and for 50 miles under 50.47 and appropriate protective measures could be taken for a dose-defined LPZ in Pt 100] -- the paper doesn't attempt to deal with those rationales -- especially the technical rationales -- early fatality risk limitation; population dose limitation or control(the 50 mile IPZ); effort to limit maximum individual dose from DBAs; and similar concept with different numbers in Pt 100. The proposed rule would presume that the "best you can" under the circumstances provides "reasonable assurance".

And it treats this one reason for incomplete emergency planning as the only type of "best you can" under the circumstances to qualify for "reasonable assurance" without the further analysis or justification required for an exception.

3) Complete emergency planning is not needed for "reasonable assurance" in the case of the nonparticipation by the State, why can't other forms of incomplete planning (probably less "complete" also qualify for "reasonable assurance" if there are either kinds of good cause such as excessive cost.

EP5

The types of measures, in addition to those normally provided by the licensee, to compensate for the lack of cooperation in planning by state and local governments would include:

(1) added plans and procedures detailing compensating measures;

(2) added personnel to accompany and advise state and local officials in an actual emergency;

(3) facilities and equipment including vehicles, radios, telephone and radiation monitors as required by the plan;

(4) special training for personnel implementing compensating measures;

(5) arrangements including formalized agreements and contracts for supporting services;

(6) close communication with members of public in the EPZ to keep them informed of the status and provisions for response;

(7) providing periodic notification of state and local government personnel of the details of the compensatory measures included in the plan, the arrangements included for their involvement in the event of a real emergency, and the availability of training; and

(8) offsite exercises that demonstrate implementation of the plan to the extent feasible.

Nov. 19, 1986

Harty,

As you know, I've been assigned to work on a rule implementing "Option A" in SECY-86-180. The fundamental problem, as I see it, is overcoming some of the statements made by the Commission in 1980 in support of the emergency planning rules. You'll find them on pp. 50-SC-43,44,45 in the looseleaf regs. Briefly, the Commission held that offsite (and onsite) planning are needed for the Commission to carry out its statutory mandate. If you read this language in light of the new backfit rule, it would be clear that the Commission was invoking the 50.109(a)(4)(ii) exception for actions necessary to make a "no undue risk" finding.

Option A, as I read it, would collide directly with the 1980 rationale, in that offsite preparedness is made "highly desirable but optional." This would put offsite planning squarely under the backfit rule, and by making it optional, implies that it would not satisfy the backfit rule's criteria for imposition of the backfit. There is no immediately apparent way of squaring these two views of offsite planning.

I see two options but would welcome suggestion of some others. One is an attempt to use the new Superfund amendments, which apparently require States to develop an emergency response capability for hazardous facilities. I ha not yet had a chance to research this option in detail. It would be palatable only if (1) the amendments extend to reactors and (2) the planning required could be construed as adequate under the Commission's requirements.

A second option would be for the Commission to repudiate the 1980 findings and state that offsite planning is indeed in the "optional backfit" category. We would amend the rules to State that utilities are required to submit offsite plans (and exercise them) only where offsite entities cooperate. We could offer as rationale that (1) offsite planning does not meet the new criteria for backfits and (2) substantial gains in safety have been made since 1980 in other areas such as fire protection, equipment qualification, ATWS, pressurized thermal shock, human factors, and maintenance. (Some [illegible])

Both of these options would come under heavy fire, but so would just about any variation of "Option A." I would be interested to know if you can think of other approaches or variations on those I have [illegible]ed.

Bill Shields

cc: Bill Olmstead

99th Congress 2d Session	COMMITTEE PRINT	S PRT 99-169

LIST OF TOXIC CHEMICALS

SUBJECT TO THE PROVISIONS OF

SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT OF 1986

AUGUST 1986

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Senate Committee on Environment and Public Works

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LEE O FULLER Minority Staff Director

The following toxic chemicals are subject to annual reporting of releases into the environment under section 313 of the Emergency Planning and Community Right to Know Act of 1986. This list may be revised from time to time by the Administrator of the Environmental Protection Agency consistent with the provisions of that Act.

Chemical Abstract Service (CAS) number	Chemical name	Chemical Abstract Service (CAS) number	Chemical name
50-00-0	Formaldehyde	75-01-4	Vinyl chloride monomer
51-28-5	2,4-Dinitrophenol	75-05-8	Acetonitrile
51-75-2	Nitrogen mustard	75-07-0	Acetaldehyde
51-79-6	Urethane (Ethyl carbamate) (monomer)	75-09-2	Dichloromethane
52-68-6	Trichlorfon	75-15-0	Carbon disulfide
53-96-3	2-Acetylaminofluorene	75-21-8	Ethylene oxide
55-18-5	N-Nitrosodiethylamine	75-25-2	Bromoform (Tribromomethane)
55-21-0	Benzamide	75-27-4	Dichlorobromomethane
55-63-0	Nitroglycerin	75-35-4	Vinylidene chloride
56-23-5	Carbon tetrachloride	75-44-5	Phosgene
56-38-2	Parathion	75-55-8	Propyleneimine
57-12-5	Cyanide compounds	75-56-9	Propylene oxide
57-14-7	1,1-Dimethyl hydrazine	75-65-0	tert-Butyl alcohol
57-57-8	beta-Propiolactone	76-13-1	Chlorinated fluorocarbon (Freon 113) (1,1,2-Trichloro-1,2,2-trifluoroethane)
57-74-9	Chlordane		
58-89-9	Lindane	76-44-8	Heptachlor
59-89-2	N-Nitrosomorpholine	77-47-4	Hexachlorocyclopentadiene
60-09-3	4-Aminoazobenzene	77-78-1	Dimethyl sulfate
60-11-7	4-Dimethylaminoazobenzene	78-84-2	Isobutyraldehyde
60-34-4	Methyl hydrazine	78-87-5	1,2-Dichloropropane
60-35-5	Acetamide	78-92-2	sec-Butyl alcohol
62-53-3	Aniline	78-93-3	Methyl ethyl ketone
62-55-5	Thioacetamide	79-00-5	1,1,2-Trichloroethane
62-56-6	Thiourea	79-01-6	Trichloroethylene
62-73-7	Dichlorvos	79-06-1	Acrylamide
62-75-9	N-Nitrosodimethylamine	79-10-7	Acrylic acid
63-25-2	Carbaryl	79-11-8	Chloroacetic acid
64-67-5	Diethyl sulfate	79-21-0	Peracetic acid
67-56-1	Methanol	79-34-5	1,1,2,2-Tetrachloroethane
67-63-0	Isopropyl alcohol (manufacturing-strong acid process)	79-44-7	Dimethylcarbamyl chloride
		79-46-9	2-Nitropropane
67-64-1	Acetone	80-05-7	4,4'-Isopropylidenediphenol
67-66-3	Chloroform	80-15-9	Cumene hydroperoxide
67-72-1	Hexachloroethane	80-62-6	Methyl methacrylate
68-76-8	Triaziquone	81-07-2	Saccharin (manufacturing)
71-36-3	n-Butyl alcohol	81-88-9	C.I. Food Red 15
71-43-2	Benzene	82-28-0	1-Amino-2-methylanthraquinone
71-55-6	1,1,1-Trichloroethane (Methyl chloroform)	82-68-8	Quintozene (Pentachloronitrobenzene)
72-43-5	Methoxychlor	84-66-2	Diethyl phthalate
74-83-9	Bromomethane (Methyl bromide)	84-74-2	Dibutyl phthalate
74-85-1	Ethylene	85-44-9	Phthalic anhydride
74-87-3	Chloromethane (Methyl chloride)	85-68-7	Butyl benzyl phthalate
74-88-4	Methyl iodide	86-30-6	N-Nitrosodiphenylamine
74-90-8	Hydrogen cyanide	87-62-7	2,6-Xylidine
74-95-3	Methylene bromide	87-68-3	Hexachloro-1,3-butadiene
75-00-3	Chloroethane (Ethyl chloride)	87-86-5	Pentachlorophenol (PCP)

Chemical abstract service CAS number	Chemical name	Chemical abstract service CAS number	Chemical name
88-06-2	2,4,6-Trichlorophenol	107-21-1	Ethylene glycol
88-75-5	2-Nitrophenol	107-30-2	Chloromethyl methyl ether
88-89-1	Picric acid	108-05-4	Vinyl acetate
90-04-0	o-Anisidine	108-10-1	Methyl isobutyl ketone
90-43-7	2-Phenylphenol	108-31-6	Maleic anhydride
90-94-8	Michler's ketone	108-38-3	m-Xylene
91-08-7	Toluene-2,6-diisocyanate	108-39-4	m-Cresol
91-20-3	Naphthalene	108-60-1	Bis(2-chloro-1-methylethyl) ether
91-22-5	Quinoline	108-78-1	Melamine
91-59-8	beta-Naphthylamine	108-88-3	Toluene
91-94-1	3,3'-Dichlorobenzidine	108-90-7	Chlorobenzene
92-52-4	Biphenyl	108-95-2	Phenol
92-67-1	4-Aminobiphenyl	109-86-4	2-Methoxyethanol
92-87-5	Benzidine	110-80-5	2-Ethoxyethanol
92-93-3	4-Nitrobiphenyl	110-82-7	Cyclohexane
94-36-0	Benzoyl peroxide	110-86-1	Pyridine
94-59-7	Safrole	111-42-2	Diethanolamine
94-75-7	2,4-D	111-44-4	Bis(2-chloroethyl) ether
95-47-6	o-Xylene	114-26-1	Propoxur
95-48-7	o-Cresol	115-07-1	Propylene (Propene)
95-50-1	1,2-Dichlorobenzene	115-32-2	Dicofol
95-53-4	o-Toluidine	117-79-3	2-Aminoanthraquinone
95-63-6	1,2,4-Trimethylbenzene	117-81-7	Di(2-ethylhexyl) phthalate (DEHP)
95-80-7	2,4-Diaminotoluene	117-84-0	n-Dioctylphthalate
95-95-4	2,4,5-Trichlorophenol	118-74-1	Hexachlorobenzene
96-09-3	Styrene oxide	119-90-4	3,3'-Dimethoxybenzidine
96-12-8	1,2-Dibromo-3-chloropropane (DBCP)	119-93-7	3,3'-Dimethylbenzidine (o-Tolidine)
96-33-3	Methyl acrylate	120-12-7	Anthracene
96-45-7	Ethylene thiourea	120-71-8	p-Cresidine
97-56-3	C.I. Solvent Yellow 3	120-80-9	Catechol
98-07-7	Benzoic trichloride (Benzotrichloride)	120-82-1	1,2,4-Trichlorobenzene
98-82-8	Cumene	120-83-2	2,4-Dichlorophenol
98-87-3	Benzal chloride	121-14-2	2,4-Dinitrotoluene
98-88-4	Benzoyl chloride	121-69-7	N,N-Dimethylaniline
98-95-3	Nitrobenzene	122-66-7	1,2-Diphenylhydrazine (Hydrazobenzene)
99-59-2	5-Nitro-o-anisidine	123-31-9	Hydroquinone
100-02-7	4-Nitrophenol	123-38-6	Propionaldehyde
100-21-0	Terephthalic acid	123-72-8	Butyraldehyde
100-41-4	Ethyl benzene	123-91-1	1,4-Dioxane
100-42-5	Styrene monomer	126-72-7	Tris(2,3-dibromopropyl) phosphate
100-44-7	Benzyl chloride	126-99-8	Chloroprene
100-75-4	N-Nitrosopiperidine	127-18-4	Tetrachloroethylene (Perchloroethylene)
101-14-4	4,4'-Methylene bis(2-chloroaniline) (MOCA)	128-66-5	C.I. Vat Yellow 4
101-61-1	4,4'-Methylene bis(N,N-dimethyl) benzenamine	131-11-3	Dimethyl phthalate
101-68-8	Methylene bisphenylisocyanate (MDI)	132-64-9	Dibenzofuran
101-77-9	4,4'-Methylene dianiline	133-06-2	Captan
101-80-4	4,4'-Diaminodiphenyl ether	133-90-4	Chloramben
103-23-1	Bis(2-ethylhexyl) adipate	134-29-2	o-Anisidine hydrochloride
104-94-9	p-Anisidine	134-32-7	alpha-Naphthylamine
105-67-9	2,4-Dimethylphenol	135-20-6	Cupferron
106-42-3	p-Xylene	139-13-9	Nitrilotriacetic acid
106-44-5	p-Cresol	139-65-1	4,4'-Thiodianiline
106-46-7	1,4-Dichlorobenzene	140-88-5	Ethyl acrylate
106-50-3	p-Phenylenediamine	141-32-2	Butyl acrylate
106-51-4	Quinone	151-56-4	Ethyleneimine (Aziridine)
106-88-7	1,2-Butylene oxide	156-10-5	p-Nitrosodiphenylamine
106-89-8	Epichlorohydrin	156-62-7	Calcium cyanamide
106-93-4	1,2-Dibromoethane (Ethylene dibromide)	302-01-2	Hydrazine
106-99-0	1,3-Butadiene	309-00-2	Aldrin
107-02-8	Acrolein	334-88-3	Diazomethane
107-05-1	Allyl chloride	463-58-1	Carbonyl sulfide
107-06-2	1,2-Dichloroethane (Ethylene dichloride)	492-80-8	Auramine
107-13-1	Acrylonitrile	505-60-2	Mustard gas

Chemical Abstract Service CAS Number	Chemical name
510-15-6	Chlorobenzilate
532-27-4	2 Chloroacetophenone
534-52-1	4,6 Dinitro o cresol
540-59-0	1,2 Dichloroethylene
541-41-3	Ethyl chloroformate
541-73-1	1,3 Dichlorobenzene
542-75-6	1,3 Dichloropropylene
542-88-1	Bis(chloromethyl) ether
569-64-2	C I Basic Acid Green 4
584-84-9	Toluene 2,4 diisocyanate
593-60-2	Vinyl bromide
606-20-2	2,6 Dinitrotoluene
615-05-4	2,4 Diaminoanisole
621-64-7	N Nitrosodi n propylamine
624-83-9	Methyl isocyanate
636-21-5	o Toluidine hydrochloride
680-31-9	Hexamethylphosphoramide
684-93-5	N Nitroso N methylurea
759-73-9	N Nitroso N ethylurea
842-07-9	C I Solvent Yellow 14
924-16-3	N Nitrosodi n butylamine
961-11-5	Tetrachlorvinphos
989-38-8	C I Basic Red 1
1120-71-4	Propane sultone
1163-19-5	Decabromodiphenyl oxide
1310-73-2	Sodium hydroxide (solution)
1313-27-5	Molybdenum trioxide
1314-20-1	Thorium dioxide
1319-77-3	Cresol (mixed isomers)
1330-20-7	Xylene (mixed isomers)
1332-21-4	Asbestos (friable)
1335-87-1	Hexachloronaphthalene
1336-36-3	Polychlorinated biphenyls (PCBs)
1344-28-1	Aluminum oxide
1464-53-5	Diepoxybutane
1582-09-8	Trifluralin
1634-04-4	Methyl tert butyl ether
1836-75-5	Nitrofen
1897-45-6	Chlorothalonil
1937-37-7	Direct Black 38
2164-17-2	Fluometuron
2234-13-1	Octachloronaphthalene
2303-16-4	Diallate
2602-46-2	Direct Blue 6
2650-18-2	C I Acid Blue 9, diammonium salt
2832-40-8	C I Disperse Yellow 3
3118-97-6	C I Solvent Orange 7
3761-53-3	C I Food Red 5
3844-45-9	C I Acid Blue 9, disodium salt
4549-40-0	N Nitrosomethylvinylamine
4680-78-8	C I Acid Green 3
6484-52-2	Ammonium nitrate (solution)
7429-90-5	Aluminum (fume or dust)
7439-92-1	Lead and compounds
7439-96-5	Manganese and compounds
7439-97-6	Mercury and compounds
7440-02-0	Nickel and compounds
7440-22-4	Silver and compounds
7440-28-0	Thallium and compounds
7440-36-0	Antimony and compounds
7440-38-2	Arsenic and compounds
7440-39-3	Barium and compounds
7440-41-7	Beryllium and compounds
7440-43-9	Cadmium and compounds
7440-47-3	Chromium and compounds
7440-48-4	Cobalt and compounds
7440-50-8	Copper and compounds
7440-62-2	Vanadium (fume or dust)
7440-66-6	Zinc (fume or dust) and compounds
7550-45-0	Titanium tetrachloride
7647-01-0	Hydrochloric acid
7664-38-2	Phosphoric acid
7664-39-3	Hydrogen fluoride
7664-41-7	Ammonia
7664-93-9	Sulfuric acid
7697-37-2	Nitric acid
7723-14-0	Phosphorus (yellow or white)
7757-82-6	Sodium sulfate (solution)
7782-49-2	Selenium and compounds
7782-50-5	Chlorine
7783-20-2	Ammonium sulfate (solution)
8001-35-2	Toxaphene
10034-93-2	Hydrazine sulfate
10049-04-4	Chlorine dioxide
12122-67-7	Zineb
12427-38-2	Maneb
13463-67-7	Titanium dioxide
16071-86-6	Direct Brown 95
16543-55-8	N Nitrosonornicotine
20816-12-0	Osmium tetroxide
25321-22-6	Dichlorobenzene (mixed isomers)
25376-45-8	Diaminotoluene (mixed isomers)
39156-41-7	2,4 Diaminoanisole sulfate
	Antimony Compounds
	Arsenic Compounds
	Barium Compounds
	Beryllium Compounds
	Cadmium Compounds
	Chlorophenols
	Chromium Compounds
	Cobalt Compounds
	Copper Compounds
	Cyanide Compounds
	Glycol Ethers
	Lead Compounds
	Manganese Compounds
	Mercury Compounds
	Nickel Compounds
	Polybrominated Biphenyls (PBBs)
	Selenium Compounds
	Silver Compounds
	Thallium Compounds
	Zinc Compounds

Robt. Connelli 79025

Superfund Amendment
Implications for NRC

(1) Sec. 102(a) deadlines for ROR by EPA
Dec. 31, 86 for proposed rule
April 30 88 for final

(2) Sec. 104 (j) - acquisition of property
relationship to URPA § 151
and UMTRCA - BEA § 83

May 104(j) be applied to these two cases.

(3) Special Study Waste - reduction of volume
to apply based upon hazards or substance
in waste and not on total quantity

(4) Section 108(b)(2); adds qualification as a
self-insurer as evidence of
financial responsibility
for on land facilities, and to
finance response to release =

potential application to licensees

(5) Section 302. Chemical Emergency Preparedness
program -
list of extremely hazardous substances
(30 days after enactment)
threshold planning quantities.

similar substitute for NRC existing chemical emergency program

N.B. § 304 applies only to emergency releases
Waste.

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Project: RULES
Revision:

Rulemaking on Emergency Planning

Rule

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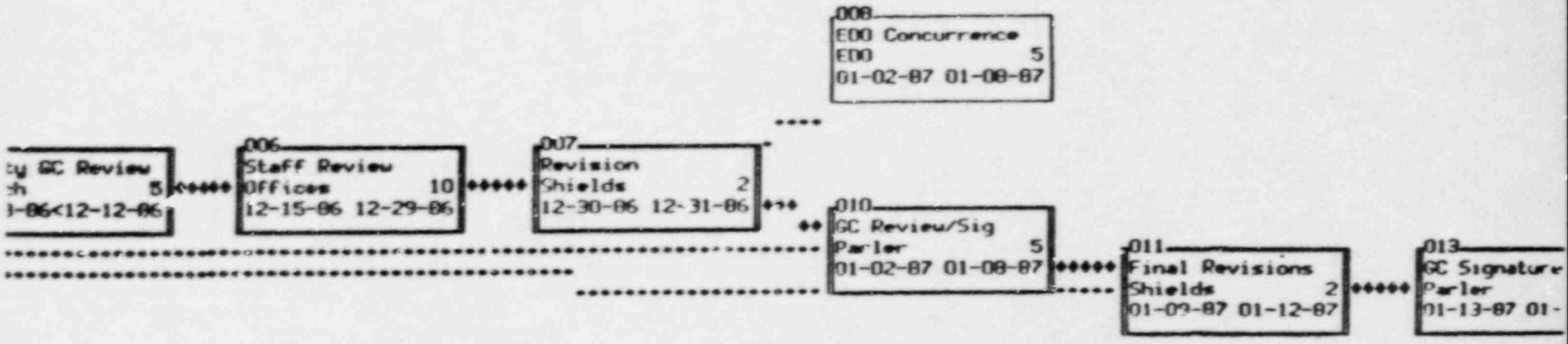
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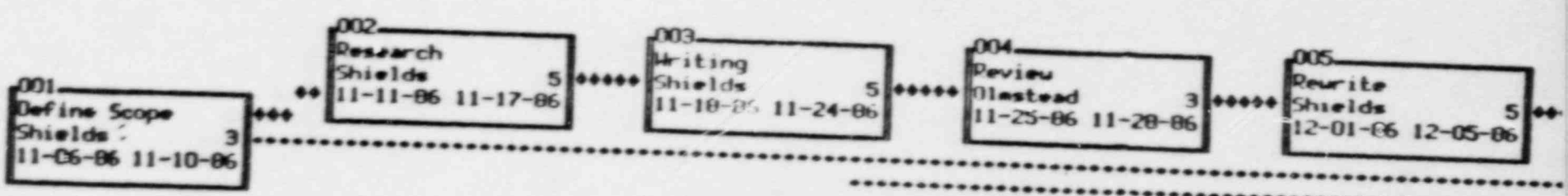
Rulemaking on Emergency Planning

Project: RULES.PJ
Revision: 6



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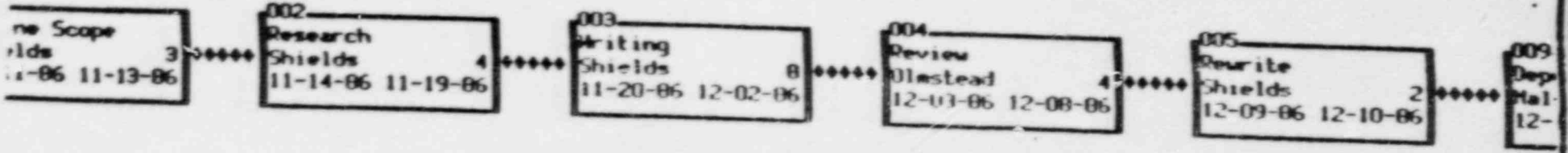
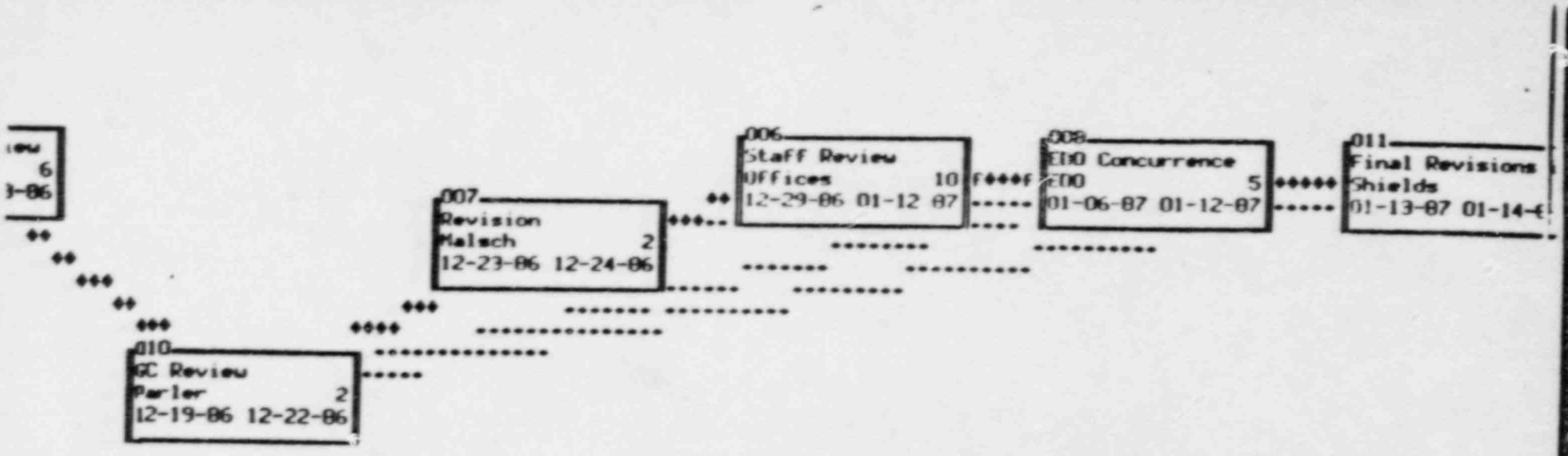
Project: RULES.PJ
Revision: 12

Rulemaking on Emergency Planning

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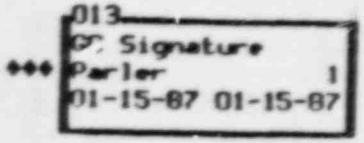
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Commissioner Asselstine's Response

On two occasions in 1986, I was contacted by Mr. Leonard Bickwit. Mr. Bickwit served as NRC's General Counsel from 1979 to 1982 and is now an attorney in private practice in Washington, D. C. On these occasions, Mr. Bickwit advised me that he wished to discuss an emergency planning proposal on behalf of his nuclear utility clients. Mr. Bickwit also told me that discussion of his proposal necessitated the discussion of the NRC staff's position in ongoing reactor licensing proceedings in which emergency planning was a contested issue. In addition, Mr. Bickwit stated that he was making similar requests to each of the other Commissioners. On both of these occasions, I declined Mr. Bickwit's request because I believed it would be inappropriate to discuss with him the merits of the NRC staff's position in ongoing NRC adjudications. Last week, I was advised by Mr. William Olmstead, an NRC attorney in our Office of General Counsel who has discussed Mr. Bickwit's proposal with him, that Mr. Bickwit's proposal addresses precisely the same subject as the NRC staff's proposed rule in SECY-87-35: allowing full power nuclear plant operation to begin when there is a lack of State or local government cooperation in offsite emergency planning. I understand that the approach being advocated by Mr. Bickwit differs slightly from the NRC staff's approach in that Mr. Bickwit's proposal would simply eliminate the requirement in NRC's regulations (10 C.F.R. 50.47) that there be reasonable assurance that adequate protective measures will be taken in the event of an accident. The NRC staff's proposal would provide for an alternative to this requirement in the form of a four-part test which focuses on the utility

applicant's efforts to compensate for the lack of government cooperation. In view of the similarity of the Bickwit and NRC staff proposals and the identity of their subject matter, I believe that my two brief conversations with Mr. Bickwit fall within the scope of your request.