UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY COMMISSION

Proposed Rule: Production and Utilization Facilities; Timing Requirements for Full Participation Emergency Preparedness Exercises for Power Reactors Prior to Receipt of an Operating License, 51 Fed. Reg. 43,369 (December 2, 1986)	10 CFR Part 50, Appendix E

JOINT COMMENTS BY UNION OF CONCERNED SCIENTISTS AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION

The Union of Concerned Scientists ("UCS") and the New England Coalition on Nuclear Pollution ("NECNP") appreciate this opportunity to submit the following joint comments on the Nuclear Regulatory Commission's proposal regarding the timing of emergency planning exercises. For the reasons discussed below, UCS and NECNP strongly oppose the promulgation of the rule.

The Commission's current rule requires that offsite emergency plans must be exercised within one year before the issuance of a full power operating license. 10 CFR Part 50, Appendix E, § F.1. The Commission proposes to extend the time for conducting pre-licensing exercises to within two years before issuance of a full-power license. The proposed rule would thus relax the requirements for nuclear power plant licensing.

Under the Administrative Procedure Act, the Commission cannot lawfully change a well-established regulatory position without providing some rational explanation for the changes in its policy. As the Supreme Court held in Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 103 S.Ct. 2856, 2866 (1983),

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> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies commited to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-808, 93 S.Ct. 2367, 2374-75. 37 L.Ed2d 350 (1973).
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> If Congress established a presumption from which judicial review should start, that presumption ... is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.

Indeed, sharp changes of agency course constitute 'danger signals' that the will of Congress is being ignored. State Farm Mutual Atomobile Insurance Co. v. Department of Transportation, 680 F.2d 206, 220-221 (D.C. Cir. 1982), affirmed sub nom. Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 103 S.Ct. 2856, 2866 (1983), citing Joseph v. FCC, 404 F.2d 207, 212 (D.C. Cir. 1968). An agency which changes its regulatory course "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored ...."Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971).

The Commission has not met this standard. The stated purpose of this change is to make the rule consistent with the NRC's and Federal Emergency Management Agency's ("FEMA's") regulations for post-licensing exercises, which are required every two years. Citing its concern that state and local governments are unduly burdened by annual pre-licensing exercises, the Commission states

that it can find "little reason" why pre-licensing exercises should be conducted more frequently than post-licensing exercises. 51 Fed. Reg. at 43,370, Cols. 1-2.

The Commission appears to have either reversed its previous position without acknowledging it, or simply ignored it. Only a few years ago, the Commission attempted to remove emergency planning exercises from the scope of licensing hearings, in part on the ground that it was impractical to hold hearings on exercises, which must be conducted as close as possible to licensing in order to be effective. The Commission declared that:

> The conduct of full-scale exercises early enough in the licensing process to permit the outcome of the exercises to be fully litigated at the hearing is premature. Such exercises are best held at a later time, when the operating and management staff of the plant -- who are central figures in an exercises -- are in place and trained in emergency functions.

Final Rule: "Emergency Planning and Preparedness," 47 Fed. Reg. 30,232, 30,233 (July 13, 1982).

In the proposed version of the rule, the Commission elaborated further on the benefits of exercising offsite plans as close as possible to the time of licensing:

> [M]aking the conduct of a full-scale exercise, which includes participation by several Federal, State, and local agencies as well as the applicant, a prerequisite to license issuance would require that, as a practical matter, the exercises be conducted some months before license issuance so that the exercise results can be factored into the informal prelicensing review process and any pending adjudicatory hearings which are considering relevant emergency planning issues. Recent experience indicates that this could result in premature exercises that do not accurately reflect the abilities of the affected agencies. If the exercises are segregated from the prelicensing review, then they can be conducted at a later time during the early phase of

> operation when equipment and procedures are fully in place and the exercise will more accurately reflect emergency planning capabilities.

Notice of proposed rulemaking: "Emergency Planning and Preparedness," 46 Fed. Reg. 61,134, 61,135 (December 15, 1981) emphasis added.

In 1983, the Commission repeated that the purpose of the amendment to the emergency planning rule "was to improve the conduct of exercises by placing them as close in time to commercial operation as possible...." Denial of Petition for Rulemaking: "Union of Concerned Scientists; Petition for Rulemaking," 48 Fed. Reg. 16,691, 16,693 (April 19, 1983). The Commission declared that:

> There are sound policy reasons for removing the full-scale exercise from the operating license proceeding. ... The Commission ... believes that it is important that the full-scale exercise be held as close in time as possible to commercial operation of the facility. This is necessary so that the licensee personnel who will be responsible for the commercial operation of the facility will be present at the site, familiar with the plant and its environs, and trained to carry out the emergency plan. As one moves back in time from commercial operation, these personnel will not, for the most part, be present. In addition, certain instrumentation to be relied on in emergencies may not be fully operational or calibrated. The safety of the plant would be better served by an exercise utilizing those licensee perosnnel who would have to carry out emergency procedures once the plant is licensed for commercial operation.

Id.

The Commission makes no attempt to explain how or why its views on the need to conduct exercises close to the time of licensing have changed. The reasons given for the change either are irrelevant to the question of safety, or do not address the safety issues that originally governed the Commission's policy.

For instance, the Commission's stated concern that frequent exercises overburden state and local governments is simply irrelevant to the question of whether exercises within one year before commercial operation are needed to provide a reasonable assurance that nuclear power plants can and will be operated safely. The Commission is not entrusted with oversight over the affairs of state and local governments, but with a responsibility to safeguard the health and safety of the public.

The Commission also states that it wishes to make the frequency of pre-licensing exercises consistent with the frequency of post-licensing exercises. No safety imperative is cited in support of this drive for consistency. Rather, the Commission merely states that it "does not believe this disparity in treatment is warranted." 51 Fed. Reg. at 43,370. However, it is clear from the previously offered rationale for holding exercises close to the time of commercial operation that there are important differences between pre-licensing and post-licensing exercises. In the quotations cited above, the Commission notes that significant changes in the plant and emergency response personnel may take place in the months before an operating license is issued.

In addition, the emergency plans themselves may change enormously during the months before licensing. Offsite emergency plans submitted in support of an operating license application are subject to intense scrutiny and criticism by the Federal Emergency Management and the parties to operating license pro-

ceedings, and may be changed several times in the course of the operating license proceeding, up until shortly before licensing. In the Seabrook case, for instance, FEMA and the intervenors are now reviewing the third revision to the offsite emergency plans for the State of New Hampshire. The first revision was exercised in February of 1986. In response to criticisms from FEMA and the parties, as well as the refusal by some New Hampshire towns to participate in the emergency planning process, the new revision contains numerous significant changes in the planned emergency response process. Most significantly, the new revision shifts numerous important responsibilities from local governments to the State government. If Seabrook receives an operating license before February of 1988, the capability of the State government to carry out its new responsibilities may not be exercised. Thus, the proposed rule would have exactly the result that the Commission purportedly wishes to avoid: the conduct of an exercise "too long before commercial operation [to] accurately reflect the capability to respond to a radiological accident."[1]

In contrast, post-licensing exercises are designed to test whether, under established and approved emergency plans, there

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[1] The Commission states that it intends to continue to require operating license applicants to test onsite emergency plans within a year before licensing, without the participation of state or local governments. An exercise of an applicants' emergency plan, without the participation of offsite authorities, however, can demonstrate nothing about the adequacy of offsite emergency planning. Thus, the proposal does nothing to mitigate the lack of timely exercises of offsite plans.

exists continuing capability to respond to an accident. The emergency plans are no longer under intense scrutiny by FEMA and the parties to the operating license proceeding; thus, there is no expectation that they will change dramatically after licensing occurs.

This proposed rule ignores the important and obvious distinctions between pre- and post-operational emergency planning exercises. It also ignores the established and thoughtfully elaborated policy by which the Commission previously sought to assure the public health and safety by requiring timely pre-operational emergency planning exercises. The apparent motive for this hasty and ill-considered action is to legitimize the recent issuance of a full-power operating license for Shearon Harris, which was done in spite of the license applicants' non-compliance with the requirement for a full-scale exercise within one year of licensing. The Commission cannot lawfully disregard a rational, well-established policy in order to achieve that end. We urge the Commission to rescind this proposal.

Finally, we object to the Commission's failure to prepare a backfit analysis in support of this rulemaking. Although we believe the backfit rule is illegal and UCS has challenged it in the U.S. Court of Appeals for the District of Columbia [UCS v. NRC, Nos. 85-1757, 86-1219], we also believe that the Commission must apply the rule consistently as long as it is on the books. In particular, we believe that the Commission should be required to justify regulatory changes which relax the level of safety at

nuclear power plants, under the same limits it imposes on the imposition of new standards that would improve the protection of the public health and safety. The Commission argues that this proposal does not constitute a backfit because it does not fall under the rule's definition of a backfit. However, the proposal clearly constitutes a change to the "procedures" that are "required to ... operate a facility." The Commission must perform a backfit analysis before promulgating this rule.

Respectfully submitted,

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