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PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Monday, September 20, 1993

The Commission met in open session, pursuant to notice, at 10:00 a.m., Ivan Selin, Chairman, presiding.

COMMISSIONERS PRESENT:

IVAN SELIN, Chairman of the Commission
KENNETH C. ROGERS, Commissioner
FORREST J. REMICK, Commissioner
E. GAIL de PLANQUE, Commissioner

STAFF SEATED AT THE COMMISSION TABLE:

WILLIAM C. PARLER, General Counsel

JOHN HOYLE, Assistant Secretary

JAMES TAYLOR, Executive Director for Operations

FRANCIS CAMERON, Office of the General Counsel

MARTIN MALSCH, Deputy General Counsel for Licensing and Regulations

JAMES PARTLOW, Associate Director for Projects, NRR

P-R-O-C-E-E-D-I-N-G-S

10:00 a.m.

CHAIRMAN SELIN: Good morning, ladies and gentlemen.

The Commission is meeting at this time to receive a briefing from the staff on the status report of the review of the regulations in practice governing citizen petitions under 10 CFR 2.206. As the staff observes in their paper, the 2.206 petition process is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC-licensed facility outside of a licensing or rulemaking proceeding.

We're concerned that this process should be as effective and as practical as possible in order to help resolve safety concerns, but also in order to contribute to the NRC's regulation mission to protect the public health and safety. The Commission is especially concerned that the public participation aspects of this process be as effective, accessible and credible as possible.

As a first step in evaluating the 2.206 process, the staff has conducted a public workshop, led by Francis Cameron of the Office of the General Counsel. I understand that we're going to hear from

Mr. Cameron about the results of the workshop today.

Would any of the Commissioners -- Mr. Parler?

MR. PARLER: Mr. Chairman and members of the Commission, you are correct that Mr. Cameron will give the Commission the briefing this morning on the status of the workshop. Before we proceed with Mr. Cameron, we have Mr. Malsch, who you know, to Mr. Cameron's left. Jim Taylor is here because he supported the staff's efforts which the Commission also subsequently agreed to and strongly supported to have the workshop.

The issues that are raised in the 2.206 petitions are principally safety issues which the staff has to evaluate and respond to. The support for the effort that we have undertaken of course has to be conditioned on practical realities. That is we're in an age of resource constraints and anything that we do, changes, has to keep that in mind.

We're also very pleased to have with us at the table Jim Partlow. Jim participated in the workshop throughout the day. He went to great lengths to explain the way that the process works internally and that added much to the workshop. He also was singled out for recognition by one of the participants

as having communicated or the ability to communicate with those that are interested in these issues quite successfully, even if the process perhaps needs some retooling or refining. So, that was a very welcome and good news.

Mr. Chairman, the paper that you have reviewed to, as well as some of your introductory remarks, have indicated why we embarked on this reevaluation of the 2.206 process. In essence, it is the process that we have in our regulations for interested members of the public to raise safety issues in contexts other than a formal licensing proceeding or in a rulemaking proceeding. It is a process which is very important to us as a regulatory agency. It is also important to interested members of the public that might have these concerns. The process was established in 1974 with very little said about its objectives. What was said at that time was that we're establishing a formal process, formal procedures to enable the public to raise these issues. Obviously the objectives of the process are to give interested members of the public an opportunity to raise safety issues, to give the agency the benefit of those issues that have been identified and to present its evaluation. It, I think, when properly used, adds

to the credibility and to the integrity of the process.

I should hasten to add at this point that there is nothing in the history of the process that I'm aware of which suggests that it has been handled otherwise and in good faith and integrity. Nevertheless, one of the reasons why the initiative was started to reevaluate the process is because it was challenged. Questions were raised about it at least on two different congressional hearings. There was a study by a public interest group which raised questions about it. There was much focus on the question of the lack of judicial reviewability of our decisions which was not because of our doing but because of the precedent of a Supreme Court decision that applied generically.

So, for all of those reasons, it occurred to me and to others of us that it would be a good time to systematically reevaluate the experience, where we stand. One of the best ways we could think of to do that was through the workshop which was held on July the 28th and I believe was very successful.

After the workshop, there was an opportunity presented under the Federal Register notice for comments by interested members of the

public. There were 13 such comments that were filed. A number of the comments were filed by participants in the workshop. We have not completed our evaluation of these comments which were attached to the paper that you have before you for this briefing. We will do that when we come forward with our recommendations to the Commission.

I have reviewed the comments and I don't believe they introduce any new fundamental issues. Perhaps different observations about how particular goals could be reached. But in any event, we will thoroughly evaluate all of them.

There's one thing in the one of the comments that I would like to address at this point, at least as I understand the point and the comment. Since we know, the agency knows that these petitions are not under the current legal doctrine subject to judicial review, we do what we please with the 2.206 petitions and the vast majority are summarily denied.

The fact is that even though that might be the impression on the outside, when the first judicial decision was received which said that these petitions are not judicially reviewed, the then Solicitor, Mr. Briggs, and I got together and decided we should tell everybody that's involved in this process that rather

than relaxing our vigilance, et cetera, that we should be even more particularly concerned about the thoroughness and the accuracy with which we review these petitions. Indeed, in all of our activities, process type activities, we view ourselves as the first line of defense and not -- we do not have the thoroughness of our review colored by the availability or the non-availability of judicial review. As a matter of fact, judicial review of administrative decisions typically gives great deference to the administrative decision maker.

For that reason, we recognize that and try to do as thorough a job as possible.

Now, whatever the recommendations may be that we will come up with to present to the Commission for Commission action, I think, as Mr. Cameron goes through the briefing, that there are some areas which would not affect resources at all, that we should give serious consideration to, such as the openness of the process, communicating with the petitioner. If the petitioner raises an issue and the petition is denied but we still actively pursue the issue, I do not treat the petitioner as if the petitioner was just another member of the public and had never raised the issue.

There is the question of the rationale for

some of these decisions, particularly if certain regulations are not complied with, how can we better explain what we're doing. Generally speaking, I think there is a lesson to be learned that we should be more open, less adversarial in handling these petitions and proceed more with a spirit of cooperation and to address directly the safety issue that had been raised without worrying about whether the burden of proof has been met for the particular enforcement action.

I might also note that if the Commission as a result of this briefing or otherwise has particular suggestions that they would like for us to consider when we prepare our recommendations, that we would be pleased to get them and to respond to them before we set our recommendations up. Obviously if we get them after we send our recommendations up, we will be equally responsive to them.

CHAIRMAN SELIN: But not equally happy.

MR. PARLER: I'm happy all the time, but particularly happy right at this point because I can turn the proceeding over to Mr. Cameron.

CHAIRMAN SELIN: Mr. Parler, may I ask you a question? Does the 2.206 petition have to outline a course of action or can it just call attention to a safety issue without specifically calling for an

enforcement or a particular activity?

MR. PARLER: I think that they are -- typically the process calls for -- asks for an enforcement action. If something less comes in, even if it's a letter that raises a safety issue, we treat it as a 2.206 petition. So, we're very flexible.

CHAIRMAN SELIN: Yes. The reason I asked that is when we report on how many petitions have been approved, not only do we have to agree with the safety supposition, but we have to agree with the action called for in order to say we've approved the petition. In my experience, quite a few times we find merit in the argument but don't believe that the remedy is the appropriate one.

MR. PARLER: That's true and that leaves at least two results, that you have numbers such as in a congressional hearing a couple of years ago. Only ten out of 300 some odd were actions taken and that's perhaps misleading. The second point is that if the specific enforcement action that might have been requested was not taken, then the petition is denied. That leaves the impression that the petitioner did not otherwise raise a valid issue and contributed to the process. That is something that we perhaps should look at very carefully when we come up with our

recommendations.

MR. PARTLOW: I might point out that in the past year, at the urging of Doctor Murley, we have tried in responding to these petitions, even though we may basically be denying the petition, to point out to the extent that some enforcement action was taken or some other kind of action was taken, that the petition was partially accepted.

CHAIRMAN SELIN: Mr. Cameron?

MR. CAMERON: Thank you very much, Chairman, Mr. Parler.

I think the Chairman and Mr. Parler have already emphasized the rationale for the evaluation of the 2.206 process. What I'd like to do is to briefly talk about the format for the workshop and then get into the summary of the workshop discussions and spend a few moments on schedule at the end of the briefing.

(Slide) Could we have slide number 4 on the format for the workshops? I apologize to the Commission that these slides are not numbered.

MR. PARLER: This is the first time we've ever had slide at an OGC presentation, Mr. Chairman. So, if you'll bear with us. As the learning curve improves, we'll do better.

MR. CAMERON: We've been hanging around

too much with the technical staff, so we're picking up some bad habits. But we haven't really mastered it yet.

COMMISSIONER ROGERS: Got the bad ones but not the good ones.

MR. CAMERON: Right. Thank you.

As Mr. Parler mentioned, the first step in the evaluation process was a workshop that brought together the representatives of affected interests to discuss the 2.206 process. The idea here was to get people with experience in the process together to discuss the process and to see if we could generate some recommendations for improving the process as well as to promote a better understanding of how the 2.206 process works. We had a very knowledgeable group of participants. They represented diverse interests. There were representatives there from citizen groups who we would normally think of as petitioners. We had several representatives from the nuclear industry who had represented or represent licensees in 2.206 proceedings. We had a state government participant and, of course, the NRC staff. Jim Partlow was at the table and Jack Goldberg from the Office of General Counsel was at the table with us. We had the General Counsel from the Administrative Conference of the

United States, Gary Edles.

COMMISSIONER de PLANQUE: Chip, is Appendix A the full list of participants?

MR. CAMERON: Yes, it is.

COMMISSIONER de PLANQUE: Okay. Thank you.

MR. CAMERON: And I should also add that Marty Malsch was at the table with us from OGC.

MR. PARLER: That's the full list of participants who were at the table. There's a longer list of attendees which we have.

COMMISSIONER de PLANQUE: Okay.

MR. CAMERON: Yes. Thank you, Mr. Parler, for that clarification.

We used a background paper that was prepared by the NRC staff to focus the workshop discussions and there were basically three themes in the background paper. One focused on interaction with the petitioner. A second theme was should we change the focus of the 2.206 process from a specific enforcement action to resolution of the underlying safety issue. This is very relevant to the question the Chairman asked earlier on the flexibility to take different actions under the petitions. The third theme was to possibly establish a priority scheme for

2.206 petitions and for those petitions of the highest significance to establish a more rigorous review procedure perhaps, such as an independent internal review or other things like that.

We pretty much followed those themes in the workshop and I've divided my presentation on workshop discussions into five areas: perspectives on the 2.206 process; interaction with the petitioner; what the focus of the process should be; independent internal review; and a last item that was added at the recommendation of several of the participants was the issue of judicial review.

Could we have the next slide, please?

COMMISSIONER ROGERS: Just before you leave that, Chip.

MR. CAMERON: Sure.

COMMISSIONER ROGERS: In preparing the background paper, did you try to do any kind of a quantitative sort of all the petitions that have been received over some years -- I don't know how far you want to go back, but back some years -- to see just what the -- how many of various types and how one might characterize them so that we would have a feeling of how many we're talking about.

I have an impression, and I may be wrong

here, that some of the issues and solutions may be prompted by a few petitions in which there was great unhappiness with the way they were handled, but perhaps only a few of that particular kind. I was just wondering whether you tried to do any kind of a sort here of numbers based on the nature of the petition, what the kind of safety issue was and what the remedy was that was suggested in the petition, just to have some quantitative measures of these.

So often when we ask for comments on papers that represent several years' work, we get maybe 20 comments from the whole country. Those 20 comments affect our thinking, but it's only 20. Now, sometimes they are 20 from organizations who represent more than one person or one point of view, but I'm just asking whether you had thought to try to do any kind of a quantitative sort here into bins of various kinds and numbers.

MR. PARLER: We did not, Commissioner Rogers, do that for this particular paper. Mr. Goldberg's office, as well as I believe Mr. Lieberman's office, have background data which may enable that to be done. To some extent, we did what you're talking about to prepare a response to congressional questions several years ago, perhaps not

into the detailed breakout that you were talking about.

I think it is correct to suggest that at least those that appear to be the most concerned about the process and refinements or changes to the process are using for their comments their own experience --

COMMISSIONER ROGERS: Yes. Yes.

MR. PARLER: -- in a particular number of cases which are certainly only a very small percentage of the over 300 or so cases that we've dealt with. I will look at the data that we have and try to provide such a breakout to you and to members of the Commission.

COMMISSIONER ROGERS: I think it might be helpful in deciding just what course ultimately to take of how many of certain kinds of petitions that we have received and how we've dealt with them. It might just serve to put that in perspective. I'm concerned about ultimately coming out with some suggestions for major changes that really were prompted by only a very few petitions.

MR. CAMERON: As Mr. Parler noted, we didn't do that type of analysis for the paper. But I think that the workshop discussions and also the written comments raised the advisability of doing what

you suggested, Commissioner Rogers, and we will do that as Mr. Parler noted.

COMMISSIONER ROGERS: Thank you.

MR. CAMERON: (Slide) Could I have the fifth slide, please, on perspectives on the 2.206 process?

We started off the workshop discussions with participants' impressions of the process. Does it work, what are the strengths, what are the weaknesses? We looked at this from a petitioner perspective, a licensee perspective and the NRC staff perspective. As far as the petitioners are concerned, the fact that most petitions are denied and hearings on petitions are extremely rare means that to them public participation stops after the plant is licensed and there's no opportunity for participation by the public after licensing.

Secondly, petitioners noted that the review appears, the 2.206 review appears to occur behind closed doors with a licensee with little involvement of the petitioner in that review process.

A third point was that there are no criteria to guide the review of the petitions in terms of when a petition should be granted, when a petition should be denied and I'll come back to that point

later on. And again emphasizing the fact that most petitions are denied to petitioners means that the process has very little credibility and it appears that the Commission is not responsive to public concerns.

(Slide) Could I have the next slide, please?

As far as the industry was concerned, the industry believed that the process was working and that there were no significant flaws in the process. The industry representatives were very concerned about costs, not only NRC costs but also licensee costs, and with what they termed over proceduralization of the process. They were very concerned that adding detailed formal review procedures would divert NRC resources and licensee resources from other perhaps more important issues. They also noted that the 2.206 process was only one of the many ways that safety issues are raised and evaluated within the NRC and that the Commission must have the flexibility and the discretion to decide where to direct its resources in terms of evaluating issues.

Lastly, the industry said that the number of denials is not indicative of how well the process is working. Rather, we should look to how well the

underlying safety issue was evaluated and the industry participants believed that the staff evaluations of 2.206 petitions were thorough and well evaluated and that with the regulatory framework in place within the NRC and also the licensee programs, that you would expect very few petitions to be granted because the safety issues should have already been flagged and evaluated through other processes.

(Slide) Could I have the next slide, please?

Now, the first substantive area that we turned to was interaction and communication with the petitioner. As far as the petitioner representatives were concerned, there was little involvement of the petitioner in the process after the petition was submitted. The perception, as I noted earlier, is that it's an exclusive NRC licensee review process once the petition is submitted and that there is very little communication with the petitioner about what is going on in the review process.

Now, interestingly enough, the industry agreed that the 2.206 process should be an open, transparent and what they called a user friendly process and both industry participants and petitioner participants noted a number of steps that the NRC

should ensure happens in the petition process. One, that the petitioner should receive a copy of the licensee response to the petition and that the petitioners should have the ability to respond to that licensee response. The petitioner should be invited to participate in any meetings between the NRC and the licensee on the petition. The NRC should provide an update on the status of the petition to the petitioner and note to the petitioner who the petitioner can call for information on the petition and also make relevant documents available to the petitioner.

As was noted by the NRC staff participants, our procedures do provide for many of these types of things. But it was pointed out also that they could be perhaps more uniformly implemented and that the NRC staff could be more proactive in working with the petitioner.

COMMISSIONER de PLANQUE: Excuse me. Do the procedures call for the petitioner to get a copy of the licensee response?

MR. CAMERON: I believe that they do.

MR. PARTLOW: Yes. Let me address that. We have an NRR office letter on procedures. We modified it on August 6th, a week or so after this meeting, to clarify several points. First, that the

petitioner should get a copy of the licensee's response if we asked the licensee for a response. It says to encourage the licensee to do that directly and to provide the petitioner with other correspondence having to do with the subject. But if the licensee does not do it, then the project manager is to ensure that it's done.

We've also modified the procedures to require that the project manager be in touch with the petitioner at least every 60 days to tell them the status of their petition and to answer any further questions that they might have.

COMMISSIONER de PLANQUE: These modifications were done recently?

MR. PARTLOW: Yes, just following the workshop.

COMMISSIONER de PLANQUE: Okay.

CHAIRMAN SELIN: This is within NRR?

MR. PARTLOW: Yes.

CHAIRMAN SELIN: So they wouldn't apply to non-reactor petitions?

MR. PARTLOW: No, although that's a good point. I should certainly share this office letter with the other offices.

MR. TAYLOR: We'll do that. NRR gets the

bulk of the petitions.

MR. CAMERON: One last point that was raised under the interaction with the petitioner section was the idea of some type of a hearing, a meeting with the petitioner to review the issues. As some of the petitioners pointed out that even if you improve the communication and availability of information, there would still be a need for some type of face to face discussion on the issues between the NRC, the petitioner and the licensee and not necessarily a formal adjudicatory proceeding, but some type of process.

One issue that kept coming up during the discussions was that the petitioners would only be satisfied if the desired outcome was achieved and nothing less than that would really satisfy them and that's what all the furor was about. I think several participants disagreed with that and stated that the primary concern was not particularly that the desired outcome would result, but that there be an effective process, some type of process for the discussion of the issues. From the industry statements and the comment letters from the industry, the industry basically disagrees that there needs to be some formalization of this face to face meeting concept.

CHAIRMAN SELIN: Was there any -- you know, one could generalize and say the petitions fall loosely into two categories. There's a set of petitions that observers sent in. They say, "We have the same information you have and we disagree with your conclusion. We want you to rethink what you did. But there are also petitions that bring information that we don't have. It might be safety information, it might be effect on a particular population. There'd be petitions that say, "You don't realize what an impact, whether it's health, safety, economic or disruptive, certain activities at a particular place have on us, the neighbors, or we who live on the transportation routes."

Was there any discussion of -- I mean some petitions are, in a sense, second guessing and others are bringing information to us that we may not have had. Was there any discussion of trying to identify or treat these differently or is that just a superficial distinction?

MR. CAMERON: Well, there was a discussion, Doctor Selin, of the whole idea of trying to prioritize categories of petitions so that for some of the petitions, for example, that provide new information, that those might be treated differently.

There was very little clarity that came out of that discussion on priorities. It was noted by Jim Partlow that NRR at least has a priority ranking scheme that includes not only 2.206 issues but all the safety issues, I think, that they look at. But I think that the priority ranking is something that we have to look harder at and take a look at the comment letters and see if there's something that comes out of that.

So, it was discussed but not as deeply as perhaps it should be.

MR. PARTLOW: Yes. Mr. Chairman, we don't categorize the petitions the way you described those two, but I think that it happens naturally. There are those that come in that contain information that may have come out of our own inspection reports. There are those that come in that contain new information. I think it happens without having to write a list that those that present new information get our attention and probably get a quicker priority to find out what's going on than do those that cover something that's already been covered in an old inspection report.

MR. PARLER: Mr. Chairman, I think that what we told Commissioner Rogers that we would do looking at the ones that we've received over the years and try to put them into categories might help us in

our recommendations on the particular issue about priorities and the basic thrust of your question, at least as I understand it.

MR. CAMERON: (Slide) Could we have the next slide, please, on the focus of the process?

As we noted in the background paper, the existing focus of the process is on a request for a specific commission action in regard to the license, modify, suspend or revoke the license. But the underlying significance of the 2.206 process is to bring potential health and safety issues to the Commission's attention. There was some belief that changing the focus to elevate the underlying safety issue would allow for more petitions to be granted if additional investigation was necessary on a particular issue. The actual outcome in terms of licensee-specific actions could be determined later on. It was believed that this might be a more positive outcome, lead to a more positive perception of the process.

It was also noted by some of the participants that this would result in less polarization, less adversarialness to the process. But generally there were mixed feelings among the participants on this issue. Some thought that it would be a good idea to elevate the underlying safety

issue as the focus. Others didn't think that it would be a good idea. This one didn't break down into petitioner industry lines. There were mixed feelings about how to handle this within the petitioner participants and also within the industry.

One comment that was perhaps relevant to what you brought up at the beginning of the meeting, Doctor Selin, was that a petitioner noted that by focusing on modify, suspend, revoke a license, that often they feel they have to ask for more extreme measure than they ordinarily would when perhaps they could just ask for various categories of electrical wiring to be replaced at a facility. But I believe that the 2.206 process not only allows for modification, suspension or revocation, but has a general other action to it, so that I believe that under the existing rules some lesser action could be requested by a petitioner.

COMMISSIONER REMICK: Chip, along that line, I can understand how the public would not totally appreciate the 2.206 or enforcement action from the standpoint of just suspending and revoking because if you read the words, if I had not been told that these words strictly meant enforcement, I would read it more broadly, as you indicated. It says, "Any

person may file a request to institute a proceeding pursuant to 202 to modify," modify enforcement perhaps, suspend and revoke, yes, in my mind, "a license or for such other action as may be proper." Then later on it says, "Their request shall specify the action requested and set forth the facts that constitute the basis for the request."

So, in my mind, that's much broader than what I interpret to be strictly enforcement. Now, I know traditionally we've reviewed these as enforcement, but I think there's a basis in the public's mind to think that this is a broader concept than just some kind of a drastic action that must be taken and thus just raise safety issues.

Then my observation, as pointed out by Mr. Parler, is sometimes we get requests that aren't clear and because we want to have them addressed, and I commend the process, we throw them in the 2.206 bucket and then they're reviewed as enforcement. But maybe it wasn't the intention in the petitioner's mind truly enforcement. They wanted to bring something to our attention.

Has any thought been given to another category of this type of thing but is not -- truly we don't view it as enforcement action, that it is

raising an issue that we should address in some format without necessarily saying, "Well, this does not result in a suspension or revocation of the license?"

MR. CAMERON: Well, I think that one thing that we definitely have to do is to consider that in the evaluation now at this point and even perhaps make it more well known that it just doesn't have to be modify, revoke or suspend.

CHAIRMAN SELIN: I mean a prosecutor gets a conviction, doesn't get the sentence he asks for. That's considered a successful outcome, not an unsuccessful outcome. But going a little more broadly, in our experience, when we appeared before the Senate Committee on Environment and Public Works, one of the issues that was raised is that there aren't any citizen suits under the Atomic Energy Act. They're precluded as opposed to other environmental rules. So, it seems that one consideration ought to be if the 2.206 is in a sense a substitute for citizen suits, what are the objectives of the citizen suits and do we have a different kind of recourse, do we provide a different kind of recourse for people that would otherwise be putting in a citizen suit directly against the licensee.

MR. CAMERON: That's a good suggestion,

Doctor Selin. I would point out that we did take at least a preliminary look at the citizen suit provision and compared it to the 2.206 process and found that in some respects 2.206 afforded a broader opportunity for the public than the citizen suit provisions in the sense that large safety problems could be identified as opposed to compliance with strict emission regulations. But I think there may be some food for thought in the analogy to citizen suit objectives.

COMMISSIONER de PLANQUE: If -- go ahead.

MR. PARLER: Mr. Chairman, on the discussion that has just taken place, as far as 2.206 is concerned there has been at least some broad division in the 2.206 process, that is for licensing purposes which was taken care of and addressed in the legislative language in the Energy Policy Act of 1992. As far as 2.206 actions that are related to enforcement, the Heckler v. Chaney doctrine, at least as I understand it, which leads to the no judicial review opinions in the court decisions is based on the discretionary authority that an agency has for enforcement actions.

So, these issues would have to be looked at very carefully and in doing so being mindful of the positions that the Commission has taken and also the

requirements and the directions that the Commission has given to us in looking into this area.

COMMISSIONER de PLANQUE: I think you just answered my question, but let me make sure. If you move away from the enforcement emphasis on the 2.206, then you effect the judicial reviewability of it, is that what you're --

MR. PARLER: That certainly is my understanding that that could happen, yes.

COMMISSIONER de PLANQUE: Okay.

MR. PARTLOW: Commissioner Remick, concerning another category of requests, I do want to point out that the staff and the Commission receives a lot of requests in letters from people. They are picked up in the Secretary's tracking system, the EDO's tracking system or NRR's tracking system. So, those that do represent a legitimate concern or request, they are addressed and they are answered by the staff.

COMMISSIONER REMICK: You mean independent of the 2.206?

MR. PARTLOW: Yes. Even though they are not labeled as a 2.206 request.

COMMISSIONER REMICK: Yes. But my impression is that we put a number of these in the

2.206 bucket, even though they specifically don't mention 2.206.

MR. PARTLOW: That's right. At times the Office of General Counsel looks at them and says, "Let's work this as a 2.206 request."

COMMISSIONER REMICK: And I'm not criticizing that because I think the thing should be addressed one way or another.

MR. PARTLOW: Yes, but that's my point. Whether they belibeled that or not, we do address them.

COMMISSIONER REMICK: Just as we do in rulemaking. We get requests that sometimes we interpret as a rulemaking request, although they perhaps didn't refer to our regulations.

MR. CAMERON: That's another important category of requests too, of petitions for rulemaking to address more generic issues.

MR. MALSCH: In fact, Commissioner Remick, one of the sort of semi-famous 2.206 cases that we have that went all the way to the U.S. Supreme Court actually involved a letter written to the NRC which was treated by the staff as a 2.206 petition over petitioner's objection.

COMMISSIONER REMICK: I see.

MR. MALSCH: So we have been very liberal in construing papers coming into us as 2.206 petitions.

MR. CAMERON: And there is at least one comment letter that came in that has a rather extensive discussion on this issue of treating unspecified requests as 2.206 petitions.

COMMISSIONER REMICK: That's in the attachment, one of the letters in the attachment?

MR. CAMERON: Yes, it is, the letter from Susan Hyatt of Ohio Citizens for Responsible Energy.

COMMISSIONER REMICK: Thank you.

MR. CAMERON: (Slide) Could I have the next slide, please?

The next discussion area at the workshop was the concept of providing for some type of internal NRC independent review of the staff decision on the 2.206 petition. Some of the participants believe that this type of independent review is necessary to remove the perception of bias, the bias resulting from the fact that the NRC staff who originally evaluated a particular safety issue is the same group of people that the petition is turned over to. As one participant noted, it would be natural for a bias to result from that type of arrangement. There were

several suggestions made for who might perform the independent review, the Inspector General, the Atomic Safety and Licensing Board panel, the Office of Commission Appellate Adjudication or some new group that was set up specifically for this purpose.

Now, the industry participants thought it was unnecessary to institute this type of independent review. They point out that the Commission already has the ability to take review of a staff decision on a 2.206 petition. Again, there was the concern over the resource impacts in terms of diverting staff and licensee resources from other more important ideas and also the industry participants did not feel that any bias was specifically demonstrated by the petitioner participants.

There was in this section a discussion by Mr. Malsch of a previous independent review of 2.206 petitions. This was back when we had two separate legal offices, the Office of General Counsel and the Office of the Executive Legal Director. At that time the Office of General Counsel, with technical assistance from the old Office of Policy Evaluation, would undertake a review of the director's decisions. Now, an informal OGC review still takes place of the director's decisions but with no technical input such

as was offered by the Office of Policy Evaluation.

A significant point that came out in this discussion was statements by a couple of the participants that if there was this type of independent review that there might not be as much as a call for judicial review by representatives of the public.

A last point in terms of independent review was the whole possibility of establishing this for priority categories, perhaps the new information categories that we were talking about earlier on.

(Slide) Could we have the next slide, please?

COMMISSIONER REMICK: Incidentally, going back to Mr. Parler's invitation for any suggestions from the Commission at this point, it would helpful to have at least an outline of the internal review that takes place now on 2.206 petitions because I'm sure there is a review process within the staff.

MR. PARTLOW: You mean orally now, Commissioner?

COMMISSIONER REMICK: No, no, no. I'm thinking when the --

MR. TAYLOR: We'll provide that.

MR. CAMERON: Okay. One of the last

topics that we discussed, again added at the suggestion of some of the participants, was the whole idea of judicial review. This has perhaps been the most visible issue in the 2.206 process. We did discuss this and it still received a lot of support from some participants in terms of providing accountability to the process. But it was interesting. There were some petitioner participants who stated that there would be other improvements to the 2.206 process that might mitigate the need for judicial review or at least would provide a more positive contribution to the process than providing for judicial review.

As Mr. Parler already mentioned earlier, the courts give deference to agency decisions in terms of the agency's technical expertise and, as was noted by several participants at the workshop, they believe that the NRC decisions were pretty well reasoned and pretty carefully done, therefore insulating even further those decisions from overturn on judicial review. I think that this issue underscores the value of the workshop and one aspect at least is that we may have been putting too fine a point on the whole issue of judicial review and when you really examined some of the underlying concerns behind people's positions

on the issues, you may find that there are other ways to address those rather than judicial review.

(Slide) Could we have the next slide, please?

There were several other issues that were brought up at the workshop. One was suggested by the General Counsel from the Administrative Conference of the United States, is that we should explore whether consensus building techniques might profitably be used in the 2.206 process. And though most of the industry participants at least did not feel that this would be appropriate for an enforcement context, at least one industry participant said that there might be some types of issues, for example petitions that raise multifacility issues or that raise unique issues that might be handled through the consensus building process.

We talked a little bit about the experience of other agencies and I provided the Commission with a letter that came in from Gary Edles, General Counsel of the Administrative Conference. They had looked at any agencies that had similar processes. I think the one notable one was the Food and Drug Administration that has a process where the head of the agency, rather than the staff, handles a

request for action. But it can include enforcement, it can include rulemaking. It can include almost anything. It is a perhaps more interactive process than ours is with the petitioner, but as noted in Mr. Edles' letter, they have a significant backlog in terms of responding to these types of petitions.

As I mentioned earlier, Mr. Malsch discussed the citizen suit experience of other agencies and compared it to our 2.206 process.

The third area that I have down here is non-compliance with the regulations. A couple of the petitioner participants stated that we needed criteria, internal criteria on whether to grant or deny petitions. The specific issue that came up there is that non-compliance with the regulations should be grounds for granting a petition. Petitioner participants at the workshop cited that there's a double standard involved here where when we're licensing a plant we reach a conclusion that it's acceptable for licensing if all the regulations are met, but yet non-compliance with regulations after a plant is licensed is not direct grounds for granting a 2.206 petition. Again, that's the perception of the petitioner participants at the workshop.

One last issue that was raised is that

local citizens around a facility should be involved in the 2.206 process since it often affects the livelihood of people in the town, is that they should be involved in any requested action to shut down that facility.

(Slide) Could I have the last slide, please?

In terms of the schedule, we are in the process of evaluating the written comments that were submitted as well as the workshop discussions and we plan to submit recommendations to the Commission in late November on what improvements should be made to the process.

That's the end of our portion of the briefing.

CHAIRMAN SELIN: Could you just sketch out a little bit about the dynamics of the conference? Did people go away feeling they had learned something new? Were there any exchanges of views or did people pretty much just come and say what they had to say and then leave?

MR. CAMERON: No, I believe that people came away from the workshop feeling that it was a very constructive process and the comment letters, I think, reinforce that view. The discussions that occurred on

the whole idea of communications, I think, found that the industry was pretty sympathetic to some of the concerns that were stated by the petitioners. In fact, I got the impression that the industry was surprised that some of these communication recommendations don't happen as a matter of course more uniformly than they do now.

So, I thought that there was a meeting of the minds on some issues and also that even though there might have been disagreement about what should be done, that both sides of the -- people on both sides of the issue perhaps understood a little bit better the frustration or the views of the other side on the particular issues.

MR. PARLER: Mr. Chairman, a bottom line question is whether -- I think they're better off in this area having had the workshop than if it were not held. The answer to that is clear in my mind, having attended the first half of the workshop and read the comments. The answer to that is yes, we're better off having it.

MR. PARTLOW: I thought it was very worthwhile. I'd like to give one little example on this matter of communication and whether or not the staff works the petition in the dark. One of the

petitioners said that. They send in their petition and then nothing is heard for months and months and then the answer comes back no. Another petitioner spoke up to the others and said, "Well, you can't just put it in there and let it lie. You've got to be active yourself. Don't depend upon the government to be telling you what's going on, you get in there and find out what's going on. So, I thought there was a good give and take on everyone's part.

CHAIRMAN SELIN: Commissioner Rogers?

COMMISSIONER ROGERS: Was there participation by the attendees that were not -- you know, the observers or people not part of the group on your list?

MR. CAMERON: Yes, there was. We had -- after each major discussion area we opened it up to the public for comment and we did receive several comments. In fact, one of the commenters was a staff person from the Senate Committee on Environment and Natural Resources and provided a very useful function by asking sort of broad summary questions so that we went through the group at the end of each session and tried to summarize the views on the particular issue that was being discussed.

COMMISSIONER ROGERS: Did you see any

dynamics during this? I mean a change in people's views on the part of the participants as they discussed matters together such as we saw in the workshops that you were holding on the decommissioning standards, cleanup standards? There it was very clear that there was a dynamic at work during the course of at least the one that I attended.

MR. CAMERON: Well, I think you could see that dynamic at work, Commissioner Rogers, as witnessed by some of the points that Mr. Parler and Mr. Partlow and I talked about earlier. It perhaps wasn't as dramatic as the decommissioning criteria workshops, which is possibly a much more dramatic issue, but also we had a second day there where the first day was devoted more to position taking and then the second day got more into a give and take and accommodation on the issues.

COMMISSIONER ROGERS: Well, just in general, it does seem to me that this approach that you're taking here is -- you know, I haven't seen any negatives from trying to have workshops and get in a well prepared way the participation of a broad spectrum of interested parties. I hope that it is a process that we will use with increasing frequency as occasions arise because it does seem to me that so far

the two cases which we've seen seem to me to provide a lot of positive information and perspective to our processes.

So, I'd like to commend OGC for promoting this and your own participation in making it come off.

I do hope that we will be able to find some ways to improve the communication aspect. To me, it's something that could be done without great cost. It is just a question of attitude, I think, on our part as to paying a little bit more attention to communicating more with the people that have come to us with something.

So, I await your recommendations as a result of your study here without trying to anticipate them and make comments on what some of the issues are that you're looking at. But I do think that it is important to look at the whole picture from within some kind of a framework that puts things in perspective. I feel that some of the solutions that may be favored by some of the participants may really be there for one or two cases that they've been very concerned about. I don't know that, but I'd like to see a quantitative perspective here and perhaps some cost analysis of various options because doing some things may be very costly and others may produce

almost exactly the same result without being so costly.

So, I do think that we have to be mindful of resources and I think that that should be part of your thinking in coming to us with recommendations. In other words, I'd like all of these issues which clearly have great emotional elements involved in them, people feel very strongly about some of these things, and those have to be dealt with in a reasonable and responsible way. But at the same time, I think we have to put some kind of a -- some measures out there of what it's going to cost us to follow any of these options.

Thank you.

CHAIRMAN SELIN: Commissioner Remick?

COMMISSIONER REMICK: Well, I tried to read carefully the Director's decisions on the 2.206 petitions and I really have been impressed with the thoroughness of the technical review of those Director decisions. But it is obvious that we could do more in the communication area with the petitioners so that they know what is going on.

I would appreciate when you evaluate this to address the question and I don't know if it's right or not, to be putting into the 2.206 baskets things

which specifically aren't requested that are probably pros and cons. I'd appreciate people looking at the alternatives there.

I also want to congratulate the staff for the initiative in suggesting the workshops in this particular case and the SECY document I thought was very well written. It was concise, I thought very even-handed. I'm sure that the workshop was conducted in a even-handed way and was quite interesting reading. So, I congratulate the staff. Thank you.

CHAIRMAN SELIN: Commissioner de Planque?

COMMISSIONER de PLANQUE: I think there were certain individuals or groups that were pushing before this for a judicial review. Were those groups or individuals represented at this workshop by and large?

MR. CAMERON: They were. There was one notable unavoidable absence, Diane Curran, who was involved in Yankee Rowe and also in the writing of --

CHAIRMAN SELIN: Sequoyah.

MR. CAMERON: In Sequoyah and the writing of the Union of Concerned Scientists' report on the 2.206 petition process at the last minute could not make it. But she had been invited and we were looking forward to her attending. But I think that the

representatives from the other citizens groups probably made her points for her, I would imagine.

COMMISSIONER de PLANQUE: Okay. Once again it sounds like communications are at least a part of this problem. I understand from what you've said that you've already made some modifications in your procedures. I would suggest that when you come back to us with recommendations that you indicate what changes you've already made and how they compared with the past situation so that we can see what action has already been taken to satisfy the workshop suggestions.

Again, in accordance with what the Chairman said, the other side of the house should know about all this and be consistent as well.

MR. CAMERON: Yes.

COMMISSIONER de PLANQUE: But I thought the paper was very good, the briefing was very good. It sounds like you did a wonderful job.

MR. CAMERON: Thank you. And the next time we come back we'll have our viewgraphs numbered, hopefully.

COMMISSIONER REMICK: Incidentally, along that line, there was a Director of the Office of Policy Evaluation as a new activity in 1981 suggested

that as a courtesy to the Commission that all viewgraphs should have the title, the presenter's name, his organization, date and they should be numbered.

COMMISSIONER de PLANQUE: And there's no room left for the substance.

CHAIRMAN SELIN: You know, there are a couple of things I think are important and this is really responding to the General Counsel's invitation for some response. First of all, as Commissioner Remick noted, the NRR Director evaluations are really quite thorough. They are handled in great depth. They're argued very carefully. There's no question that the staff takes these petitions very seriously. I think the important point -- there's a lot of discussion as if right now we have a cheap process and we're going to make it expensive. In fact, that's quite wrong. 2.206 is a way to get at the head of the line. The amount of work that goes into this is really considerable. We already have a major investment. So, the question isn't so much what else should we do but how can we recoup a little more from that investment.

We have essentially, if you read the Commission principles and the Controller's report,

protect the health and safety, do it the most open fashion possible and do it without -- as economically to the licensee as we can. We have a major investment here and the question is what can we do with this to keep it.

I don't personally have any problem with the results. But you've heard a story I've sometimes told about Norbert Weiner giving a lecture and he writes this very complicated definite integral on the left side and he looks at it and he looks at it and he writes down 2 pi. Well, all definite integrals come out 2 pi. But he looks at this and the class looks and they say, "How did you do it?" and he erased the 2 pi and he looked again and again and he wrote down 2 pi and he said, "See, I did it a different way."

The opacity of the process is clearly a problem. It's not so much the final results or the documentation, but the dynamics that are gotten that way.

The second is, as you've pointed out, there are a number of no lose ways to just handle things mechanically better than communications, et cetera. But I do think the opacity has to be given some clear look, some kind of criteria or some kind of guidelines that say -- you know, we sometimes get just

bothersome 2.206s which should be dispensed with competently, but as quickly as possible, and others that would benefit from some more conversation, perhaps even a -- not a hearing in the formal sense, but a meeting at which the licensee and the petitioner were present or the staff were present so that there could be some back and forth.

The Yankee Rowe case I hope is unusual. I mean an enormous amount of effort went into that. I don't think it's unprecedented and there's no question in my mind that the results were much better for there having been meetings at which people could express their points of view rather than just the Director or even the Commission going in camera and issuing the report.

The third is I want to make clear, I'm not saying that these should not be enforcement petitions. But there seem to me to be two levels of review. First is the safety issue and then the appropriate action. It might be useful to investigate ways in which the safety issue is addressed and responded to and then at the end, the bottom line is still the same, is the enforcement action approved or modified. But the analogy with a case where you have both a finding and then a sentence I think isn't such a bad

one. The key question -- they are enforcement petitions and maybe you want to change that, but I don't think it's necessary to change that in order to get more focus on the underlying safety issue.

I think this was a very good report. I am cognizant of the fact that General Counsel had to push for awhile to get this workshop approved and I think it's now clear to all of us how valuable the workshop has been. And, in fact, it's not that we have a bad process. We have a very good process which, in spite of an enormous amount of effort and competence doesn't accomplish all that ought to be accomplishable with that amount of confidence and effort. I hope this workshop turns out to have been a big step towards achieving that.

Thank you very much.

MR. CAMERON: Thank you.

(Whereupon, at 11:11 a.m., the above-entitled matter was concluded.)

CERTIFICATE OF TRANSCRIBER

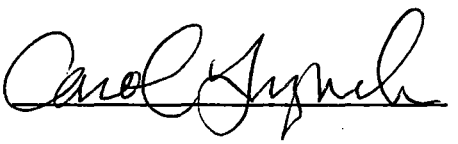
This is to certify that the attached events of a meeting of the United States Nuclear Regulatory Commission entitled:

TITLE OF MEETING: BRIEFING ON RESULTS OF 2.206 WORKSHOP

PLACE OF MEETING: ROCKVILLE, MARYLAND

DATE OF MEETING: SEPTEMBER 20, 1993

were transcribed by me. I further certify that said transcription is accurate and complete, to the best of my ability, and that the transcript is a true and accurate record of the foregoing events.



Reporter's name: Peter Lynch

COMMISSION BRIEFING

EVALUATION OF THE 10 CFR 2.206 PROCESS

SEPTEMBER 20, 1993

OVERVIEW

- INTRODUCTION
- RATIONALE FOR THE EVALUATION OF 2.206
- FORMAT FOR THE JULY 28, 1993 WORKSHOP
- SUMMARY OF WORKSHOP DISCUSSIONS
- SCHEDULE

RATIONALE FOR THE EVALUATION

- ENSURE THAT PROCESS IS EFFECTIVE, UNDERSTANDABLE, CREDIBLE
- PRIMARY METHOD FOR PUBLIC REQUESTS FOR COMMISSION ACTION
- NO PREVIOUS GENERAL RE-EVALUATION
- SUBSTANTIAL CONCERNS RAISED BY CITIZENS GROUPS

WORKSHOP - JULY 28, 1993

- **PURPOSE**
- **PARTICIPANTS**
- **BACKGROUND PAPER**
- **AGENDA**

PERSPECTIVES ON THE 2.206 PROCESS

- "PETITIONERS"
  - PUBLIC PARTICIPATION STOPS AFTER THE PLANT IS LICENSED
  - REVIEW OCCURS BEHIND CLOSED DOORS WITH THE LICENSEE
  - NO CRITERIA TO GUIDE REVIEW
  - MOST PETITIONS ARE DENIED

PERSPECTIVES ON THE 2.206 PROCESS

- "INDUSTRY"
  - PROCESS IS WORKING
  - CONCERN ABOUT COSTS AND "OVER-PROCEDURALIZATION"
  - PETITIONS SHOULD BE EVALUATED WITHIN THE CONTEXT OF OTHER SAFETY ISSUES
  - NUMBER OF DENIALS IS NOT INDICATIVE OF HOW WELL THE PROCESS WORKS

INTERACTION WITH THE PETITIONER

- LITTLE INVOLVEMENT WITH PETITIONER AFTER PETITION IS SUBMITTED
- FORUM FOR DISCUSSION OF THE ISSUES SHOULD BE PROVIDED
- INDUSTRY PARTICIPANTS ALSO SUPPORT AN OPEN, TRANSPARENT, USER-FRIENDLY PROCESS

FOCUS OF THE PROCESS

- **ENFORCEMENT**
- **UNDERLYING SAFETY ISSUE**

INDEPENDENT REVIEW

- INDEPENDENT REVIEW NEEDED TO REMOVE PERCEPTION OF BIAS
- OPTIONS: IG, ASLBP, OCAA, NEW GROUP
- CONCERN OVER RESOURCE IMPACTS
- POSSIBILITY FOR PRIORITY CATEGORIES

JUDICIAL REVIEW

- **PROVIDES ACCOUNTABILITY**
- **VALUE OF JUDICIAL REVIEW QUESTIONED**
  - **DEFERENCE**
  - **QUALITY OF EXISTING DECISIONS**

OTHER ISSUES

- USE OF CONSENSUS BUILDING TECHNIQUES
- EXPERIENCE OF OTHER AGENCIES
- NONCOMPLIANCE WITH THE REGULATIONS

SCHEDULE

- **WRITTEN COMMENTS SUBMITTED - AUGUST 28, 1993**

- **RECOMMENDATIONS TO COMMISSION IN NOVEMBER, 1993**

September 13, 1993 SECY-93-258

POLICY ISSUE

(Information)

FOR: The Commissioners

FROM: William C. Parler
General Counsel

SUBJECT: STATUS REPORT ON THE STAFF REVIEW OF THE REGULATIONS AND PRACTICE GOVERNING CITIZEN PETITIONS UNDER 10 CFR 2.206

PURPOSE:

To provide the Commission with information on the status of the staff evaluation of potential improvements to the 10 CFR 2.206 process, including a summary of the July 28, 1993 workshop on the 2.206 process.

SUMMARY:

In a January 26, 1993 Staff Requirements Memorandum, the Commission approved the initiation of a review of the Commission's regulations and practice governing the submission of citizen petitions under 10 CFR 2.206. This provision is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC-licensed facility, outside of a licensing or a rulemaking proceeding. The purpose of the review is to ensure that the 2.206 process is as effective, understandable, and as credible as possible. As the first step in the re-evaluation of the 2.206 process, the staff held a workshop on July 28, 1993 where knowledgeable representatives of a broad spectrum of interests -- citizen groups, industry, state and federal government, and the NRC staff -- shared their views and concerns on the nature and effectiveness of the 2.206 process. This Paper provides a summary of the workshop discussions and the staff schedule for completing the review of the 2.206 process.

BACKGROUND:

There were a number of reasons why the Commission undertook a review of the 2.206 process. As noted in the SUMMARY, the 2.206 provision is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC-licensed facility, outside of a licensing or a rulemaking proceeding. Consequently, it is important that the 2.206 process be as effective, understandable, and as credible as possible. Furthermore, there has not been a general re-evaluation of the

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NOTE: TO BE MADE PUBLICLY AVAILABLE AT COMMISSION BRIEFING ON SEPTEMBER 20, 1993

2.206 process since this provision was added to the Commission's regulations in 1974. In addition, over the last several years, substantial concerns have been expressed by several citizens groups about the effectiveness and credibility of the process.

The first step in the evaluation of the 2.206 process was the convening of a workshop on July 28, 1993 where representatives of a broad spectrum of interests and the NRC staff shared their views and concerns on the nature and effectiveness of the 2.206 process. The purpose of the workshop was to not only generate productive suggestions for improvement of the 2.206 process, but also to promote a better understanding of the 2.206 process. Both of these goals were furthered by the participation in the workshop of extremely knowledgeable individuals representing a variety of perspectives. Several of the participants had filed 2.206 petitions and had direct experience with the 2.206 process from the petitioners perspective. The participants also included several attorneys who had represented NRC licensees in regard to 2.206 petitions. In addition to the representatives from the NRC legal and technical staff, the General Counsel of the Administrative Conference of the United States participated in the workshop discussions. The participants also included a representative of the Attorney General's Office of the Commonwealth of Massachusetts with significant experience in the 2.206 process. The complete list of participants is included at Attachment A.

The workshop was open to the public and several members of the public actively participated in the public comment sessions that were interspersed throughout the workshop. Included in the audience were representatives of the nuclear industry, staff from the Senate Committee on Environment and Natural Resources, a representative from a pro-nuclear citizens group, and personnel from the Atomic Safety and Licensing Board Panel. In the Federal Register Notice announcing the workshop, the Commission also requested public comment on the issues discussed in the NRC staff background paper on the 2.206 process (Attachment B). The comment period closed on August 28, 1993 and several comment letters have been submitted. These comments have not yet been fully evaluated by the staff and have not been summarized for this paper. However, the comments are enclosed for the Commission's information in Attachment C.

The background paper prepared by the NRC staff provided the foundation for the workshop discussions. In addition to providing a description of the 2.206 process, the paper also included a discussion of several broad areas for potential improvement of the 2.206 process -- increasing the involvement of the petitioner in the review process; focussing more on the resolution of the underlying safety issue rather than on a specific enforcement action; and prioritizing 2.206 petitions and subjecting the most significant petitions to more rigorous review procedures. The agenda for the workshop generally followed these broad issue areas,

with the addition of the issue of judicial review on the recommendation of the participants. Chairman Selin opened the workshop with introductory comments on the 2.206 process and the NRC staff provided an overview presentation on the 2.206 process.

SUMMARY OF WORKSHOP DISCUSSIONS:

Perspectives on the 2.206 process

The first topic of discussion at the workshop was a general discussion of participant views on the objectives of the 2.206 process and on how well the process was working. Many of the participants in the petitioners category stated that public participation basically stops once the plant is licensed, in effect erecting an "iron curtain" against public participation in the regard to the operation of the plant. No hearing rights are afforded to the public after the plant is licensed, discretionary hearing opportunities are extremely rare, and there is little involvement of the petitioner in the review process after the petition is submitted. Furthermore, participants in the petitioners category stated the evaluation of 2.206 petitions appears to occur in a "black box" with no criteria to guide the evaluation. It also appears that the evaluation is conducted behind "closed doors" with the licensee. The perception is that the NRC attitude is one of asking how the issues raised in the petition can be refuted rather than on asking if a legitimate safety problem exists. It was also stated that what is needed is not necessarily a change in the 2.206 regulations or practice but rather a change in the NRC attitude towards the petition and the petitioner. The fact that most petitions are denied makes the public understandably reluctant to submit a petition. Several examples were provided of problems that petitioners had experienced with the 2.206 process. In the petition submitted in regard to the Thermo-Lag issue, the petition was denied even though the Commission and others initiated several evaluations and investigations of open safety issues concerning Thermo-Lag after the petition was submitted. In the case of a seismic issue at the Perry nuclear power plant, the NRC rationale for denying the petition was merely a restatement of the original staff licensing conclusions on this issue rather than a specific discussion of the points raised in the petition.

Representatives of the industry believed that the 2.206 process was functioning reasonably well and that the NRC review of petitions has been thorough and well-reasoned. Furthermore, the industry representatives believed that any potential revisions to the 2.206 process must take into account the increased burden on NRC and licensee resources that might be involved and the affect that this might have on the evaluation of other safety issues. For example, industry representatives were concerned that revisions might result in the "overproceduralization" of the 2.206 process. They also noted that 2.206 petitions were only one of several ways that

safety issues were raised and evaluated within the NRC and that the NRC must have the discretion to direct its resources to where they will have the most impact. Finally, the industry representatives stated that the oft-cited fact that very few 2.206 petitions are granted is not a fair indicator of either the amount of effort devoted to evaluating a petition or on how well the underlying safety issues are being addressed.

Involvement of the petitioner in the review process

The second major topic of discussion at the workshop concerned the degree to which the petitioner is involved in the review process. A number of issues were discussed in this segment including keeping the petitioner informed of the status of the review process, ensuring that the petitioner has access to all relevant documents, including the licensee's response to the petition, participation in meetings between the NRC staff and the licensee on the petition, and providing a forum for the meaningful discussion of the issues raised in the petition. Generally, there was quite a bit of agreement among all the participants that this would be a fruitful area for improvement of the 2.206 process.

Several petitioners stated that after the petition is filed, the petitioner usually doesn't hear anything further from the NRC staff until they receive a denial of the petition. No further input is sought from the petitioner. The perception is that the NRC addresses the petition behind closed doors with the licensee. In some cases, petitioners were not even provided with a copy of the licensee response to the petition. In other cases, petitioners were not provided with an opportunity to respond to the licensee's response. Several participants representing a petitioner's perspective category believed that some type of forum should be provided by the NRC for a meaningful discussion of the issues raised in the petition. This would not have to be a formal adjudicatory hearing but rather some type of an informal forum to discuss the issues raised in the petition. These participants stated that they were not taking the position that the only way they will be satisfied is if the action requested in the petition is taken, but rather they want a process for a open discussion of the issues to be readily available. Even if the requested enforcement action isn't taken, the petitioner will walk away with some degree of satisfaction if they've had an opportunity for a meaningful dialogue on the issues.

The petitioners also offered several examples of the defects in the current NRC process in terms of communication and dialogue with the petitioner. For example, in the Petition submitted on the Thermo-Lag issue, even though the safety issues raised in the petition continue to be evaluated after the petition was denied, in the petitioner's judgement, they have been excluded from these ongoing discussion of the issues. Furthermore, they have not even been notified of ongoing activities related to the issues raised in the

petition, and have had to rely on the Freedom of Information Act and the Public Document Room to obtain relevant documents. In the case of one petition, the petitioner was not allowed to actively participate in a meeting between NRC staff and the licensee on the petition, even though the petitioner had originally flagged these issues for attention. Although there was general agreement among the petitioner participants that the involvement of the petitioner in the review process could be improved, one participant who had submitted a petition on emergency planning noted that she had a very good relationship with the NRC management in regard to the petition and has been thoroughly involved in the review process. However, she also noted that she had been very assertive in developing this working relationship with the NRC and that this type of involvement should be available to all petitioners as a matter of course.

The industry representatives agreed that, to the extent that there were communication problems in the current process, then the Commission should act to correct these deficiencies. Failure to actively involve the petitioner creates a negative perception of the entire process. These participants emphasized that the 2.206 process should be open, transparent, and "user-friendly." There should not be any perception that petitions are resolved in secret with the licensee. Petitioners should be provided with a copy of the licensee's response to the petition, should be given an opportunity to respond to the licensee's response, should be provided with the opportunity to participate in NRC-licensee meetings on the issues, should be routinely kept informed of the status of the staff review, and should know who on the NRC staff to contact for information on the petition. While the current NRC process may provide for these types of involvement, the industry representative believed the NRC should take a more affirmative attitude in ensuring that the petitioner is kept informed and involved.

Focus on the underlying safety issue

This topic of discussion concerned the possibility that the 2.206 process might be more constructive and more credible if the focus was on the resolution of the underlying safety issue rather than on a specific enforcement action. Several petitioner participants believed that if there was less focus on the specific enforcement action, then the process would be less adversarial and would result in less polarization between the petitioner and the NRC staff and the licensee. Consequently the process would be more constructive. As stated by one of these participants, most petitioners aren't concerned with punishing licensees but with raising and resolving safety issues. The positive aspects of toning down the adversarial aspects of the 2.206 process through the use of consensus-building techniques was also offered as a possibility, and is discussed later in this paper.

However, there was a continued belief on the part of the industry representatives, and by some petitioner representatives, that the focus should be on enforcement rather than on, as one participant put it, "adding another issue to the Unresolved Safety Issue list." An industry representative noted that if you're seeking a change in a facility, then the focus has to be on enforcement. Another industry participant suggested that perhaps we need a different way of keeping score, instead of counting how many petitions have been denied, we should keep track of the number of times that the underlying safety issue has been resolved, and in these cases issue a notice of "petition granted but no further action necessary."

Independent review

Many of the petitioner representative called for the initiation of some type of mandatory independent review of the inial Director's Decision on a 2.206 petition. They criticized the current process because it turns the petition over to the very staff who performed the original safety evaluation that is at issue. These participants noted that you can't expect the staff to be objective in these circumstances and that the resulting public perception is that the review is biased. One petitioner speculated that if the NRC process provided for a mandatory independent review, there would not be much demand for the judicial review of 2.206 decisions. Other petitioner representatives agreed that an independent internal review would be a much more significant improvement to the process than providing for judicial review of NRC decisions on 2.206 petitions. It was also suggested that if the NRC enhanced the involvement of the petitioner in the review process, that this also might mitigate the demand for judicial review.

There were a number of suggestions on who might best conduct this type of internal review, including the Office of the Inspector General, Atomic safety and Licensing Board, the Office of Commission Appellate Review, or a new special review group established for this purpose. In this regard, there was some interest in the now defunct review that was conducted by the NRC Office of the General Counsel when it operated independently of the counsel to the NRC staff in the former Office of the Executive Legal Director, with technical assistance from the former Office of Policy Evaluation. An OGC participant in the workshop noted that this independent review was not a *de novo* peer review of the Director's Decision, but rather a more limited review that focussed on whether the decision was responsive to the petition and whether there an adequate rationale provided for the decision. The NRC staff also noted that a limited informal review is still conducted by OGC and the Commission staff offices. The legal counsel to the Atomic Safety and Licensing Board Panel provided a description of the technical and legal qualifications of Panel members to address 2.206 issues.

The industry representatives, as well as the NRC staff representatives, expressed concern over the lack of adequate staff resources and expertise to conduct a separate independent review. The fear was that the independent review would divert staff resources away from other, perhaps more important, safety issues. It was also questioned why there would be a need for this type of independent review in light the Commission's status as an independent agency with the responsibility to protect public health and safety. Several industry participants also pointed out that the staff decisions on 2.206 petitions were already subject to independent review by the Commission. However, a petitioner representative provided the clarification that the Commission review was *sua sponte* and not mandatory. An industry representative cautioned that 2.206 is enforcement oriented and that the NRC needs discretion as to how it employs its enforcement resources. An Atomic Safety and Licensing Board, or the other organizations proposed to conduct the independent review, would not be appropriate judges of that determination. Furthermore, if there is a legitimate question of bad faith on the part of the NRC staff involved, a vehicle already exists through the Office of the Inspector General to investigate and review the decision.

Prioritization

One issue discussed in the NRC staff issues paper was the possibility that an independent review requirement, or other similar procedures, might be reserved for only the most significant petitions. Therefore, the issues paper raised the possibility of establishing priority categories for 2.206 petitions. James G. Partlow, Associate Director for Projects in the Office of Nuclear Reactor Regulation (NRR)m, the NRC participant from the technical staff, noted that there is a priority ranking system for NRR review efforts, including 2.206 petitions. These four categories range from the highest priority Category 1 issues which include "highly risk-significant safety concerns" to the lowest priority Category 4 issues "items to be deferred or closed out without further staff review." Although the priority categories concept was of interest to some of the participants, the discussion did not provide much clarity on what criteria would be used to select the most significant petitions or even whether this was a feasible idea.

Judicial Review

Although the issue of judicial review was not addressed in the NRC staff issues paper, the issue was recommended for discussion by several participants. One petitioner representative believed that judicial review was necessary to ensure the accountability of Commission decisionmaking on 2.206 petitions. The question was posed of why the NRC should be wary of judicial review if we have confidence in our decisions. Other petitioner participants did not believe that judicial review would be a very constructive change in light of the deference that courts give to the technical expertise

of the agencies. The high cost associated with judicial review was also noted. Participants also believed that, for the most part, NRC decisions on 2.206 petitions were sufficiently justified to withstand the judicial review process.

Industry representatives stated that the NRC's 2.206 decisions were equally well-supported and reasoned both before and after the Heckler v. Cheney decision. Forcing the 2.206 decisions through a legal "sieve" won't improve the quality of the decisions. Several industry representatives also reiterated the point that Chairman Selin made in his introductory remarks, to the effect of why should the NRC enforcement decisions be singled out for judicial review, particularly in light of the NRC's pervasive regulatory framework. Another industry representative speculated that judicial review would be perceived as a waste of resources from the perspective of the utility customer. According to this participant, the courts and the Congress (referring to the legislation that provided for judicial review of licensing type 2.206s but not for enforcement type 2,206s) have already spoken on this issue and that adding another step in the process would be unnecessary and wasteful.

Other issues

Several other issues were raised at the workshops. The General Counsel of the Administrative Conference of the United States recommended that the Commission explore whether some type of consensus-building techniques might be used in the 2.206 context. In this regard, another participant wondered whether a process similar to that used in the review of the reactor license applications might be useful, at least for some types of petitions. The license application review process involves resolution of technical disputes through the exchange of technical documents and meetings to discuss the technical issues. The industry representatives did not believe that consensus-building would be appropriate in the enforcement context, although one industry representative conceded that there may be some situations where consensus building techniques could be used in the 2.206 context, for example, where multi-facility impacts are involved, or where unique issues have been raised. In these cases, the petition could be converted into a petition for rulemaking and consensus building techniques applied. However, for the majority of 2.206 petitions, it would be inappropriate and a waste of resources.

There was substantial interest in the experience of other agencies with processes that may be similar to the 2.206 process. The representative from the Administrative Conference offered to explore this issue and develop some information for the Commission's consideration. In addition, Martin G. Malsch, Deputy General Counsel for Licensing and Regulations in the Office of General Counsel, addressed some of the analogies that could be drawn between the citizens suit provisions in other environmental statutes such as the Clean Air Act and the Commission's 2.206

process. Mr. Malsch noted that most, if not all, citizen suits brought under these statutes are confined to very specific and narrow violations, for example, noncompliance with an emission limit; whereas the relief sought in most 2.206 petitions is broader and more subjective, involving the evaluation of a particular safety issue. Unlike the 2.206 process, these other statutes allow a member of the public to bring suit directly against the alleged polluter. However, suits can also be brought against the Administrator of the EPA to force enforcement action against the alleged polluter. Mr. Malsch noted, that in these latter cases, the EPA has same type of enforcement discretion that the NRC has and that decisions declining enforcement action are judicially unreviewable except in the case of some sort of gross abdication of responsibility.

One participant wanted to know if the NRC had criteria for evaluating whether a 2.206 should be granted. The NRC representatives stated that there are procedures for handling 2.206 petitions but no substantive criteria for making 2.206 decisions. This participant also believed that noncompliance with the NRC regulations should be a basis for granting a 2.206 petition. Several participants stated that some petitions are denied even though a basis for the petition was noncompliance with the NRC regulations. This sends a negative message to the public about the NRC's credibility.

A member of the audience representing a pro-nuclear citizens group raised the issue of how these groups could participate in the process for reviewing a 2.206 petition in regard to a particular facility. In many cases, the decision on a 2.206 petition could have adverse economic effects on the local community.

FUTURE ACTIONS:

The Office of the General Counsel, in cooperation with the staff, is proceeding to evaluate the workshop discussions and the written comments submitted on the 2.206 issues in order to develop recommendations for the Commission's consideration. It is anticipated that we will submit these recommendations in November, 1993.

William C. Parler
General Counsel

Attachments:

A. List of participants
B. NRC Staff Issues Paper
C. Public Comments

DISTRIBUTION:
Commissioners
OGC
OCAA
OIG
OPA
OCA
EDO
ASLBP
SECY

ATTACHMENT A

Gary Edles
Administrative Conference of
the United States

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Office of the General Counsel
U.S. Nuclear Regulatory Commission

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Jane Fleming
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Mark Wetterhaan
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Paul Blanch
Citizen Representative

Maurice Axelrad
Newman and Holtzinger

Jay Silberg
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Jim Riccio
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Paul Gunter
Nuclear Resource and Information Service

Jim Miller
Balch and Bingham

Bob Bishop
NUMARC

Marty Malsch
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U.S. Nuclear Regulatory Commission

ATTACHMENT B

REVIEW OF THE § 2.206 PETITION PROCESS

BACKGROUND DISCUSSION PAPER

U.S. NUCLEAR REGULATORY COMMISSION
June 1993

INTRODUCTION

The Commission has approved the initiation of a review of its regulations and practice governing petitions under 10 CFR § 2.206. The first step in this evaluation process will be a public workshop where knowledgeable affected interests will share their advice and recommendations concerning the § 2.206 process with the NRC staff. In addition to providing an opportunity for representatives of affected interests to comment on the § 2.206 process, the workshop will also provide an opportunity for participants from citizens' groups, industry, and government to exchange information on the objectives of the § 2.206 process, its effectiveness, and what, if any, improvements could be made to the process. The Commission believes that, whatever the ultimate outcome of the Commission's evaluation of the § 2.206 process, this educational aspect of the workshop will be valuable for all participants in terms of fostering a better understanding the § 2.206 process. The purpose of this paper is to outline the scope of the review, to provide background information on the § 2.206 process, and to identify several broad categories of potential improvements for discussion at the workshop.

The § 2.206 petition is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC licensed facility, outside of a licensing or

rulemaking proceeding[1]. The petitioner need only ask in writing that some action be taken against an NRC licensee and identify the facts that the petitioner believes provide sufficient grounds for taking the proposed action. This action triggers an evaluation by the appropriate program office which concludes with a written decision by the Office Director which addresses the issues raised in the petition.

The NRC has not re-examined the process in any systematic way since this provision was added to the Commission's regulations in 1974. In addition, this process has been the subject of longstanding criticism by citizens' groups and by some members of Congress, primarily because most §2.206 petitions have been denied in whole or in part in the past. Therefore, the Commission believes that it is time to evaluate the § 2.206 process and to determine whether any changes should be made to that process. This evaluation is also consistent with current Commission efforts to enhance public participation in the Commission's decisionmaking process. The purpose of this review is to ensure that the § 2.206 process is an effective, equitable, and credible mechanism for the public to prompt Commission investigation and resolution of potential health and safety problems. In addition, given the reality of shrinking

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[1] A less formal process is also available for any person to bring an allegation of wrongdoing associated with NRC licensed activities to be investigated by the NRC. The Atomic Energy Act includes no provision for "citizen suits" whereby an interested person or group may bring suit directly against a licensee for violations of the Act or NRC rules or orders. (See, e.g., Section 304 of the Clean Air Act, 42 U.S.C. 7604).

rather than expanding resources, the Commission believes that the evaluation of the § 2.206 process must consider how to achieve a more effective § 2.206 process with equal or fewer resources.

Section 2.206 was added to the Commission's regulations in 1974 to specify the procedures to be used by members of the public to request action against an NRC licensee. The broad focus of the Commission's review of the § 2.206 process is to determine whether § 2.206 has proven to be an effective mechanism, for not only bringing potential safety problems to the Commission's attention, but also ensuring that the Commission has been responsive in evaluating any such potential safety problems. The review of the § 2.206 process will address such questions as: What is the objective of the § 2.206 process? Is it meeting this objective? How can the § 2.206 process be improved? Is this the most effective mechanism to bring safety problems to the Commission's attention? What other mechanisms exist, such as, for example, the allegation management system, for bringing safety problems to the Commission's attention? How are these different from § 2.206 both in objective and procedure? The workshop will not only focus on these broad issues, but will specifically address the procedures that the Commission uses to evaluate § 2.206 petitions. The staff has identified three broad areas of potential improvement to the § 2.206 process which are discussed later in this paper: 1. Increasing interaction with the petitioner; 2. Focussing on resolution of safety issues rather than on requesting enforcement

action; and 3. Categorizing petitions according to importance of issues raised.

II. Description of the § 2.206 Process

Any person may file a petition under 10 CFR § 2.206 to request that the Commission institute a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. This process provides the public with a mechanism to raise issues of concern, which must then be reviewed and addressed by the Commission's staff. Except as specifically provided in the regulations[2], each § 2.206 petition is reviewed by the appropriate major program Office Director, who must either initiate the requested proceeding or issue a formal Director's Decision providing a specific disposition of all issues raised in the petition within a "reasonable time." If the Director finds that the petition raises a substantial safety question, an enforcement order will be issued or other appropriate action taken, within the Director's discretion.

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[2] For instance, Part 52 at section 52.103(f) provides that a petition to modify the terms and conditions of the combined license will be processed as a § 2.206 petition. However, these petitions shall be considered by the Commission itself. The Commission must determine whether any immediate action is required prior to commencement of operation under the license. The scope of this workshop discussion is limited to the usual enforcement-type § 2.206 petitions, and specifically excludes § 2.206 petitions pursuant to Part 52 combined licenses.

In reviewing the issues raised in a § 2.206 petition, the staff generally relies on its own resources to gather and review information, including, when appropriate, the initiation of engineering reviews by headquarters staff or inspections by inspectors operating out of one of the NRC regional offices. Allegations of wrongdoing concerning the conduct of NRC-licensed activities which are contained in a § 2.206 petition may be referred to the NRC Office of Investigation, or, if the allegation suggests wrongdoing by a Commission employee, to the Office of the Inspector General, for further inquiry. The staff also may rely on studies prepared by NRC consultants and, for emergency planning issues, may refer the petition to the Federal Emergency Management Agency for its review and comment.

The licensee usually voluntarily responds in writing to the issues in the petition. Also, at the staff's discretion, it may require the licensee to submit under oath or affirmation, additional information in response to the petition. In many instances, the staff's review may not involve new engineering work or inspection; rather, the primary job of the staff may be to explain why results of earlier technical reviews or inspections do not warrant further agency action.

An important purpose of § 2.206 is to provide a simple method for any member of the public to bring facts or issues to the NRC's attention for evaluation. The petitioner bears a minimal burden in

filing a request under § 2.206. The petitioner need only ask that some action be taken against a licensee and identify the facts that the petitioner believes provide sufficient grounds for taking the proposed action. No showing of legal standing or interest is required. It is not even required that the petition mention § 2.206. The NRC's normal practice is to treat a request for action against a licensee as a § 2.206 petition, provided only that it identifies a sufficiently specific basis for the request.

The bases for the staff's determination on each § 2.206 petition are set forth in a formal Director's Decision signed by the Director of the appropriate program office. Decisions are published with reported agency adjudicatory decisions in the NRC Issuances although the Director's Decision are not adjudicatory in nature.

The filing of a § 2.206 petition does not, by itself, initiate a hearing, and § 2.206 petitions have resulted in hearings only rarely. If an order is issued as a result of a § 2.206 petition, it may trigger an agency proceeding in which the petitioner may intervene, although the intervention is allowed on a limited basis, within the scope of issues defined by the Commission. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). However, a formal hearing will usually result only when the licensee demands a hearing to challenge the proposed order. Also, in general, § 2.206 petitions may not be used to relitigate an issue that has already been

decided or to avoid an existing forum, such as a licensing proceeding, in which the issue is being or is about to be litigated. Consequently, some issues raised in § 2.206 petitions have been addressed in hearings associated with other NRC proceedings.

When a petition is granted, the Director may also issue an order to modify, suspend, or revoke a license pursuant to the NRC's rules in 10 CFR § 2.202. Not all actions granting a petition will necessarily require the issuance of an order. For example, without issuing an order, the staff may issue a notice of violation, or a civil penalty, or may obtain a licensee's agreement either not to restart its facility pending completion of certain safety reviews or to take other appropriate measures to correct a problem that has been cited in the § 2.206 petition.

A review of the record shows that in about 10% of the more than 300 petitions that have been filed with the NRC, regulatory action was taken which, in effect, granted, in whole or in part, the relief requested. The actions taken have included issuance of a Notice of Violation and Proposed Imposition of Civil Penalty, orders modifying, suspending or revoking licenses, and the initiation of further non-routine NRC inquiries into the safety issues raised in the petition. In addition, in many instances where the petition was denied, the action requested had already otherwise been taken, and thus the § 2.206 petition was effectively mooted.

Although no formal appeal of a denial of a § 2.206 petition is allowed under the rule, such denial decisions are subject to the discretionary review by the full Commission. If, after considering the Director's Decision, the Commission does not decide to take review of the Decision within 25 days, the Decision becomes the final decision of the agency. This review authority has been rarely exercised.

III. Areas of Opportunity to Enhance Participation in the § 2.206 Process

A significant concern with the § 2.206 petition process from the view of the participating public is that the majority of these petitions are denied, usually without any further input from the petitioner other than the original written petition. The NRC staff has found that, of the more than 300 petitions which have been filed, approximately 10% have achieved, in whole or in part, the objective which the petitioner sought. However even in many of these cases, the petition is at least partially denied. Therefore, the public perception may be that these petitions are almost automatically denied.

When a petitioner submits a petition, the NRC issues an acknowledgement letter and a Federal Register notice from the appropriate program Office Director. These documents are very often the only communication the petitioner receives from the NRC

until the date that the Director's Decision is issued. That may be a fairly long time period, depending on the issues raised in the petition. However, the Director's Decision itself will often recount extensive interactions between the NRC staff and the licensee in order to resolve the issues. A possible appearance of this practice may be that while there is little opportunity for the petitioner to participate in the resolution of the issues the petitioner has raised, the licensee has a much greater opportunity to become involved and influence the decision process. In fact, often by the time of the issuance of the Director's Decision, after interactions with the NRC staff, the licensee has taken measures to correct the problems noted in the petition and the NRC has evaluated the licensee action as acceptable. These actions are treated as grounds to deny the § 2.206 petition as moot and have the effect of avoiding initiation of formal enforcement proceedings.

On the other hand, from the point of view of the NRC staff, a disproportionate amount of time and resources are spent coordinating decisions on § 2.206 petitions. Time spent on § 2.206 petitions must be taken away from other direct regulatory responsibilities. Very often the facts alleged in a § 2.206 petition are gleaned from NRC documents, and are thus well known to the staff, and have already been or are being resolved in the normal course of regulatory interaction between the NRC and the licensee.

The goal in considering possible changes to the § 2.206 process would be to produce improvements in the opportunities for petitioner's participation, without adding significantly to existing resource burdens on either staff or petitioners, and with the possibility of reducing resource requirements by more efficient allocation. Some of the changes discussed below may require changes to the regulation, while others may be accomplished by directing internal staff practice and procedure:

1. Increasing interaction with the petitioner. One option involving only staff practices would be to implement a variety of internal staff procedures to enhance interactions with petitioners. Some of these practices are carried out currently to some extent, but these procedures could be made an explicit and mandatory part of the procedure for handling § 2.206 petitions.

One such example would be informal inquiries to clarify matters raised in the petition and the petitioner's concerns. This effort might serve also to focus or narrow the issues in question.

In appropriate cases, increased consideration could be given to requiring the licensee to respond under oath or affirmation (pursuant to a staff request under 10 CFR § 50.54(f)) to issues raised in the petition. The petitioner would be provided a copy of the licensees response and would be allowed to submit comments on

the response. This would also conserve NRC staff time and help to focus the issues of concern.

The petitioner could be put on the service list for all communications with the licensee regarding issues raised in the petition. In addition, the petitioner could be permitted to attend NRC staff meetings with the licensee regarding these issues and these meetings could be held in the area where the licensee is located. The petitioner could also be permitted to respond to any other submission of information on the issue from the licensee. Some of these measures have already been implemented to some extent, however, the practice could be made explicit.

Informal public discussions could be held on significant issues upon a determination that the scope of the issue(s) would be appropriate for broader public input.

2. Focussing on resolution of safety issues rather than on requested enforcement action. Another option would involve simply a change in approach to the resolution of issues raised in the petition. Although a petition under § 2.206 is phrased in terms of requesting a particular action from the Commission. i.e., to "modify, suspend, or revoke a license, or for such other action as may be proper", the underlying significance of the § 2.206 petition is to bring issues of potential health and safety impact to the attention of the Commission. Therefore, if a new issue of some

importance has been raised, and the staff decides that it should make additional inquiries, inspections, or investigations, the petition could be granted with the actual outcome of the additional efforts left open. This treatment would acknowledge the legitimacy of the petitioner's concerns.

A variation on this approach would involve a change to the rule in § 2.206 which would allow petitions that the Commission consider a safety issue or issues, alleging violation of a Commission rule or policy, rather than requesting a specific enforcement action (i.e. to modify, suspend, or revoke a license). This change of the focus of the rule would explicitly recognize and implement an important purpose of the § 2.206 petition, which is to bring alleged facts and concerns to the Commission's attention for further evaluation. It would de-emphasize the need to request a specific enforcement action.

3. Categorizing petitions and allocating more resources according to importance of issues raised. An option to allocate more effectively the limited existing amount of staff time and resources on § 2.206 petitions would be to establish internal criteria for determining the level of effort and the types of procedures to be used on each petition. One possible set of criteria would divide § 2.206 petitions into three categories:

In the first category would be § 2.206 petitions which merely raise issues and cite information which has already been evaluated by the NRC staff, without adding any new information or new issues. Some § 2.206 petitions merely incorporate publicly available NRC documents, such as inspection reports, and, without introducing any new information or issues or without arguing why previous decisions should be re-evaluated, request a more severe enforcement action. These petitions would be handled in the Director's Decision simply by confirming, and if appropriate, restating the staff's pre-existing evaluation of the issues.

At the other extreme would be a category of petitions which raise large significant unresolved generic issues affecting one or more licensees. An example of this type of petition involves the Thermo Lag issue. In this category, a larger scale effort could be expended, involving, as appropriate, solicitation of public comments, public workshops, Commission meetings, etc. In appropriate cases, a § 2.206 petition could be treated as a petition for rulemaking.

In the middle range would be a category of petition which raises a significant issue or issues with regard to a specific licensee. The approach on this category of petitions would be substantially similar to that used on most petitions now, involving a systematic resolution of all issues raised by the petition, allowing appropriate participation by the petitioner.

For the category of petitions which the Commission has determined raise the most significant issues, some consideration could be given to providing more explicitly some type of internal review by Commission staff of the Director's Decision. Section § 2.206 could be amended by rulemaking to incorporate some type of review within the NRC of the Director's Decision which would provide a solution for the petitioners' concern that § 2.206 petitions are reviewed only by the same NRC staff which may have already evaluated the information in the course of other regulatory responsibilities. For instance, as an example, a special internal staff group could be established to perform a review of the denial of a § 2.206 petition upon petition for review.

ATTACHMENT C

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(1)

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DOCKET NUMBER
PROPOSED RULE PR 2
(58FR 34726)

August 26, 1993

Samuel Chilk
Secretary of the Commission
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Attention: Docketing and Services Branch

Dear Mr. Chilk:

I appreciate the opportunity to comment on the Nuclear Regulatory Commission's ("NRC") background discussion paper on the Review of the §2.206 Petition Process. I agree that it is appropriate for the NRC to reevaluate the process and its effectiveness. As the primary formal method for members of the public to request NRC review of potential safety problems at licensed facilities, the process serves two important purposes. First, it provides a means for the NRC to learn of potential safety problems. In addition, it serves as the primary formal mechanism for members of the public to raise concerns about specific safety issues at nuclear facilities. The criticism alluded to at page one of the background paper is primarily focused on the latter function of the §2.206 petition process.

In general, the NRC's record of processing §2.206 petitions has led to a perception by the public that the NRC is unresponsive to such petitions. The background paper at page 2 implies that this perception is engendered by the fact that only one out of ten petitions filed with the NRC is granted in whole or in part. Background paper p. 8. However, the perception that the NRC is unresponsive to §2.206 petitions springs not merely from the fact that such petitions are regularly denied, but also from the method in which petitions are processed prior to their denial.

The background paper is correct in noting at pages 8-9 that in many, if not most, instances the only communications that a petitioner receives from the NRC is a letter acknowledging receipt of the petition along with a copy of the Federal Register notice to that effect and, sometime later, a decision by the Director denying the petition. In the meantime, there are often extensive communications between the NRC staff and the licensee on issues raised in the petition. Background paper p. 9. The petitioner is not privy to such interactions and is, therefore, not in a position to contribute his/her views on the representations made by the licensee to the NRC staff.

The one-sided interaction between the NRC staff and licensee contributes greatly to the perception that the NRC is unresponsive to public concerns. Certainly, instituting modifications in the process such as putting the petitioner on the service list, allowing the petitioner to attend NRC staff meetings of the licensee, and allowing the petitioner to respond to submissions by the licensee would help to alleviate the concern that the present §2.206 process is one-sided. Background paper p. 11. However, the NRC should also in its review consider instituting some sort of hearing where the petitioner could present his or her concerns personally to the NRC personnel assigned to review the §2.206 petition. While the NRC should consider holding adjudicatory hearing on §2.206 petitions, even a mechanism that would allow a less formal type of hearing would be an improvement over the present means of processing such petitions.

Another factor that undermines public confidence in the §2.206 petition process is the lack of independence in the review process. As the background paper notes at page 9, often the NRC staff involved in the review process are already familiar with the issue raised in the petition since the facts in the petition are drawn from NRC documents. In many instances, the NRC staff have already signed off on an issue that is the subject of a §2.206 petition prior the petition being filed. When such a petition is denied, it is perceived the NRC staff is rubber-stamping a decision that has already been reached. The NRC staff is viewed as locked into the initial judgment and having to uphold it or being at risk of raising questions about their professional judgment as it was initially exercised. Even giving full marks to the professional integrity of the NRC staff, there is a natural bias for people who have reached a conclusion to be drawn to the same result when they have confidence in their original judgment.

Given the limitations of NRC personnel resources, it may not be possible to have a fresh team of experts assigned to every §2.206 petition where members of the staff have already

reached a conclusion on an issue. However, in reviewing the §2.206 process consideration should be given to incorporating a mechanism that will afford an independent review.

One option for changing the §2.206 petition process that is discussed in the background paper at pages 11-12 is to focus on resolving safety issues rather than taking enforcement action. This appears to be what already occurs in large part. Apparently, the prime focus of the NRC staff in reviewing §2.206 petitions is whether a significant safety issue is raised. See transcript of July 28, 1993 Hearing on §2.206 Petition Process at p. 82-87. The identification of a regulatory violation in a petition does not necessarily mean that the petition will be granted because the NRC will permit plants to operate outside of its regulations. Hearing Tr. p. 83. However, the NRC staff's focus on safety has not enhanced the credibility of the §2.206 petition process because is not linked to any objective criteria. Indeed, whether a petition is granted appears to ultimately turn upon the staff's subjective judgment as to whether a significant safety issue is raised.

In evaluating changes to the §2.206 petition process, the NRC should consider adopting objective criteria for when a petition will be granted. One obvious criterion that may be considered is compliance with the NRC's own regulations. In licensing decisions the NRC has taken the position that compliance with its regulations ensures safety. Public Service Company of New Hampshire, et al., (Seabrook Units 1 and 2), 31 NRC 197, 213-217 (1990). In the interest of consistency, it would seem appropriate to apply the same standards for when enforcement action will be taken after licensing. At the same time, consideration should be given to adopting a means to impose optional sanctions to those which are sought in the petition.

For the above reasons, I believe that it is appropriate that the NRC consider rule changes for §2.206 petitions. Changes to the process could lend greater credibility to the process, and in turn, enhance the credibility of the NRC.

Sincerely,

Leslie Greer

Leslie Greer
Assistant Attorney General
Environmental Protection Division

GENERIC LETTERS ON REMOVAL OF ITEMS FROM TECH SPECS

- 88-06 Removal of Organization Charts from Technical Specifications Administrative Control Requirements (3-22-88)
- 88-12 Removal of Fire Protection Requirements from Technical Specifications (8-2-88)
- 88-16 Removal of Cycle-Specific Parameter Limits from Technical Specifications (10-4-88)
- 89-01 Implementation of Programmatic Controls for Radiological Effluent Technical Specifications in the Administrative Controls Sectionof Technical Specifications and Relocation of Procedural Details of RETS to the Offsite Dose Calculational Manual or the Process Control Program (1-31-89)
- 91-01 Removal of the Schedule for Withdrawal of Reactor Material Specimens from Technical Specifications (1-4-91)
- 91-08 Removal of Component Lists from Technical Specifications (5-6-91)

NEW STANDARD TECH SPECS: APPROX. 36% OF CURRENT TECH SPECS WILL BE RELOCATED TO INTERNAL PLANT DOCUMENTS, CHANGED THROUGH 50.59

(2)

August 26, 1993

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE") ON "REVIEW OF THE 2.206 PETITION PROCESS," 58 FED. REG. 34726 (JUNE 29, 1993)

OCRE commends the NRC for initiating this review of the petition process under 10 CFR 2.206. OCRE is pleased that the NRC conducted a workshop on this matter on July 28, 1993. It is OCRE's opinion that the workshop was extremely productive and informative, and helped illuminate the deficiencies in the 2.206 process. OCRE hopes the NRC will consider and implement serious reforms to the 2.206 process so that it can be a meaningful forum for public participation in the post-construction era.

I. Importance of the 2.206 Process

Filing a petition under 10 CFR 2.206 is the only process for formal public participation after a nuclear power plant is licensed. It is the only process by which members of the public can raise issues when new research calls the safety of a nuclear power plant into question, when plant operational performance is below par, when whistleblowers uncover deficiencies or violations, when operating events reveal unforeseen failure modes or vulnerabilities, or when external phenomena occur which exceed the plant's design basis.

Several regulatory trends within the NRC in recent years place even more importance on the 2.206 process.

First, the license renewal rule, 10 CFR 54, relies on the assumed adequacy of the current licensing basis, rather than conducting a thorough reexamination of the CLB as part of license renewal application review, with an opportunity for a public hearing. The only issue which can be raised in the public hearing for license renewal is aging degradation unique to license renewal. Any citizen concerns about the adequacy of the CLB must be raised through a 2.206 petition.

Second, the NRC is encouraging the relocation of items from the plant Technical Specifications to internal plant documents, where they can be changed at will by the licensees, under the 10 CFR 50.59 process, without seeking an operating license amendment. The NRC has issued six Generic Letters (see attachment) on removal of items from plant Tech Specs. In addition, the new standard Tech Specs will result in the relocation of approximately 36% of current Tech Specs to internal plant documents. The end result of this trend is that the universe of potential operating license amendments, and thus, the opportunities for a public hearing, is greatly diminished. Citizens are left with the 2.206 process for raising issues related to changes in the items so removed from the Tech Specs.

Third, the 1990 revisions to 10 CFR 72 which allow the onsite storage of spent nuclear fuel in dry storage casks approved under a general license also diminish the opportunities for an adjudicatory hearing on this issue. See 55 Fed. Reg. 29181 (July 18, 1990) Any site specific concerns must be raised through the 2.206 process. As the permanent disposal for high level waste is a moving target, and as spent fuel pools at the reactor sites are filling up, the use of onsite cask storage will increase, and accordingly, citizen concern will increase as well.

As more and more issues are shunted to the 2.206 process, instead of the license amendment process, it is imperative that this process be reformed so that is a meaningful procedure.

II. Purpose of the 2.206 Process

OCRE believes the purpose of the 2.206 process should be to provide a meaningful forum in which citizens can raise health and safety issues. OCRE would place the main emphasis on the word "meaningful." The 2.206 process should primarily be a due process mechanism equivalent to the procedures available to the public before plant licensing and equivalent to the procedures available to other entities after plant licensing.

It is illustrative to compare citizens' rights before and after licensing. For example, consider the Thermo-Lag issue. Suppose the problems with Thermo-Lag had been discovered in 1981 instead of 1991. Then, intervenors in the pending operating license cases could have filed contentions on Thermo-Lag. Considering the severity of the issue, the contentions would have most certainly been admitted. Then the intervenors would be entitled to discovery. If the matter survived summary disposition, the intervenors would participate in a hearing in which they could present oral and documentary evidence and cross-examine witnesses. They could file proposed findings of fact and conclusions of law with the Licensing Board. If the Board's decision was adverse to the intervenors, they could appeal the case within the agency. They could also seek judicial review of the NRC's final decision.

Now, since the problems with Thermo-Lag were not disclosed until 1991, when the licensing proceedings for almost all existing plants had long since been concluded, members of the public have only the 2.206 petition for raising concerns about Thermo-Lag. The 2.206 process contains none of the procedural mechanisms available to intervenors in a Subpart G hearing. Under 2.206, there is no discovery, no hearing, no proposed findings, no agency appeal, and no judicial review. By no stretch of the imagination could the 2.206 process be considered equivalent to the procedural mechanisms available in the initial licensing proceeding.

When contrasted with the opportunities for public participation in pre-operational licensing proceedings, it is not unfair to say

that citizen-initiated participation rights effectively cease after a nuclear power plant starts operating. This hardly makes sense, since that is precisely when a reactor becomes hazardous.

Why is there a difference in the procedures available to the public before and after licensing? Clearly with issues like Thermo-Lag, the only difference is that of timing: when the issue was discovered. If the issue is discovered before the nuclear plant is licensed, then citizens have hearing rights. If discovered after the plant is licensed, then citizens have no hearing rights. Is Thermo-Lag less of a problem because it was disclosed in 1991 instead of 1981? Clearly, no. Are nuclear power plants less dangerous when they begin operations than when they are under construction? Obviously not. Is public participation less important after a nuclear power plant is licensed? OCRE believes it should not be. The present situation is patently absurd. Upon issuance of the plant operating license, the site boundary truly becomes an "iron curtain" within which public participation is excluded.

An examination of the opportunities for formal public participation in the regulation of operating nuclear power plants reveals that meaningful opportunities are extremely limited. Such opportunities may be classified by the way they are initiated: NRC Staff initiated, licensee initiated, and citizen initiated.

NRC Staff initiated proceedings are enforcement proceedings. In such proceedings the licensee has a right to a hearing. However, a court has ruled that citizens have no right to intervene if the licensee does not seek a hearing. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). (Ironically, the court in Bellotti found that the petitioner was not left without a remedy, that remedy being the 2.206 petition. At the time of that decision, 2.206 denials were reviewable, and the court relied on that fact.)

Licensee initiated proceedings are operating license amendment proceedings. These are the only proceedings in which there is a clear right to a hearing under section 189a of the Atomic Energy Act. However, the scope of the proceeding is strictly limited to the subject matter of the specific amendment under consideration. Unlike 2.206 petitions, however, final NRC decisions on operating license amendment proceedings may be appealed to the U.S. Courts of Appeals.

The only mechanism available for citizens to initiate proceedings is a petition under 10 CFR 2.206. This regulation allows any person to file a petition with the NRC Executive Director for Operations seeking the institution of a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. However, this process does not provide a meaningful mechanism for public input. There is no right to a hearing on a 2.206 petition. The decision is issued by the NRC Staff, not by an independent Licensing Board. The vast majority of 2.206 petitions are denied. Petitioners may not request Commission

review of a Staff denial of a 2.206 petition. Finally, judicial review of NRC denials of 2.206 petitions is not available.

When compared in this manner, the 2.206 process is again clearly unfair. The NRC has the right to initiate a proceeding, the licensee has this right, but citizens are left with the woefully inadequate 2.206 petition.

With regard to the fact that the vast majority of 2.206 petitions are denied, comments were made at the July 28th workshop that it is inappropriate to play a numbers game; it is necessary to look to the merits of the petitions. Certainly it is not credible to assume that all of these petitions were meritorious and should have been granted. However, nor is it credible to assume that virtually all of the 2.206 petitions the NRC receives are lacking in merit. Many of these petitions are submitted by highly knowledgeable and respected petitioners, such as the Union of Concerned Scientists and state governments. Some, such as OCRE's seismic petition regarding the Perry Nuclear Power Plant (see DD-88-10), are based on the reports of qualified experts. With other petitions, such as the one submitted by NIRS on Thermo-Lag, the NRC has tacitly acknowledged the merit of the issue by continuing to pursue the resolution of this open item with industry, albeit without the participation of the petitioners, because their petition was denied as supposedly lacking in merit.

The lack of meaningful public participation opportunities after nuclear plants are licensed is inconsistent with the NRC's "Principles of Good Regulation," which states that "nuclear regulation is the public's business, and it must be transacted publicly and candidly. The public must be informed about and have the opportunity to participate in the regulatory processes as required by law . . . " As the D.C. Circuit Court of Appeals has made clear, "Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984) (emphasis added).

We do not have a rational regulatory process when a licensee cannot correct a typographical error in its plant Technical Specifications without seeking an operating license amendment, complete with Federal Register notice and the opportunity for a hearing, while there is no right to a hearing on serious issues such as Thermo-Lag, Rosemount transmitters, motor operated valve problems, station blackout, etc.

The 2.206 process must be reformed to create a process in which citizens have meaningful participation rights.

III. The Lack of Judicial Review

A recent development which has made the 2.206 process even less meaningful is the lack of judicial review. This is based on lower court application of a 1985 Supreme Court case which interpreted

the Administrative Procedure Act. Specifically, 5 U.S.C. 701(a)(2) denies judicial review for those matters "committed to agency discretion by law." Instead of confining this prohibition to those matters explicitly committed to agency discretion by law, the Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985) expanded this provision to those implicit cases in which the governing statutes are so broadly drawn that no manageable standards exist for judicial review, or "no law to apply." While Chaney did not deal with atomic energy law, three circuits have applied its holding to 2.206 denials, finding that neither the AEA nor the applicable NRC regulations provide law to apply. MASSPIRG v. NRC, 852 F.2d 9 (1st Cir. 1988); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989); Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C. Cir. 1989).

The lack of judicial review has made the NRC completely unaccountable in its decisions on 2.206 petitions. The lack of judicial review enabled the NRC to evade serious consideration of OCRE's 2.206 petition concerning the Perry Nuclear Power Plant which raised serious concern, based on the report of an expert seismologist, on the seismic design of that facility.

Since the NRC knows that it will never be subjected to judicial scrutiny, it does what it pleases with 2.206 petitions, which means that the vast majority of them are summarily denied.

This lack of accountability is best revealed by the dialogue which took place during oral argument in OCRE's attempt to obtain judicial review of the Perry seismic case. (The court, within a week after oral argument, dismissed case due to Chaney and its progeny; OCRE v. NRC, 893 F.2d 1404 (D.C. Cir. 1990).) Judge Buckley posed the following question to NRC staff counsel: "Suppose the earthquake that occurred was a magnitude 6, and that the petitioner had six world-class seismologists, and that the NRC's decision was clearly incorrect; would that be reviewable?" The NRC attorney replied, "No."

It is interesting that prior to Chaney, 2.206 denials were considered reviewable, and the courts routinely reviewed them. See, e.g., Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979); Porter County Chapter of the Izaak Walton League of America v. NRC, 606 F.2d 1363 (D.C. Cir. 1979); Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982); Seacoast Anti-Pollution League of New Hampshire v. NRC, 690 F.2d 1025 (D.C. Cir. 1982); County of Rockland v. NRC, 709 F.2d 766 (2nd Cir. 1983). Only after Chaney did the NRC conveniently start advancing the unreviewability argument. OCRE believes that the NRC truly took advantage of Chaney to evade accountability.

Congress has stated that the hearing process is intended to serve "a vital function as a forum for raising relevant issues regarding the design, construction, and operation of a reactor, and for providing a means by which the applicant and the Commission staff can be held accountable for their actions regarding a particular facility. . . . (T)he hearing process is essential to obtain

public confidence in the licensing process which is needed if the nuclear option is to be preserved." H.R. Rep. No. 22, Part 2, 97th Congress, 1st Sess. 11 (1982) (emphasis added).

With no right to a hearing under 2.206, and no judicial review, it is clear that the NRC is accountable to no one in is regulation of operating reactors.

OCRE supports the restoration of judicial review for NRC denials of 2.206 petitions. This can be done legislatively, and there is currently pending in Congress a bill which would accomplish this.

It could also be done administratively. Although the adverse case law (Chaney and its progeny) does exist, the NRC could, the next time a petitioner tries to obtain judicial review of a 2.206 denial, not file a motion to dismiss based on Chaney. The NRC could support the petitioner's position that the case is reviewable. Professor Davis is of the opinion that Chaney is bad law, an aberration, and will not long endure. Kenneth Culp Davis, "No Law to Apply," San Diego Law Review, Vol. 25:1, 1988. The NRC could speed its demise by exercising leadership in urging the Supreme Court to revisit Chaney, much as the Justice Department in the Reagan and Bush administrations advocated the overturn of Roe v. Wade.

In addition, the NRC could amend its regulations to clearly provide "law to apply." Since manageable standards for judicial review would then exist, Chaney's mandate would not extend to the NRC.

Although OCRE supports judicial review in 2.206 cases, we recognize that it is not a panacea, due to the highly deferential standard of review which the Courts have established. See, e.g., Baltimore Gas and Electric Co. v. NRDC, 463 U.S. 87 (1983) (the NRC is making predictions "at the frontiers of science" and the Courts must be extremely deferential). Therefore, OCRE supports administrative reforms as well as the restoration of judicial review.

IV. Remedies

While OCRE certainly supports the suggestions for improvement of the 2.206 process contained in the NRC's background discussion paper, OCRE feels that they do not go far enough.

The root cause of the problem is the fact that the NRC Staff is the decisionmaker in 2.206 decisions. Every 2.206 petition alleges at least implicitly, and in some cases explicitly, that the Staff has failed to properly exercise its responsibilities. Predictably, the Staff's response is defensive of the status quo. This problem was clearly explained by Ms. Jane Fleming at the July 28th workshop. Tr. 25-26, 251.

Is it reasonable to expect the NRC Staff to objectively view a petition which criticizes the Staff's performance? Obviously

not. This is really a separation of powers issue, and the remedy is review by an independent tribunal within the NRC. The present provision for sua sponte review by the Commission is inadequate. Petitioners must have the right to seek review and to receive it.

The ideal entity within the NRC which would serve as the independent tribunal for reviewing 2.206 decisions is the Atomic Safety and Licensing Board Panel. As explained by Mr. Lee Dewey, counsel for the Licensing Board Panel, at the July 28th workshop, the Licensing Board Panel has the legal and technical expertise to review these cases. Tr. 255-256. Indeed, the Licensing Boards evaluate similar complex technical issues in initial licensing and license amendment proceedings. There is no reason why they would not have the expertise to review 2.206 cases. To continue the hypothetical example cited earlier, if the problems with Thermo-Lag had been discovered in 1981 instead of 1991, the Licensing Boards would have considered contentions and conducted hearings on Thermo-Lag in licensing proceedings. It would be ridiculous to assert that the Licensing Boards could properly evaluate the Thermo-Lag issue in an operating license case but are unable to do so in reviewing a 2.206 decision.

Moreover, members of the Licensing Board Panel have expertise in due process of law, a concept which desperately needs to be inserted into the 2.206 process. As an independent tribunal which is not involved in preparation of the Staff's 2.206 decision, the ASLB Panel will not have the bias inherent in having a Staff person evaluate a petition which criticizes the Staff's work (perhaps the work of that very individual).

The ASLB Panel is more appropriate for this review than is the Commission. The Panel has the personnel resources and technical expertise that the Commissioner offices lack. Reviewing every 2.206 decision at the petitioners' request would create too great a burden on the Commission.

A suggestion was made at the July 28th workshop that the Office of Commission Appellate Adjudication should perform this review function. Tr. 252-253. Under 10 CFR 1.24, this office has a very limited role and actually acts in an advisory and opinion writing capacity to the Commission. In addition, it is OCRE's understanding that the personnel and resources of this office are very limited.

Another suggestion was made at the workshop that the Office of Inspector General should conduct this independent review. Tr. 230. This office likewise has a limited role and limited resources.

OCRE believes that the ASLB Panel is the ideal entity to conduct reviews of 2.206 decisions. The Panel has the technical expertise and the procedural expertise in conducting fair hearings. Significantly, the Panel already has the personnel in place to perform this review function. With the diminished caseload in the post-construction era, the Panel is an under-utilized re-

source in the NRC.

It is also within the Commission's statutory authority to use the ASLB Panel in this manner, as Section 191 of the AEA authorizes the Commission to "delegate to a board such other regulatory functions as the Commission deems appropriate."

OCRE would propose the following revisions to the 2.206 process under this review scenario:

The "front end" of the process (from the filing of the petition to the issuance of the Director's Decision) would proceed much as it does now, with these exceptions:

(1) there is much more interaction and communication between the petitioner and the NRC Staff; the petitioner is to be "in the loop" in any interactions between the NRC and the licensee concerning the petition.

(2) the petitioner has the absolute right to reply to any responses to the petition filed by the licensee, or, in the case of generic issues, industry groups such as NUMARC, INPO, or owners groups. No Director's Decision is to be issued before the petitioner has had the opportunity to reply, and all responses and replies, of both the petitioner and the licensee, shall be considered and evaluated by the Staff in preparing the decision. The NRC Staff should remain in communication with both the petitioner and the licensee to determine whether further responses are forthcoming. The petitioner also has the right to supplement the petition should new relevant information be discovered.

The "back end" of the process, from issuance of the Director's Decision to final agency action, is as follows:

Within 30 days after issuance of the Director's Decision, the petitioner may seek Licensing Board review of the record in the 2.206 case. This is to be done by filing a notice of appeal with the ASLB Panel Chairman.

Upon receipt of a notice of appeal, a Licensing Board, consisting of an attorney chairman and technical members having the appropriate areas of expertise, is appointed.

Within 45 days after the appointment of the Licensing Board, the petitioner should file a statement with the Licensing Board, with copies to the Director and the licensee, explaining why the petitioner believes the Director's Decision is in error.

The Licensing Board would then review the record in the 2.206 case, which consists of the 2.206 petition (and any supplements or amendments thereto), any responses to it filed by the licensee, any replies to these responses filed by the petitioner, the Director's Decision, and the petitioner's statement of appeal.

The Licensing Board should afford the parties (being the peti-

tioner, the NRC Staff, and the licensee) the opportunity to file additional written statements with the Board.

The Licensing Board would have substantial discretion in fashioning whatever informal procedures it deems necessary for the resolution of the case. These procedures would include conferences with the parties, oral argument, and the use of alternative dispute resolution techniques.

At the conclusion of the Licensing Board's review of the 2.206 case, the Licensing Board will issue an opinion either affirming the Director's Decision or referring the matter to the Commission recommending the institution of a formal proceeding or other such actions as may be appropriate. The Licensing Board's opinion should thoroughly explain the basis for its decision and recommendations.

If the Licensing Board does not affirm the Director's Decision, but refers the matter to the Commission, the Commission should issue an opinion in the case within a reasonable time. Before rejecting any recommendation of the Licensing Board, the Commission shall give the parties the opportunity to conduct oral argument before the Commission.

If the Licensing Board affirms the Director's Decision, the petitioner may request Commission review of the 2.206 case. Commission review in such situations shall be entirely discretionary.

In either case, the decision of the Commission shall be final agency action in the 2.206 case.

OCRE believes that these procedures would provide the accountability now missing in the 2.206 process. These procedures would also provide an opportunity for meaningful public input. They would enhance the credibility of the 2.206 process and of the agency.

V. Other Matters

A. Labeling Misc. Correspondence as a 2.206 Petition; Consolidation of Petitions

As stated in the July 28th workshop, OCRE has strong objections to the NRC's current practice of labeling correspondence, including postcards, as a 2.206 petition when no mention of that regulation was made by the author of such correspondence.

OCRE believes that persons who want the NRC to consider their concerns under the formal 2.206 process should be familiar enough with the NRC's regulatory program to cite the regulation. If there is any doubt about the petitioner's intentions, the Staff should contact the petitioner to determine his or her wishes

regarding treatment as a 2.206 petition.

OCRE's concern is that petitioners, such as OCRE, that do a thorough job in researching and documenting their 2.206 petitions will be prejudiced by the NRC's prior consideration, as a 2.206 petition, of general correspondence on the same issues which may be poorly researched and documented. Despite Staff protestations to the contrary at the July 28th workshop, the NRC does in fact apply a "res judicata" standard, even if not specifically articulated as such. For example, in the Director's Decision on the Perry seismic case, DD-88-10, the staff repeated its earlier conclusions set forth in its 1986 SSER 10 for Perry, without addressing or refuting the new evidence in the petition based on the report of an expert seismologist. Another example is PRM-50-49, a petition for rulemaking filed by OCRE on the exemption rule, 10 CFR 50.12. The NRC denied this petition, and did not even publish a notice of it in the Federal Register for public comment, a highly unusual move, on the basis that the issues raised in OCRE's petition had already been considered and resolved in the 1985 rulemaking on 10 CFR 50.12 and in the backfit rule remand rulemaking. (*)

OCRE also objects to the consolidation of 2.206 petitions without the consent of all petitioners involved. In DD-86-4 regarding the Perry Nuclear Power Plant, OCRE's 2.206 petition was consolidated with a petition which was poorly written and unfocused. OCRE's petition addressed the seismic issue only. The other petitioner addressed the seismic issue and over a dozen other matters. The Director's Decision mainly addressed the other petition and lumped OCRE's concerns in with it. In fact, the Director's Decision even included a statement that both petitioners claimed that the January 31, 1986 earthquake had damaged the Perry plant. OCRE <u>never</u> made such a statement, although the other petitioner did. OCRE believes that this consolidation damaged our case. Certainly, the fact that such a statement appeared in the Director's Decision is evidence that the NRC Staff did not thoroughly read OCRE's petition.

OCRE is especially concerned with the NRC's willingness to paint both petitioners with the same brush. The NRC's inability to distinguish a quality petition from one decidedly lacking in quality suggests that the agency has basic disrespect for members of the public. Not every person who is critical of the nuclear industry is a flake.

(*) The NRC claimed that no purpose would be served by soliciting public comment on issues already resolved in recent rulemakings. However, this standard is not applied uniformly to all petitioners. Shortly after the NRC published the final revisions to 10 CFR 20 in May 1991, the NRC published for comment in the Federal Register a notice on PRM-20-20, which raised issues already considered and resolved in the recent Part 20 rulemaking.

B. Standards for Operating Plants: Safety or Regulatory Compliance

As discussed at the July 28th workshop by Ms. Leslie Greer (Tr. 115), the NRC apparently uses a double standard before and after licensing. In the licensing proceeding compliance with regulations is required and is the standard of safety. After a plant is operating, regulations can be violated but the NRC considers the plant safe anyway.

OCRE believes that a single standard should be used both before and after licensing. That standard should be compliance with all regulations.

In a licensing proceeding, an intervenor cannot argue that, even though the plant complies with the regulations, it is still unsafe. That is considered to be a challenge to the Commission's regulations, prohibited by 10 CFR 2.758. Nor can an applicant claim a plant is safe anyway even if not in compliance. Twenty years ago the Appeal Board clearly articulated that safety means regulatory compliance:

> As a general rule, the Commission's regulations preclude a challenge to applicable regulations in an individual licensing proceeding. 10 CFR 2.758. This rule has frequently been applied in such proceedings to preclude challenges by intervenors to Commission regulations. Generally, then, an intervenor cannot validly argue on safety grounds that a reactor which meets applicable standards should not be licensed. By the same token, neither the applicant nor the staff should be permitted to challenge applicable regulations, either directly or indirectly. Thus, those parties should not generally be permitted to seek or justify the licensing of a reactor which does not comply with applicable standards. Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected. For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety.
>
> In short, in order for a facility to be licensed to operate, the applicant must establish that the facility complies with all applicable regulations. If the facility does not comply, or if there has been no showing that it does comply, it may not be licensed.
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> * * *
>
> It bears repetition that, under the principles we have set out above, it cannot be argued that, even though the reactor does not comply with the criteria, it should receive an unrestricted full-power, full-term license on the ground that there is reasonable assurance that it can operate without adversely affecting the public health and safety. Such an argument might be factually supportable, but would constitute an indirect attack on the applicable Commission regulations. Again, the point to be made

is a simple one: reactors may not be licensed unless they comply with all applicable standards.

Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 528-9 (1973). See also Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009 (1973) ("the sine qua non of adequate protection to public health and safety is compliance with all applicable safety rules and regulations promulgated by the Commission").

This is the standard which should apply after the plant is licensed as well. This should be the standard against which 2.206 petitions are judged. If the violations alleged in the petition are found to be true, then the petition should be granted and appropriate enforcement action taken. Codification of this standard could provide "law to apply" which would enable the courts to review the Director's Decisions.

Curiously, the Appeal Board did not accept a "two-track" scheme of regulations as was mentioned by Mr. Marty Malsch at the July 28th workshop (Tr. 88). The Appeal Board did not classify some regulations as necessary for adequate protection, while some are going beyond adequate protection. The Appeal Board clearly stated that compliance with all regulations is mandatory. To repeat, "once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety." Vermont Yankee at 528.

VI. Conclusion

OCRE urges the NRC to carefully consider all the comments made at the July 28th workshop and made in writing. It is essential that the 2.206 process be reformed so it is a meaningful mechanism for public participation in the regulation of operating reactors. The NRC needs to enter a new era in which adversarial relationships with the public are replaced with a spirit of partnership with the public in the pursuit of safety.

Respectfully submitted,

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August 27, 1993

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

Attn: Docketing and Service Branch

Re: Comments Regarding § 2.206 Process

Dear Mr. Chilk:

In the Federal Register notice of June 29, 1993 (58 Fed. Reg. 34726), the Nuclear Regulatory Commission requested comments regarding its review of its regulations and practices governing petitions filed under 10 CFR 2.206.

In response to such request, we are pleased to submit the enclosed "Comments Regarding the § 2.206 Process" on behalf of:

- Arizona Public Service Co.
- Florida Power & Light Co.
- Houston Lighting & Power Co.
- Illinois Power Co.
- Iowa Electric Light & Power Co.
- Southern California Edison Co.
- Texas Utilities Electric Co.

All of these companies hold NRC operating licenses for nuclear reactors and believe in the importance of an effective § 2.206 process for use by the public.

As shown in the enclosed comments, the § 2.206 process has met its objective of providing the public an effective, equitable and creditable mechanism to bring to the NRC's attention concerns that a facility is not operating in conformity with applicable regulatory requirements, or other safety concerns, to request action on those concerns, and to obtain a reasoned decision from the agency in response to those concerns. Although some potential enhancements have been identified, primarily with respect to interactions between the NRC and

petitioners, there are no indications of any significant flaws in the § 2.206 process. Accordingly, we urge the NRC not to adopt any changes that would further formalize the process and divert scarce NRC and licensee resources from other tasks that are more important to safety of operations.

Sincerely yours,

Maurice Axelrad

Maurice Axelrad

/tg

Enclosure: As Stated

NEWMAN & HOLTZINGER, P.C.

COMMENTS REGARDING § 2.206 PROCESS

In its Federal Register notice of June 29, 1993 (58 Fed. Reg. 34726), the Nuclear Regulatory Commission (NRC) announced that it was initiating a review of its regulations and practices governing petitions filed under 10 CFR 2.206. As the first step in that process it held a public workshop on July 28, 1993 where participants from citizens' groups, industry and government could exchange information on the objectives of the § 2.206 petition process, its effectiveness, and, what, if any, revisions should be made to the process. To help focus discussion at the workshop, the NRC issued a Background Discussion Paper which outlined the scope of the review, provided background information on the § 2.206 process, and identified several broad categories of potential improvements for discussion at the workshop.

The Federal Register notice established an agenda for the workshop which focused on the four areas of principal interest to the Commission, i.e., whether the § 2.206 process was meeting its objectives and three broad areas of potential improvements in the process (increasing interaction with the petitioner; focusing on resolution of safety issues rather than on requesting enforcement action; categorizing petitions according to importance of issues raised).

The first four sections of the comments below address the four areas identified in the Federal Register notice. The last two sections of the comments (1) address an extraneous subject (judicial review) that was briefly discussed during the open portion of the workshop agenda, and (2) summarize our principal conclusions regarding the § 2.206 process.

1. Perspectives On The § 2.206 Process - What Are The Objectives Of the § 2.206 Process? Do The Current Procedures And Process Meet These Objectives? What Is The Relationship Of The § 2.206 Process To Other Mechanisms For The Public to Identify Safety Problems?

The objective of the § 2.206 process is to provide members of the public an effective, equitable and credible mechanism to bring to the Commission's attention concerns that a facility is not operating in conformity with applicable regulatory requirements, or other safety concerns, to request agency action on those concerns, and to obtain a reasoned decision from the agency in response to those concerns.

In our view, the § 2.206 process meets its objective and functions effectively.

The process is readily available for use by the public and facilitates the filing of petitions. A petitioner is not required to make any showing of standing or affected interest. The petition itself can be very simple. The petitioner need only identify a requested action and state minimal facts that would provide grounds for the action. In practice, the petitioner need only provide sufficient information so that the NRC can understand the safety concern to be reviewed.

Review of the petition is assigned to the NRC office with programmatic responsibility for the subject matter of the petition. This assures that the most knowledgeable and expert resources within the agency will perform the review. It also assures the most effective use of the agency's resources.

If the petition is denied, in whole or in part, the NRC provides the petitioner a carefully reasoned, detailed decision summarizing the basis for the agency's decision, including related actions that may have been taken by the licensee or the NRC and the reasons why the action requested by the petitioner is not warranted. Although formal review of the decision by the Commission is discretionary, each Commissioner, with the assistance of his/her staff, examines each decision to determine whether more formal review is warranted.

As discussed in the workshop, some enhancements in the § 2.206 process would be useful. For example, as discussed in Section 2 below, some improvements could be made in interactions between the NRC and petitioners. But there has been no showing of any basic flaw in the § 2.206 process, and major changes are not warranted and would be counterproductive.

Criticisms of the § 2.206 process because it has historically resulted in few formal enforcement actions or formal hearings are mistaken. Since the vast preponderance of § 2.206 petitions involve issues that have been or are already being addressed by licensees and the NRC and rely on licensee or NRC documents, it's understandable that few petitions would result in formal actions. When additional action is warranted, it is usually undertaken voluntarily by the licensee. If the § 2.206 process were, in fact, to result in a significant number of formal hearings or enforcement actions, that would be an indicator that the overall NRC regulatory process is not functioning effectively.

There is no merit to the argument that additional hearings should be provided through the § 2.206 process in order to attain more public credibility for the process. Such action would unnecessarily divert scarce NRC and licensee resources that are better spent in assuring safe operations of facilities. It would result in overjudicialization of the § 2.206 process rather

than the achievement of sound technical resolution of safety concerns.

Both the Background Issues Paper and the agenda in the Federal Register notice questioned the relationship between the § 2.206 process and other existing mechanisms to bring safety problems to the Commission's attention.

The most effective mechanisms for identifying and resolving any safety problems at a plant, and for bringing any significant problems to the NRC's attention, are a licensee's extensive operational, surveillance and review programs. Literally hundreds of thousands of issues are routinely identified and resolved each year through these standard programs.

The NRC inspection program, which includes at least two resident inspectors stationed at each reactor site and frequent inspections by Regional and Headquarters personnel, is another effective mechanism for identifying any safety problems.

In addition, most reactor licensees have a formal program (such as Hotline, Safeteam, Speakout, etc.) under which current employees of the licensee or its contractors, exiting or former employees, and members of the public can bring safety problems to the attention of the licensee. These programs provide a mechanism under which individuals can identify concerns anonymously or in confidence, if they prefer.

Similarly, employees or members of the public can bring safety concerns directly to the NRC, where they are handled under the NRC's allegation management system. Allegations are assigned to the appropriate office or region of the NRC for processing, and are assessed for safety significance to permit ranking and resolution in a timely manner. The licensee is often requested to address the area of concern, subject to NRC audit, in order to minimize expenditure of NRC resources. Allegations are tracked to resolution and the alleger is informed of the close-out. The allegation management system is an effective process which is complementary to, but not a substitute for, the § 2.206 process.

The public also has other opportunities to participate in oversight of a licensee's activities. An interested person can request a hearing on any license amendment. Any member of the public can request and/or participate in rulemakings. If an order has been issued, an interested person can request a hearing on whether the order should be sustained.

Thus, it is apparent that § 2.206 is not the primary mechanism for bring safety concerns to the Commission's attention, but rather a back-up to other effective means of identifying issues. Section 2.206 petitions frequently consist

of a reiteration of matters that were previously disclosed and addressed as a result of licensee programs, the NRC inspection system or the allegation management system. Accordingly, as previously noted, it is understandable that few § 2.206 petitions would result in additional formal NRC actions.

2. Potential Revisions To The § 2.206 Process: Increased Interaction Between The NRC Staff And The Petitioner

Although the NRC effectively addresses concerns raised in § 2.206 petitions, it is apparent that some petitioners are dissatisfied with their ability to participate in the process and with the information that they receive as to the progress of the NRC's review.

We would urge the NRC to take reasonable steps to improve its interaction with petitioners. When a petition is accepted, the NRC should inform the petitioner of the identity of an NRC contact at the working level who can respond to any inquiries by the petitioner as to the status of its petition. In addition, if resolution of the petition will be prolonged the petitioners should be periodically informed as to the progress of the NRC's review.

It is important that the NRC clearly understand the requested actions and the petitioner's supporting grounds. If necessary in order to achieve such understanding, the NRC should ask the petitioner clarifying questions or meet with the petitioner, as appropriate.

Although the NRC indicated at the workshop that its internal procedures call for providing the petitioner with copies of NRC-licensee correspondence relating to the petition, it appears that this practice has not been followed uniformly. The NRC should assure that the petitioner receives such material (unless it is of a proprietary nature). If the NRC holds meetings with the licensee relating to the petition, the petitioner should be provided an opportunity to attend as an observer. Subsequently, the petitioner should have an opportunity to address any additional information relating to the petition that has been provided by the licensee in its correspondence or meetings with the NRC.

A corollary to keeping the petitioner better informed is to assure that the licensee is fully informed regarding the petition and its progress. A licensee should receive copies of all correspondence between the petitioner and the NRC and be provided an opportunity to attend any NRC-petitioner meetings as an observer. The licensee should also be given an opportunity to address any additional information that has been provided by the petitioner in its correspondence or meetings with the NRC.

In its discussion of increased interaction with petitioners, the Background Discussion Paper mentioned possible consideration of increased formalization of interaction with a licensee, such as requesting licensees to respond to issues raised in the petition under § 50.54(f). Such formalization of the relationship with the licensee is unnecessary and would be counterproductive. Many licensees already provide voluntary responses to petitions. When requested by the NRC, they readily cooperate in providing any additional information desired by the NRC without the need for a formal request. Formalizing the obtaining of information from licensees relating to § 2.206 petitions would waste resources and would imply, contrary to existing practice, that voluntary cooperation by licensees has been insufficient to meet NRC needs.

3. Potential Revisions To The § 2.206 Process: Shift The Focus Of § 2.206 Petitions From A Specific Enforcement Action To The Exploration And Resolution Of The Underlying Safety Issue

Any member of the public who wishes to raise a safety issue, without requesting a specific enforcement action, can readily do so outside of the § 2.206 process. Presumably such issue would be addressed by the NRC under its allegation management system, would be tracked to resolution and the member of the public would be informed of the close-out of the issue.

However, it does not seem that this would be a substitute for the present § 2.206 process that enables a member of the public to request an enforcement action and to receive a reasoned decision on his/her request from a responsible NRC official.

Nevertheless, even though the § 2.206 process hinges on a petitioner's request for action, it should be possible to shift the focus of the NRC responses to emphasize how the underlying safety issue has been addressed, rather than on whether a formal hearing has been granted or a formal enforcement action taken.

As previously discussed, the effectiveness of the § 2.206 process should be judged by whether safety concerns raised in petitions have been fully and timely resolved, and not by whether additional formal hearings or enforcement actions were required to achieve such resolution. Although the NRC does seek to explain its rationale in its § 2.206 decisions, it appears that the public may still not fully understand that the basic purpose of the process has been satisfied through resolution of the underlying safety concern. The NRC should strive to make this point more explicit in each of its § 2.206 decisions.

4. Potential Revisions To The § 2.206 Process: Establishing Categories Of Petitions According To Significance Of The Issues Raised And Specifying Different Levels Of Internal Review According To These Categories

The Background Discussion Paper mentioned the possibility of establishing internal NRC criteria for categorizing petitions in order to determine the level of effort and the types of procedures to be used on each petition.

Particularly in view of the limited number of § 2.206 petitions filed each year, there appears to be no need to establish such criteria. There is no indication that the NRC has misapplied its resources in dealing with § 2.206 petitions or has failed to consider petitions adequately. In fact, discussion at the workshop indicated that § 2.206 petitions may get expedited treatment beyond that warranted by the safety significance of the issues raised -- which may be understandable in view of the public involvement. The screening of petitions and assignment of resources are typical functions that should be performed by agency management through the exercise of discretion based on the specific circumstances involved. The process should not become overformalized through the establishment of criteria. Such criteria may even be counterproductive, since they might cause delay or diversion of resources because of potential disputes regarding appropriate categorization.

There was extensive discussion at the workshop about the possibility of establishing some type of internal review of NRC decisions on § 2.206 petitions. The principal reason cited appeared to be a concern about the credibility of an NRC decision when a § 2.206 petition is reviewed by the same NRC personnel who were responsible for previous evaluations of the safety concerns.

In our view, establishing routine NRC internal review of § 2.206 petitions is wholly unnecessary and would constitute a wasteful diversion of NRC resources. Each § 2.206 decision is reviewed informally by the Commissioners, with the assistance of their staffs, who can readily determine whether any particular decision is sufficiently significant or questionable that a second review might be useful. If such question arises, the Commissioners obviously have the discretion to decide on an ad hoc basis what type of additional NRC review should be conducted.

Concerns about having review of § 2.206 petitions performed by the same individuals who performed previous evaluations are without foundation. These are technical questions decided by professionals, with oversight from multi-levels of review within the agency. Since these professionals are competent to decide without bias the thousands of issues that arise each year in the course of reviewing amendment requests, inspection reports, and enforcement actions, they are certainly

able similarly to act competently in the review of § 2.206 petitions.

The establishment of routine internal reviews of § 2.206 decisions would not be an effective use of NRC resources. Since the most knowledgeable and expert NRC personnel are assigned to act on the § 2.206 petition, it is doubtful that other personnel assigned to a review of the § 2.206 decision would add significant technical insight to the decision. Moreover, assigning personnel to such review would divert scarce NRC resources from regulatory functions that would contribute more effectively to safety of operations. Similarly, retaining additional personnel or consultants simply to perform internal reviews of § 2.206 decisions would be a wasteful diversion of NRC funds. It can always be argued that a second opinion has some value, but there is no reason to believe that, in the absence of specific circumstances where the Commission so determines, NRC § 2.206 decisions would benefit from such additional review.

The suggestion was made at the workshop that NRC internal review of § 2.206 decisions could be performed by the Atomics Safety and Licensing Board or the Office of Commission Appellate Adjudication, perhaps on an informal basis. In our view, this suggestion is even less worthy of consideration than a technical internal review within the NRC Staff. Regardless of how this review were structured, it would transform a process for the technical resolution of safety concerns into a legalistic process, which is not a desirable mechanism for addressing technical questions. Such a process would be even more wasteful of NRC and licensee resources, with little likelihood that it would contribute significantly to the soundness of the ultimate technical decisions.

5. Judicial Review

Although not part of the overall topic of actions that could be taken by the NRC to improve the efficacy of the § 2.206 process, the subject of judicial review of NRC denials of § 2.206 petitions was briefly discussed during the open portion of the agenda at the workshop. Accordingly, we are providing some brief comments on that extraneous subject.

For many of the reasons that were expressed by Chairman Selin both at the workshop and in his recent testimony on S. 1165, "Nuclear Enforcement Accountability Act of 1993," we are strongly opposed to judicial reviewability of denials of § 2.206 petitions. The courts have held that the enforcement decisions of Federal agencies, except in limited circumstances, are within the agency's discretion and not subject to judicial review. Such holding is soundly based on the fact that in making enforcement decisions, an agency like the NRC must have the discretion to

weigh such factors as whether a violation or other safety concern exists, the safety significance or seriousness of the particular violation or concern, actions that have already been taken or are being taken by the licensee and/or the NRC, priority of the violation or concern as compared to other issues that are being or could be addressed by the licensee and/or the NRC, and availability of NRC resources and their appropriate allocation. Such discretionary decisions within the expertise of an agency should not be subject to judicial review.

The judicial decisions denying reviewability of enforcement actions apply uniformly to federal agencies. There is no reason why the NRC should be singled out to have its enforcement decisions subject to judicial review. In fact, in light of the comprehensive regulatory program implemented by the NRC, which is unmatched by any other Federal agency in its breadth and thoroughness, there is even less justification for making NRC enforcement decisions subject to judicial review than there would be for any other agency.

In addition, although NRC representatives at the workshop indicated that the NRC has not changed its practices regarding § 2.206 petitions since courts have held NRC decisions unreviewable, we are concerned that under current circumstances the NRC would feel compelled to develop a more extensive record if its decisions became judicially reviewable. This would additionally escalate and focus disproportionate attention and NRC resources on the relatively small number of allegations raised in § 2.206 petitions, without regard to their actual safety significance. The Commission may also be inclined to formally review more decisions in order to minimize the possibility of subsequent judicial reversal. These additional efforts would not only divert NRC efforts from attention to more important safety issues, but would increase regulatory costs chargeable to industry in license fees.

Section 2.206 has provided an effective process for NRC to review and respond to enforcement petitions and there has been no showing that petitions have been treated improperly or that significant safety issues have not been properly addressed. The burdens that would arise from judicial reviewability should not be superimposed on the § 2.206 process in the absence of a demonstration that current practices are inadequate. Although, as discussed above, some enhancements of the § 2.206 process should be considered by the NRC, there is no basis for singling out the NRC for judicial review of its decisions regarding requested enforcement actions.

6. Conclusions

The § 2.206 process has proven to be an effective mechanism for the public to raise safety concerns before the NRC, request action and obtain a reasoned decision from the NRC. The process can readily be initiated by any member of the public and is implemented by knowledgeable, responsible NRC personnel. There is no indication that underlying safety issues identified in § 2.206 petitions have not been soundly addressed and resolved.

Although few formal hearings or enforcement actions have resulted from § 2.206 petitions, this does not reflect any deficiency in the § 2.206 process. To the contrary it demonstrates the effectiveness of the numerous other licensee and NRC programs, which are the primary mechanisms for routinely identifying and resolving safety issues.

The § 2.206 process could be enhanced through improved interactions between the NRC and petitioners and increased emphasis in NRC decisions on how the underlying issues raised in the petition have been addressed and resolved. However, any changes that would further formalize the § 2.206 process are unnecessary, would be counterproductive and should be avoided. In the absence of any showing of a significant flaw in the process, no change should be adopted that would divert scarce NRC and licensee resources from other tasks that are contributing to safety of operations.

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

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Robert W. Bishop
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August 27, 1993

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

ATTN: Docketing and Service Branch

RE: Notice of Workshop
Section 2.206 Petitions Requesting Institution of a Proceeding To Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper;
58 *Fed. Reg.* 34726 (June 29, 1993)

Dear Mr. Chilk:

On behalf of the nuclear industry, Nuclear Management and Resources Council (NUMARC)[1] submits the following comments on the 10 CFR § 2.206 process. These comments respond to the June 29, 1993 *Federal Register* notice (58 *Fed. Reg.* 34726).

The June 29 *Federal Register* notice stated that the NRC was initiating a review of its regulations and practices governing petitions filed pursuant to 10 CFR § 2.206. As a part of its review, the NRC held a workshop on July 28, 1993, to allow interested individuals and groups to voice their opinions and concerns regarding the objectives of the § 2.206 process, its effectiveness in meeting those objectives and what, if any, revisions should be made to the process. NUMARC and several members of the nuclear industry bar[2] participated in that workshop. The workshop provided a valuable forum for

[1]NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

[2]Participants were Messrs. Maurice Axelrad (Newman & Holtzinger), Robert Bishop (NUMARC), Joseph Gallo (Gallo and Ross), James Miller III (Balch & Bingham), Jay Silberg (Shaw, Pittman, Potts & Trowbridge), and Mark Wetterhahn (Winston & Strawn).

the NRC staff to explain its approach to the § 2.206 process and to better understand the differing perspectives of the participants.

The nuclear industry views this issue as one of great importance. The NRC's review of its regulations and practices governing petitions submitted pursuant to 10 CFR § 2.206 is a useful assessment and should assist the Commission in determining whether it is adequately carrying out this aspect of its regulatory responsibilities. The discussion during the workshop made clear that the § 2.206 process satisfies its purpose of providing a structured means by which any member of the public may bring to the attention of the NRC a potential safety concern and request that the NRC take enforcement or other action in response. At no time during the workshop did members of the public, public interest group representatives or government representatives claim that they or their constituencies were impeded from bringing potential safety issues to the attention of the NRC.

The major complaints expressed by several of the workshop participants appeared to be that petitioners were not kept abreast of the NRC's ongoing actions undertaken in response to their petitions, NRC reviews of § 2.206 petitions were performed by the same individuals whose decisions were the subject of the § 2.206 petitions and thus were not independent. Some individuals also expressed concern about the NRC's failure to institute proceedings when requested and about the lack of judicial review of NRC decisions denying § 2.206 petitions.[3] However, no information has been presented from which the agency could reasonably conclude that safety issues raised by petitions, which should be the ultimate concern of those who submit and review them, are not comprehensively addressed under the current process. The NRC subjects § 2.206 petitions to rigorous technical analysis and dispositions the petitions through a detailed, written response to the issues raised.

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[3]The NRC designated judicial review of Director's Decisions of § 2.206 petitions as a topic outside the scope of the workshop. Although the industry opposes judicial review on § 2.206 petitions, these comments do not address the basis for the industry's position. The industry's views will be clearly stated in comments submitted to the Subcommittee on Clean Air and Nuclear Regulation of the U.S. Senate Committee on Environment and Public Works. During the June 30, 1993, subcommittee hearing, Chairman Selin and the representatives of Nuclear Information Research Service discussed at length the subject of judicial review of § 2.206 petitions.

The § 2.206 Process Adequately Meets Its Objective

The objective of the § 2.206 process is to provide members of the public with an easily initiated mechanism to direct the NRC staff's attention to licensee operating actions, practices or conditions which do not conform with regulatory requirements, or other safety concerns, and to request NRC enforcement action thereon. The § 2.206 process as presently implemented, meets this objective.

In providing this structured process to focus the NRC's attention on a particular issue, a petitioner is given wide latitude in presenting his or her concerns. The current regulation allows "any person" to bring any matter of concern with respect to a licensee to the attention of the NRC. That is, any member of the public may submit a § 2.206 petition without meeting any requirement for standing or for the issue's safety significance. It is without exaggeration to say that a § 2.206 petition may be submitted on no more than a post card with a bare description of the concern and the requested action. In practice, a petitioner need only provide sufficient information for the NRC to understand the potential issue for which enforcement action is sought. The lack of a standing requirement or other formal requirements unquestionably facilitates the public's ability to have its concerns considered by the NRC and, if warranted, to have them serve as the basis of enforcement or other NRC action.

The fact that § 2.206 petitions result in few hearings or orders does not mean that the safety concerns underlying the petitions are given short shrift or that the agency's decision-making process is flawed. Chairman Selin, in his opening remarks at the workshop, articulated this thought:

> ...[W]hat percentage of all petitions are granted? It doesn't seem to me to give the answer unless you know how many of the petitions are meritorious, unless you have a way of finding out how many of the petitions have affected agency actions even if they were not formally granted. (Tr. at 5-6)

The numbers of § 2.206 petitions denied have been cited to support the proposition that the § 2.206 process is not functioning properly. Such an isolated numerical focus upon the number of petitions not resulting in the requested action distorts the significance of the § 2.206 process and ignores the many other mechanisms and processes in place to bring safety issues to the Commission's attention. We believe that the relatively high number of petitions denied is evidence of the fact that the principal ways of protecting the

public health and safety are indeed functioning effectively. In numerous instances, although a § 2.206 petition is denied, the underlying safety issue has been evaluated and the requested relief has either already been granted or is no longer necessary. The value of the public input process provided by § 2.206 should be measured by whether the issues raised are timely and adequately addressed, not by whether a hearing, enforcement action or other formal action is instituted. The industry's efforts to ensure safe reactor operation, coupled with the NRC's pervasive regulatory process, have resulted in timely identification of safety issues and their resolution by licensees and/or the NRC.

The § 2.206 process is intended to allow the public to bring their post-licensing concerns to the NRC. It was not designed to be, is not, and should not be the primary means by which the NRC is made aware of potential safety issues. The process under § 2.206 was deliberately adopted in addition to the many other processes and mechanisms employed for this purpose. For example, licensees have extensive operational, surveillance and review programs. These are the most effective mechanisms for identifying and resolving safety issues at a plant and for bringing significant safety issues to the Commission's attention. Also, the NRC assigns at least one, and often two, resident inspectors at each reactor site and conducts routine and special inspection programs and audits involving all safety aspects of the plant and its operation. Further, various programs are maintained by reactor licensees for employees and contractors to identify safety issues to the licensee. The NRC also has a program for employees and contractors to bring safety problems directly to the agency (either personally or anonymously) and have the allegations processed through the NRC's Allegation Management System.[4] In addition to the processes just described, the public has other meaningful opportunities to participate in the oversight of licensees' activities: a member of the public may be present at the numerous public meetings the NRC holds with licensees each year, may initiate and participate in rulemakings, may, if certain procedural requirements are met, request and participate in a hearing on any license amendment, and may submit concerns directly to the NRC through the agency's Allegation Management System. Thus, it is unsurprising that in the vast majority of cases, the safety concerns identified by the public were already known to the NRC when the petition was submitted.

[4]To the extent it is relevant to a discussion of § 2.206, we believe that the Allegation Management System is effective. It is properly viewed as complementary to, and was not intended to be a substitute for, the § 2.206 process.

Additional Independent Review Of Director's Decisions Is Not Warranted

The § 2.206 process accomplishes its objective not only because it is accessible even to an individual unsophisticated in the workings of government, but also because those at the NRC knowledgeable about the particular technical issue are assigned to review it and to provide a reasoned decision for the determination about whether or not to take enforcement or other action. A § 2.206 petition is referred to the director of the NRC office responsible for the subject matter of the petition. The staff reporting to that director reviews the petition, including an analysis of relevant facts, and provides a detailed response. The director either institutes the requested enforcement or other regulatory action against the licensee, or advises the petitioner of the basis for the petition's denial. The Commission reviews the disposition of each § 2.206 petition to determine whether it is necessary to engage in a more formal review, which may be undertaken by the Commission on its own motion.

Criticism was levied by some at the workshop that there may be some inherent bias by the NRC reviewers because their decisions are the subject of a § 2.206 petition. The basis of this criticism may in fact be dissatisfaction with the result of the NRC's review of a particular § 2.206 petition rather than any real concern over whether the staff put forward a good faith effort to address the petition. A suggestion was made at the workshop that the process be revised to incorporate an additional independent review of § 2.206 petitions by other NRC personnel including, possibly, an Atomic Safety and Licensing Board.

The industry opposes such a revision for several reasons. First, the NRC staff assigned to review the petition are likely to possess the most k+nowledge about the particular issue. It is not sensible from either a resource allocation or safety standpoint to reserve one or more individuals who are the most capable to perform the initial assessment so that they may later perform the independent review. Second, and following from the first, the independent reviewer or reviewing body (e.g., a licensing board) will not have the same level of expertise on the issues that are the subject of the petition that the initial review team had. In that case, there is no reason to believe that an independent review would provide additional value in the safety determination. Third, from both a cost and safety perspective, it would not be an effective use of NRC resources to assign personnel to perform an independent review if they are more appropriately assigned to other significant safety issues. Fourth, the system to evaluate and respond to § 2.206 petitions already includes internal NRC reviews of § 2.206 petitions. These reviews should eliminate the possibility of bias influencing the

evaluation of and response to a petition. Fifth, even assuming such an independent review is desirable, it will not be effective unless the reviewer or reviewing body is also provided with authority to overrule or amend the initial decision on the petition. If such authority is not provided, and a different conclusion is reached by the independent reviewer, a mechanism for conflict resolution must be instituted. This would add another infrastructure to an already burdened regulatory system. Finally, an additional internal NRC review would certainly increase the time required to reach a disposition of the concern underlying the § 2.206 petition, and might result in a compromise of the protection of public health and safety.

Suggested Enhancements To The § 2.206 Process

In determining whether the 10 CFR § 2.206 process ought to be enhanced, one must again return to the purpose of the regulation. As noted above, the regulation's purpose is to provide the public with an opportunity to bring safety concerns to the NRC and have those concerns evaluated and, if warranted, acted upon. These procedures, however, were deliberately made part of the NRC's enforcement process, an area where the NRC is entitled to exercise its informed discretion. The agency is appropriately provided discretion in this context because the most effective use of its resources will always be dependent upon the specific circumstances involved. As the NRC investigates an issue raised by a § 2.206 petition, the agency has and should have many alternatives available to it. It is appropriate for the NRC to be able to determine what course to follow based upon a number of factors, including prior licensee and NRC actions on the issue, the merits of the allegations contained in the petition, the relative safety significance of the concerns raised in the petition, the most appropriate means of resolving the perceived concerns, and the most efficient use of NRC and licensee resources. Such decisions are and should remain within the agency's informed discretion because the basis for these decisions necessarily involves a combination of judgment about the facts at hand as well as agency expertise and experience.

Although the § 2.206 process is easy to set in motion (no standing requirement, only a bare description of the concern is necessary, etc.), the industry supports NRC action to make the § 2.206 process better understood by the public. Any steps to make this process better understood should be implemented in full recognition of the fact that § 2.206 petitions are part of the NRC's enforcement process and, therefore, that the ultimate decision whether to take enforcement action in a particular case must lie within the agency's discretion.

The industry supports enhancements to achieve greater communication between the petitioner and the NRC as the NRC evaluates and responds to the petition. For example, the NRC could assign a specific identifier to the petition for the purpose of tracking documents related to its disposition. The agency also could identify a contact person within the NRC and provide that person's phone number to the petitioner. Further, to ensure accuracy in framing the potential safety issue and its resolution, the NRC could meet or otherwise communicate with the petitioner to ask clarifying questions if necessary for the NRC to fully understand the safety concern and the requested action. Such discussion should provide additional assurance to the petitioner that the NRC understands the petitioner's concerns. Also, the NRC could ensure that the petitioner and the licensee receive a copy of correspondence among the parties and the published NRC documents developed in response to the petition. Finally, the NRC could provide that information to the petitioner and the licensee on some periodic basis.

In response to the dissatisfaction expressed at the workshop regarding the petitioner's opportunity to remain involved in the § 2.206 process, the petitioner could be notified and made aware of the opportunity to attend any NRC/licensee meetings held to evaluate the issues that are the subject of the petition (while observing appropriate safeguards for proprietary information). If the NRC then believes that information in its possession is sufficient to make a determination on the petition, certainly it is within its discretion to do so. If, however, the NRC believes more information is needed, the NRC could, in its discretion, provide an opportunity for the petitioner and the licensee to provide additional information.

The § 2.206 Process Should Not Be Made More Formal

The NRC's Background Paper asks whether it may be appropriate to increase the formality of the NRC's interactions with licensees on a § 2.206 petition (e.g., increased use of 10 CFR 50.54(f) information requests). The industry believes that steps to increase the formality of the process are not necessary and would be counterproductive. It would make this aspect of the enforcement process overly formal and would divert NRC resources without achieving any commensurate safety benefit. Moreover, licensees provide voluntary responses to § 2.206 petitions and readily cooperate with the NRC by providing additional information to the agency if requested. More formality within the

§ 2.206 system would serve no useful purpose. Indeed, at the workshop a representative of the state of Massachusetts noted that formalizing the § 2.206 process would not do anything to change the outcome or make the staff more accountable:

> I would certainly hope that if you were to institute an independent office or if there was to be adjudicatory review...I would expect that the results would be little different from what they are today, because I think that the staff does try to -- does view themselves as being accountable and does try to do a good job.
> (Tr. at page 243.)

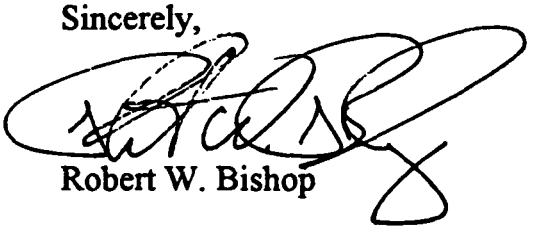
It has also been suggested that the NRC should develop and use formal criteria to categorize § 2.206 petitions. We believe that the agency should not do so. It is not necessary and would be wasteful and counterproductive. The NRC already has internal mechanisms for categorizing the petitions and assigning a priority to them and their underlying safety concerns. This is also an area where the agency's ability to use its informed discretion should be left undisturbed.

Conclusion

The industry believes that the NRC's process for handling § 2.206 petitions effectively provides the public with an opportunity to request that the NRC review and take action on a perceived concern. Nevertheless, we endorse the enhancements suggested in these comments. We believe that they will effectively address many of the concerns identified. In light of our view that the § 2.206 process achieves its objective and that no increased safety will derive from any revisions to make the process more formal, no such efforts are necessary.

NUMARC would be pleased to discuss these comments with NRC personnel and to respond to any questions they may have regarding the industry's position on the current areas of the 10 CFR § 2.206 process where modification may be appropriate.

Sincerely,



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Southern Nuclear Operating Company
the southern electric system

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August 27, 1993

Docket Nos. 50-348
50-364

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

ATTENTION: Docketing and Service Branch

Comments on
"Section 2.206 Petitions Requesting Institution of a Proceeding to Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper"
(58 Federal Register 34726 of June 29, 1993)

Dear Mr. Chilk:

A representative of Southern Nuclear Operating Company has attended the workshop "Section 2.206 Petitions Requesting Institution of a Proceeding To Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper," published in the Federal Register on June 29, 1993. In accordance with the request for comments, Southern Nuclear Operating Company is in total agreement with the NUMARC comments which are to be provided to the NRC.

In addition to the comments by NUMARC, Southern Nuclear Operating Company requests the Commission to consider the cost effectiveness of any proposed changes to the 2.206 process. Statements at the public workshop were virtually unanimous that the underlying safety issues raised by 2.206 petitions are being addressed carefully by the Staff. Even though some commentators expressed dissatisfaction that petitions were not granted as frequently as they wished, there was no suggestion that reasonable assurance of protecting public health and safety is undermined by the current 2.206 process. This means that any enhancements or refinements of the process can legitimately consider the increased regulatory burdens imposed on power reactor licensees. A balance should be struck between any proposed changes to the 2.206 process and any increase in regulatory burdens so the utility customer does not unfairly bear the cost of a new 2.206 process without a concomitant enhancement of safety.

There should be, also, a system of checks and balances that protect both the licensee and the petitioner from abuse of the 2.206 process. Undoubtedly, there are incidences where a petitioner pursues a secondary motive besides one associated with public health and safety. Should the Staff determine that this is the case, then the Staff should act swiftly to dismiss the petition. Should a licensee somehow abuse the 2.206 process, the NRC has ample authority to take appropriate action.

Should you have any questions, please advise.

Respectfully submitted,

Dave Morey

DNM/JDK

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REGULATORY, ENGINEERING, AND ENVIRONMENTAL SERVICES

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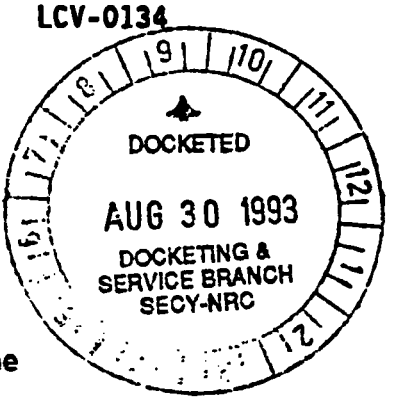

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

Comments Regarding the NRC Staff's Review of the
10 CFR Section 2.206 Process
(58 Federal Register 34726 of June 29, 1993)

Dear Mr. Chilk:

I. INTRODUCTION

On June 29, 1993, the Nuclear Regulatory Commission (NRC) invited comments on its review of the 10 C.F.R. Section 2.206 process. 58 Fed. Reg. 34,726. The Nuclear Utility Management and Resources Council (NUMARC) has submitted comments in response to the NRC's invitation. Georgia Power Company endorses NUMARC's comments and herein provides supplemental comments based on Georgia Power's experience, as a licensee, with the 10 C.F.R. Section 2.206 petition process.

In sum, we believe the NRC's current process for receiving and addressing Section 2.206 petitions strikes the appropriate balance between (1) affording interested members of the public an opportunity to raise potential safety issues and request enforcement action associated with licensed activities, and (2) providing the NRC with the flexibility necessary to carry out its statutory mandate to protect public health and safety.

Initially, while we believe it is appropriate for the NRC to examine the Section 2.206 process and consider methods for enhancing public participation, based on our experiences and the information contained in the Commission's Background Discussion Paper (NRC Paper), there is insufficient evidence to warrant substantial changes to 10 C.F.R. Section 2.206 or the NRC policies and procedures implementing that rule.

In particular, the NRC Paper, as well as the Federal Register notice, state that the review was undertaken most notably because of the "long-standing criticism by citizens groups and some members of Congress, primarily because most Section 2.206 petitions are denied." NRC Paper at 2; 58 Fed. Reg. at 34,726. Considering the primary goal

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of the Section 2.206 process -- the identification and correction of safety deficiencies[1] -- it does not follow that the process is flawed merely because a small percentage of the petitions are granted. One would expect few safety deficiencies to be uncovered by such petitions when the NRC and licensees have extensive programs and methods for ensuring public health and safety. Indeed, it should be a rare occurrence when these processes fail to identify and resolve conditions that could create a substantial safety question.

Nevertheless, Georgia Power Company strongly supports the Section 2.206 process' goal of providing interested members of the public with an opportunity to raise potential safety issues with the NRC and to request that action be taken thereon. To that end, we offer below our specific observations regarding the current Section 2.206 process.

II. DISCUSSION

As a preliminary matter, we note that the NRC Paper gives no consideration to the potential resource burden upon licensees which might arise from changes to the Section 2.206 process. While recognizing that "the reality of shrinking rather than expanding [NRC] resources" mandates that the evaluation result in a "more effective Section 2.206 process with equal or fewer resources" (NRC Paper at 3-4), the NRC Paper does not express an interest in ensuring that the costs of any proposed changes be justified based on an increase in nuclear plant safety. As discussed in Georgia Power Company's comments below, the current Section 2.206 process already incorporates many of the suggestions discussed in the NRC Paper. Georgia Power submits that further modification to the Section 2.206 process to increase public participation is not warranted as it will increase costs for plant operators, as well as the NRC Staff, without a commensurate increase in safety.

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[1]Based on the comments at the NRC's July 28, 1993, workshop on the Section 2.206 process, it appears that some public citizen groups consider the primary goal of Section 2.206 to provide a mechanism for any member of the public to obtain a full adjudicatory hearing on the safety concerns they raise. We submit that such a position mischaracterizes the purpose of the rule and evidences an inappropriate agenda - one based on a philosophical opposition to nuclear power in general.

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A. Increasing Interaction Between the Petitioner and the NRC Staff

The NRC Paper offers several options for increasing interaction between the Staff and petitioners. The suggestions, for the most part, can be implemented without any formal change to the existing Section 2.206 process. This has been demonstrated in the case of a Section 2.206 petition filed with respect to Georgia Power's Plant Vogtle. In that case, there was (and continues to be) extensive interaction with the petitioners including, for example, the following:

1. Petitioner was interviewed on several occasions (some of which were transcribed) by the NRC with respect to a number of allegations which he brought to the NRC. (Because the petitioner raised safety issues with the NRC which were later incorporated into a Section 2.206 petition, his concerns were initially handled as allegations.)

2. Georgia Power Company was required to response, in writing and under oath, to the Section 2.206 petition and its supplements.

3. Petitioner was provided a copy of each of Georgia Power Company's responses. This process directly resulted in the petitioners filing a supplemental petition.

Thus, as the NRC Paper notes, procedures for increasing the interaction between the Staff and petitioner are currently in use. It follows that no formal change to the current process is necessary for the NRC Staff to continue this practice in appropriate cases. Indeed, the NRC Staff should have some flexibility to decide which Section 2.206 petitions are necessary and appropriate for such increased interaction techniques.

Of course, Georgia Power Company discourages any increased interaction techniques which would impose a substantial burden on licensee resources. For example, the NRC Paper notes that a disproportionate amount of NRC Staff time and resources are spent coordinating Section 2.206 petition responses. In response to this, the NRC Paper, at 10-11, discusses shifting responsibility to the licensee to respond to extensive information requests, and perhaps meet with the petitioner in "informal public discussions," without regard for the time and resource burdens placed on the licensee. As in the case of NRC Staff resources, this practice would be inappropriate to the extent it would require an inordinate amount of licensee time and resources. This is especially true for the majority of Section 2.206 petitions which raise issues that are either already known to, and being resolved by, the NRC and the licensee or are unsupported and frivolous.

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B. Focusing on Resolution of Safety Issues Rather Than on Requested Enforcement Action

This area of inquiry is, in our opinion, the most important contained in the NRC Paper. Section 2.206 provides the public with a mechanism of raising potential safety issues for prompt action by the NRC. As stated above, its fundamental purpose is the identification and resolution of potential safety issues. Under limited circumstances, an adjudicatory proceeding may result. However, as stated above in n.1, based on some comments of public citizen groups at the NRC's July 28, 1993 Section 2.206 Workshop, it would appear that these groups are more interested in the latter rather than the former.[2] Increasing the opportunity for a full adjudicatory hearing in the Section 2.206 process will wreak havoc on the licensee, as well as NRC Staff resources. This, rather than the resolution of safety issues, would appear to be the goal of those who insist on adjudicating any safety issue raised in a Section 2.206 petition, no matter how small. An appropriate focus on the resolution of safety issues will achieve the purposes of Section 2.206 while minimizing the perception that petitioner's safety concerns are being summarily dismissed by the Staff.

One problem with the current Section 2.206 process is that petitioners often ask for extreme sanctions (e.g., shutdown of the plant) based on alleged improper actions by a licensee. Such "requested relief" is often out of line with the alleged safety deficiencies, even if such allegations were 100% accurate. The result is often a denial of the petitioner's requested relief because the petition did not raise a significant public health and safety issue. Nonetheless, the NRC Staff and the licensee would have addressed and resolved any of the safety issues raised in the petition which are found to be substantiated. Of course, any decision regarding enforcement action with respect to those allegations which were substantiated, appropriately rests exclusively with the NRC.

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[2]See e.g., comments by Ms. Susan Hiatt, Director of the Ohio Citizens for Responsible Energy, to the effect that meaningful public participation under Section 2.206 can only be achieved through citizen-initiated adjudicatory hearings (Tr. at 95-96) and comments by Mr. Martin Malsch, NRC Deputy General Counsel, summarizing a Union of Concerned Scientist study that concluded the appropriate purpose of Section 2.206 should be to provide the public with a formal, public hearing on any matter or safety issue raised by a petition (Tr. at 55).

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Georgia Power Company agrees with the suggestion of the NRC Paper that the NRC decision on a Section 2.206 petition should focus on the safety issues raised by the petition. In this regard, the Director's Decision could de-emphasize the granting or denying of the specific enforcement action requested by the petitioner. For example, instead of concluding that a petitioner's request for the NRC to order a plant shutdown is denied, the responsible NRC director could simply state that the petition's allegation was either substantiated or not substantiated and then state that the NRC will take enforcement action, if applicable, consistent with NRC's enforcement policy.

C. Categorizing Petitions and Allocating More Resources According to the Importance of Issues Raised

Categorizing petitions as suggested by the Staff (NRC Paper at 12-13) appears to be the current, albeit informal, approach to allocating Staff resources. We recommend that the Staff continue with this informal approach, without adopting specific procedures and inflexible criteria for segregating petitions.

Additionally, in Georgia Power's opinion, there is room for improvement in the length of time required by the NRC Staff to resolve Section 2.206 petitions. The Staff is to complete its review in a "reasonable time." However, the Staff view of what is a "reasonable time" does not necessarily coincide with that of the licensee or, for that matter, the petitioner. The length of the Staff's review time directly impacts licensee resources and has an effect on the public's perception of the licensee's competence. In order to further conserve licensee (and NRC Staff) resources, as well as to ensure timely resolution of the petitioner concerns, the NRC Staff should consider what is a "reasonable time" for all concerned, and strive to meet that time frame. This approach would avoid extended periods of inaction which frustrate licensees and, in some cases, inadvertently provide the petitioner with an unintended remedy. In other cases, extended periods of inaction apparently frustrate petitioners.[3]

D. Providing For a Formal Review Process for Director's Decisions

The NRC's existing procedures, whereby the Commission has the authority to review Director's Decisions, provide adequate review of such decisions. Judicial review is inappropriate because it invades the authority of the NRC to take appropriate enforcement action which it

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[3]This issue was raised as a concern at a July 15, 1993 hearing held by the Senate Subcommittee on Clean Air and Nuclear Regulation.

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deems necessary, within its sole discretion. This would disturb a fundamental precept of agency enforcement authority applicable to all government agencies with enforcement authority. See Heckler v. Chaney, 470 U.S. 821 (1985). As aptly discussed at length in that case,

> an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion. This is attributable . . to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agencies overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . .

Id. at 831-32.

Furthermore, there is no credible evidence to suggest that judicial review will improve upon the disposition of issues raised in the current Section 2.206 process, while it is certain that it will increase costs and create substantial delays in ultimate resolution of the issues raised.

III. CONCLUSION

Georgia Power Company submits that, on the whole, the current Section 2.206 process has served as a credible, equitable and effective mechanism for the public to raise potential safety concerns to the NRC

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for resolution. The process allows any person to raise any issue to the NRC, without regard for the petitioner's legal standing or his basis for the concern, for NRC investigation and resolution. NRC experience to date demonstrates that the current process is serving its goal of identifying, and causing the resolution of, safety issues which had not previously been addressed by either the licensee or the NRC. While few petitions have identified significant safety questions, this is an indication that licensees and the NRC Staff are adequately protecting the public health and safety rather than an indication that the Section 2.206 process is broken.

Concerns about the Section 2.206 process which have been expressed to the NRC appear to be grounded in a desire for more public involvement in the process. As discussed above, informal procedures are available within the current Section 2.206 process which will enhance public participation in the Section 2.206 process without creating a significant increase in the resource burdens on the NRC Staff and licensees. Substantial modifications to the process to provide for increased public participation will not yield a significant safety benefit and are, therefore, not warranted.

Should you have any questions, please advice.

Respectfully submitted,

C. K. McCoy

CKM/CRP

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Public Citizen

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Ralph Nader, Founder

COMMENTS OF PUBLIC CITIZEN'S CRITICAL MASS ENERGY PROJECT

Introduction

The Commission has initiated a review of its regulation and practices governing 2.206 or "show cause petitions. The purpose of the review is purportedly to ensure that the process is an effective, equitable, and credible mechanism for the public to prompt the NRC to investigate and resolve the potential health and safety threat raised by the petition. In the Commission's background paper the staff identifies three broad areas of potential improvement:

1) increasing interaction with the petitioner;
2) focussing on resolution of safety issues rather than on the requested enforcement action; and
3) categorizing petitions according to importance of issue raised.

Furthermore the review of the 2.206 process raises questions as to the objective of the process and whether the process is meeting this objective. Public Citizen participated in the Commission's workshop on the 2.206 process in which there was unanimous agreement among citizen petitioners that the process does not work. Public Citizen welcomes the opportunity to help improve the 2.206 process. Our specific comments follow.

THE PROCESS FAILS TO PROVIDE AN EFFECTIVE, EQUITABLE AND CREDIBLE MECHANISM FOR THE PUBLIC TO ENSURE THE SAFE AND ENVIRONMENTALLY SOUND OPERATION OF A NUCLEAR POWER PLANT.

Once a nuclear reactor has been licensed to operate the ability of the public to participate in the regulation of that reactor is practically non existent. The only opportunity for the public to question the operation of a nuclear reactor is through a 2.206 or "show cause" petition.

Under the Commission's regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper. (10 CFR 2.206) Unfortunately, it has been the practice of the Commission to summarily deny citizens petitions.

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Between 1985 and the end of 1991, the NRC staff issued 93 directors decisions on "show cause" petitions regarding nuclear reactor safety. The NRC staff rejected every petition. In only one case, involving the Yankee Rowe reactor, has the commission exercised its jurisdiction over a "show cause" petition and reviewed the staff's decision. (Curran, The Public as Enemy: NRC Assaults on Public Participation in the Regulation of Operating Nuclear Power Plants, Union of Concerned Scientists, April 1992, p. 24.)

In a 1990 case, Nuclear Information and Resource Service v. NRC, the Commission attempted to argue that the public's right to bring a "show cause" petition was an adequate substitute for the public's right to a hearing under section 189 (a) of the Atomic Energy Act. However, Commission attorneys failed to come up with a single instance in which a "show cause" petition raising safety concerns had been granted since the early 1980s.

In testimony given a year later, the Nuclear Regulatory Commission admitted that it had allowed only two hearings in response to 321 requests under section 2.206 in the more than 10 years that the regulation had been on the books. (Hearings Before the House Subcommittee on Energy and Power, House Committee on Energy and Commerce, 102d Cong., 1st session, May 8, 1991, p. 743 - 744). This hardly constitutes an effective, equitable and credible mechanism.

By the Commission's own admission, it is evident that the NRC has almost always denied to the public that which it is expressly authorized to seek under the regulations -- proceedings against the licensee. In its defense, the Nuclear Regulatory Commission has argued that "show cause" petitions have been granted in whole or in part about 10 percent of the time because they result in some regulatory action being taken. This claim is impossible to substantiate. Since the NRC failed to institute a proceeding against the licensee, there is no public record.

The Union of Concerned Scientists has studied the Commission's handling of 2.206 petitions. The study found that, even in the rare instance where the Commission did not reject the "show cause' petition, little if any meaningful public participation occurred. UCS found that the NRC followed a "pattern of delaying (a) ruling on the petitioners requests for hearings until it could make a plausible claim that its own, private interactions with the licensee had yielded sufficient improvement to justify denial of the hearing requests." (Curran at p. 15.)

The Commission's stated goal in this review is to determine whether the 2.206 process is an effective, equitable and credible mechanism. Public Citizen believes that the problem with the process is not there is no mechanism by which to raise safety issues but that the Commission lacks the will to use it.

Under the Commission's regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper. (10 CFR 2.206) Rather than institute a proceeding which the petitioner has requested, the Commission circles its wagons with the licensee to formulate a plausible rationale for denying the petition. If the Commission were truly concerned with affording the public an "effective, equitable and credible mechanism" it would institute a proceeding under 2.202.

INCREASED INTERACTION WITH THE PETITIONER WILL NOT ENSURE AN EFFECTIVE, EQUITABLE AND CREDIBLE MECHANISM FOR ADDRESSING SAFETY ISSUES RAISED IN THE 2.206 PETITION.

While increased interaction between the NRC and the petitioner would be welcomed it will not provide for an effective, equitable and credible mechanism for addressing safety issues raised in the 2.206 petition.

As acknowledged in the NRC's discussion paper, the Commission's handling of 2.206 petitions fosters the appearance that "while there is little opportunity for the petitioner to participate in the resolution of issues the petitioner has raised, the licensee has a much greater opportunity to become involved and influence the decision process." Increasing interaction with the petitioner will not address this problem. While the petitioner will have more information, they will still be excluded from the process.

The NRC suggests that the petitioner could be placed on the service list for all communications regarding issues raised in the petition. The petitioner could be allowed to attend meeting with the licensee and the staff. Furthermore, the NRC has suggested that the petitioner be allowed to respond to any submissions by the licensee regarding the issues raised in the petition.

While these suggestions would be welcomed by the petitioner they fail to ensure an efficient, equitable and credible mechanism for addressing issues raised in the petition. The suggested practices would enhance the public's understanding of the NRC's handling of the petition and thus the Commission's credibility, but they do nothing to address the inequity of the process. The petitioner is still an outsider to a process which is dominated by the NRC and the licensee. The petitioner's presence at meetings is not the same as public participation. The petitioner has no procedural rights and no chance for judicial review of the NRC's handling of the petition.

Information about the process is not the same as having access to it. Without the ability of the petitioner to substantively participate in the process, the NRC will not have an equitable mechanism for handling the safety issues raised in the petition.

FOCUSSING ON RESOLUTION OF SAFETY ISSUES RATHER THAN ON REQUESTED ENFORCEMENT ACTION WILL NOT SOLVE THE PROBLEMS ENDEMIC TO THE 2.206 PROCESS.

The NRC suggests changing the 2.206 rule to allow petitioners to allege a violation of a commission rule or policy rather than request a specific enforcement action, i.e., to modify, suspend or revoke a license. The NRC states that the underlying significance of the 2.206 petition is to bring issues of potential health and safety impact to the attention of the commission.

Public Citizen believes that petitioners are interested in more than merely bringing issues to the attention of the NRC. The petitioner requests the commission to institute a proceeding to modify, suspend or revoke a license. Petitioners want not only to raise potential safety issues but to participate in a process that will see them resolved.

Concentrating on the underlying safety issue rather than the specific enforcement action requested would result in further removing the petitioner from the process which they initiated. Resolution of the safety issue is the goal but there must be a consistent process in which the petitioner can participate on an equal footing with the licensee. By NRC focusing on resolving the underlying safety issue, the petition could be denied or left in some regulatory limbo while the agency and licensee concentrate on justifying further operating of the nuclear reactor.

Petitioners file a 2.206 based on what they perceived as violations of the license, NRC regulations or technical specifications. Most serious petitioners cite the NRC's code of federal regulations and the actions which they believe constitute the infraction. They are looking for the NRC to enforce its own regulations and not allow nuclear reactors to operate outside of their licenses.

Unfortunately it seems as though many petitioners take the regulations more seriously than do the NRC or the industry. We have learned through the NRC's workshop that there is a hierarchy of regulation. Yet this is not made evident in the regulations.

Further confusion is caused by the double standard imposed by the NRC before and after a nuclear reactor is licensed. The NRC takes the position in the licensing stage that compliance with regulations constitutes safety and then once the plant is licensed the NRC shifts to a different standard based on its hierarchy. This results in the NRC allowing nuclear reactors to operate outside of regulations.

The NRC has acknowledged that it has a hierarchy of regulations based upon safety. The NRC should communicate this hierarchy to the public so that petitioners don't' waste their time and effort attempting to enforce regulations which the Commission and staff consider to be of lesser importance.

CATEGORIZING PETITIONS AND ALLOCATING RESOURCES ACCORDING TO THE IMPORTANCE OF THE ISSUE FAILS TO ADDRESS THE PROBLEMS IN THE 2.206 PROCESS.

In the 2.206 workshop, NRC's Jim Partlow acknowledged that the NRC already performs a sort of triage on 2.206 petitions. However, this does not ensure that the NRC provides an efficient, equitable and credible mechanism for addressing safety issues raised in the petition. For instance the NRC gave a high priority to the 2.206 petition filed by the Nuclear Information and Resource Service (NIRS) regarding the use of Thermo-Lag fire barrier. However, the NIRS petition was denied prior to the resolution of several significant safety issues including the potential combustibility of a material that is supposed to act as a fire barrier.

As noted above, Public Citizen believes that the problem with the process is not there is no mechanism by which to raise safety issues but that the Commission lacks the will to use it. Under NRC regulations, any person may file a request to institute a proceeding pursuant to section 2.202 to modify, suspend or revoke a license or for such action as may be proper. (10 CFR 2.206) The NRC can best ensure an efficient, equitable and credible mechanism for addressing safety issues raised in the 2.206 petition by instituting the requested proceeding.

We thank the Commission for the opportunity to participate in the workshop and to comment on this most important subject.

Respectfully Submitted August 25, 1993:

James P. Riccio
Staff Attorney
Critical Mass Energy Project

Nuclear Information and Resource Service

1424 16th Street, N.W., Suite 601, Washington, D.C. 20036 (202) 328-0002

August 18, 1993

Mr. David Williams
Inspector General
U.S. N.R.C.
Mail Stop EW542
Washington, DC 20055

Dear Mr. Williams:

NIRS is filing a complaint to your office regarding the Nuclear Regulatory Commission Director's Decision DD-93-11 issued June 25, 1993 and Notice of Issuance of the Final Director's Decision issued May 23, 1993 and the Partial Director's Decision Under 10 CFR 2.206 issued February 1, 1993 denying the NIRS petitions on the controversial fire barrier material Thermo-Lag 330-1, manufactured by Thermal Science, Inc.(TSI).

NIRS asserts that the NRC, in denying the NIRS petitions under 10 CFR 2.206, has acted to prematurely close the proceedings on issues brought forward in the petition while many of those issues remain open and/or are unimplemented safety items before the Commission. Current NRC compensatory actions for the faulty fire barrier at 79 nuclear power plants are inadequate to guarantee the public's health and safety. It is also our concern that a number of issues raised in the petition are not currently being addressed with remedial or enforcement action by the regulator and the industry and have been dismissed without action. We further contend that the NRC Commissioners and Staff have exhibited undue and inexplicable favoritism toward Thermo-Lag and its manufacturer, Thermal Science, Inc., (TSI) to the point that the agency's actions have driven one major competitor out of the nuclear business, and have resulted in the apparent approval of "fixes" to the Thermo-Lag problems that would result in direct benefit and profit to Thermal Science, Inc., whose unethical and perhaps illegal actions caused many of the problems in the first place. NIRS contends that these issues remain valid concerns to public health and safety.

In summary, the following issues remain open items or inadequately addressed:

Favoritism. It cannot have gone unnoticed by either the NRC Commissioners or Staff that there are competing fire barrier materials which have passed the basic ASTM E-119 test and other

independent tests as well. Yet the NRC seems determined on changing its regulations, considering exemptions from regulations, approving fire barrier configurations with 2, 3, even 5 times the amount of Thermo-Lag originally specified, with the apparent intention of approving the use of Thermo-Lag as a fire barrier regardless of regulatory requirements.

This position is in spite of the NRC Inspector General's report of August 12, 1992, which flatly stated that TSI had used indeterminate tests to back up its claims that it met NRC fire barrier regulations, and that TSI had conducted and overseen its own tests at an unqualified laboratory where TSI itself approved its test results or, as seems apparent, conspired with testing facility personnel--including top-level management--to approve test results.

It is NIRS position that TSI has proven itself either unable or unwilling to adequately protect the public health and safety, and is thus unfit to remain a supplier to the nuclear power industry. For this reason alone, the NRC should order the immediate removal of all Thermo-Lag products from commercial nuclear power plants.

However, it has become obvious that the NRC Commissioners and Staff are more concerned with protecting TSI than they are with protecting the public health and safety. Despite the fact that Thermo-Lag has been proven through repeated testing not to meet existing fire protection regulations, the NRC has not ordered its removal.

While competing products have demonstrated their ability to meet existing fire protection regulations through widely-recognized independent testing, including passage of the ASTM E-119 test, the NRC has acted not to encourage the use of competing products, but to encourage testing of "enhanced" Thermo-Lag configurations (which generally require the use of 2-5 times as much Thermo-Lag as originally specified), thus bringing greater profit to TSI at the expense of its competitors.

Further, the NRC has acted to actually weaken independent testing criteria (E-119) when the only possible beneficiary is TSI, and its product Thermo-Lag, since competing fire barrier products already have passed this rigorous test. This NRC initiative has implications not only for the commercial nuclear power industry, but for nearly every use of fire barrier materials. In its zeal to protect TSI, the NRC is essentially endangering millions of Americans who live in apartment buildings, work in high-rise office buildings, etc. This demonstrates a remarkably callous and cavalier attitude toward public health and safety with again, only one possible beneficiary, Thermal Science, Inc.

The NRC's favoritism toward TSI has been so overt and damaging to TSI's competitors and the free enterprise system that TSI's largest competitor, the 3-M Company, recently announced that it will no longer supply the nuclear industry with nuclear-grade fire barrier material, since it cannot afford the cost of documentation to prove safety when TSI's documentation is being paid for by the federal government and the nuclear power industry (through the trade association NUMARC) in an NRC-approved testing program. The fact that the NRC continues to procrastinate and defer their regulatory role to NUMARC is demonstrated by the comments of James Taylor in a May 4, 1993 letter to NUMARC President Joseph Colvin underscoring NRC "commitments to

Congress" (i.e. Chairman. John Dingell's House Energy Subcommittee on Investigation and Oversight) that the Thermo-Lag problem would be taken care of by the NUMARC testing program. "Thus it is essential that we understand the scope and timing of the industry testing program...(for) long term corrective actions," wrote Taylor,[1] in a clear indication that the NRC--the regulatory body--was awaiting instruction from NUMARC, an industry trade association, to respond to Congressional inquiries about the progress of the Thermo-Lag testing program.

We also raise serious questions about the ethics of allowing Thermal Science, Inc. to be a major contributor to the NUMARC "independent" testing program of Thermo-Lag, since it was the TSI tests, discredited by the Inspector General, which led to the widespread use of Thermo-Lag despite its tested ineffectiveness.

NIRS thus submits that the NRC's activities--in the denying of NIRS' petitions and subsequent actions, have been driven by an inexplicable, unwarranted, and. we believe, potentially illegal favoritism toward Thermal Science, Inc. at the expense of TSI's competitors and the public health and safety. Such favoritism has no place in the federal government and must be rooted out and eliminated by independent public investigators such as the NRC Inspector General.

In addition to the above complaint, there are a number of technical issues which the NRC Commissioners and Staff have not adequately addressed.

Combustibility of the fire barrier material remains an open item. NRC acknowledges that Thermo-Lag is combustible. Yet the NRC does not address in response to the NIRS petition that the fire barrier material in fact represents an installed fire load in areas required to be free of combustible materials. 10 CFR 50 Appendix R specifically requires "Separation of cables and equipment and associated non-safety circuits of redundant train by a horizontal distance of more than 20 feet with *no intervening combustibles or fire hazards*" (Section G.2.d.) and "Separation of cables and equipment and associated non-safety circuits of redundant trains by a *noncombustible* radiant energy shield." (Section G.2.f.)[Emphasis added] Furthermore, Branch Technical Position CMEB 9.5.1 requires all fire barrier materials to be made of noncombustible materials.

The regulations are clear: combustible materials are not allowed in areas near vital electrical cables, yet every test of which NIRS is aware indicates that Thermo-Lag is indeed a combustible material.

There remains the discrepancy between the NRC Information Notice 92-82 "Results of Thermo-Lag 330-1 Combustibility Testing" findings that Thermo-Lag is combustible and the NUMARC Thermo-Lag Combustibility Assessment Program finding that Thermo-Lag "can be considered a non-combustible" as presented at the NUMARC/NRC Thermo-Lag meeting 6/28/93.

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[1] "NRC Impatient With NUMARC Work on Generic Solution to Thermo-Lag Woes," Inside N.R.C., May 17, 1993, p.1.

Combustion Toxicity of Thermo-Lag remains an open issue in so far as the NRC has failed to adequately explain the discrepancy in findings between the Promatec Final Report CTP1099 referencing Southwest Research Institute Final Report No. 01-8818-101 and evaluation by Southwest Certification Services as presented in the NIRS petition versus the NRC independent toxicological evaluation. This contention was dismissed by NRC without addressing the underlying question as to why these reputable testing laboratories came up with different results regarding the concentrations of hydrogen cyanide, carbon monoxide and ammonium resulting from the combustion of Thermo-Lag. The NRC Staff cannot merely deny NIRS' petition based on its own test results, without explaining why its test results are different, or controlling over NIRS' submitted evidence.

Ampacity Derating remains an open issue with regard to the effects of TSI underestimating the ampacity derating figure for Thermo-Lag installations on cables and cable trays. While an NRC Special Review Team recognized that a nonconservative ampacity derating could be instrumental in the installation of inappropriately sized cables which in turn could suffer premature cable jacket and cable insulation failure, NRC dismissed the contention in the NIRS petition by concluding that a sufficient margin exists to preclude any immediate safety concern. NIRS remains concerned that these Thermo-Lag installation errors, occurring in most cases over ten years ago, are causing electrical cables to operate with a diminishing safety margin, and with no regulatory remedy in sight.

Further concern is warranted by the failure of NRC to address the correlation of the ampacity derating problem and "Potential Cable Deficiencies of Certain Class 1E Instrumentation and Control Cables" as identified in Information Notice 93-33. IN 93-33 alerts licensees to the potential failure of instrumentation and control cables due to premature thermal and radiation aging. Without merit, NUMARC does not plan to share with NRC an industry-wide information survey on how extensively the faulty cable jacketing is in use, nor does NRC, at present, appear to be inclined to demand this information. NIRS contends that the combined effect of Thermo-Lag ampacity derating errors and 1E cable deficiencies are factors that neither the NRC nor NUMARC have factored to determine the postulated safety margin.

It should be of additional concern to the NRC that postulated tests performed by NUMARC are with new cable and are not indicative of aged cable found in existing nuclear power plants.

Seismic issues have not been adequately addressed by NRC and subsequently have been dismissed. NRC dismisses NIRS contentions that Thermo-Lag may not perform its fire barrier function for safe shutdown earthquakes (SSE) and may even act as a shear severing cables and shattering cable trays. NRC acknowledges that TSI has not performed seismic tests of prefabricated panels, but instead has referenced a TSI independent consultant's computer-based seismic analysis of Thermo-Lag. All other manufacturers of electrical envelop systems have performed actual seismic qualification tests. Only TSI has been allowed to function with an engineering evaluation report based on computer modeling.

While NRC rejects the NIRS contention that the material may shear cables and shatter cable trays during an earthquake, NRC acknowledges that Thermo-Lag "may crack or crumble into a powdery material or small fragments under an SSE." NRC fails to address the results of the disintegration of the material as a protective fire barrier for the safe shutdown cables and cable trays in the event of a fire caused during or after a SSE. NIRS acknowledges that a strict reading of the regulations does not require that fire barrier materials function during an earthquake. It is well-known, however, that fires are the most damaging after-effects of earthquakes, and often cause more damage than earthquakes themselves. We believe it unthinkable that the NRC would, in this instance, hide behind a legalistic reading of the regulations, and fail to offer the American people protection from nuclear meltdown induced by earthquake-initiated fire.

NRC also fails to address the consequences of the use of fire suppression systems and the increased water solubility of Thermo-Lag as a "powdery material" dissolving into the sump.

Hose Stream test failures have not been adequately addressed by NRC. NRC has acknowledged that Thermo-Lag barriers have failed hose stream tests and that cables may be damaged by thermal effects of the fire if the barrier fails as a result of a hose stream. NRC further commented in the February 1, 1993 response to the NIRS petition that "the NRC staff will require the successful completion of a hose stream test in fire barrier qualification." This has now apparently been requalified to mean that a fog nozzle test is sufficient to qualify the material. NRC Chairman Ivan Selin stated to a Congressional hearing that Texas Utilities hasn't proven they can pass the solid stream test, yet has allowed the acceptance criteria to exclusively use the fog nozzle test, an admittedly weaker test.

While NRC General Counsel William Parler acknowledged, in a March 1993 Commissioners' meeting, that the NRC cannot use the Texas Utilities fog nozzle tests on a generic basis without public comment, it is evident that the NRC is leading an effort to change ASTM testing criteria, not only for nuclear plants but for all fire barrier uses, to allow use of fog nozzle rather than the more realistic full hose stream tests. NRC personnel have attended ASTM committee meetings with the explicit mission of encouraging such a change--again, with the only possible beneficiary being TSI, since other materials already have passed the more rigorous full hose stream tests. As described by 3-M Company representative Richard Licht in House Energy Subcommittee on Oversight and Investigations hearings March 3, 1993, the full hose stream tests are essential to replicate not only the effects of fire-fighting water, but also the effects of fire barrier aging, fire-induced missiles attacking the barrier, and other unforeseen, but realistic circumstances. In any event, the NRC has no business using its funds and personnel to attempt to change basic ASTM tests to benefit a single commercial nuclear supplier, and those utilities which have purchased that supplier's material. This, again, represents rank favoritism, and a cavalier attitude toward public safety which extends even beyond the NRC's nuclear arena.

Fire watch programs do not constitute an appropriate short term substitute for a passive fire barrier system. The 1988 to 1991 four year average of fire events at U.S. nuclear power plants involving ignition and flame or smoke was 35.25 events per year and 2.94 events per month.[2]

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[2] SECY-93-143, "NRC Staff Actions To Address the Recommendations in the Report on

Events have ranged in severity, but include such accidents as the 3/02/89 fire which rendered both fire pumps inoperable at Peach Bottom, the 10/09/89 hydrogen fires at Shearon Harris which burned for 2 1/2 hours, and the Maine Yankee Main Generator fire on 4/29/91 which was allowed to burn out after 3 hours. In answering the NIRS petition, NRC acknowledges that fire watch personnel can not act as physical shields but NRC fails to adequately address how fire watch programs compensate for this specific task. In some cases, passive fire barrier protection is assigned to the specific task of protecting cables and cable trays that are behind walls or otherwise inaccessible to fire watch personnel.

Fire watch programs do not constitute adequate short term or long term compensatory actions. As documented by 24 Licensee Event Reports since 1984 and over 100 Violation Notices since 1979, fire watches are subject to a host of problems. A short list of identified areas of concern includes;

-missed fire watches due to miscommunication, personnel error, and management deficiencies
-inadequate training of fire watch personnel
-inattentiveness on fire watches and personnel observed sleeping on duty
-falsification of fire watch records and logs
-vandalism of plant property by fire watch personnel.

In conclusion, we acknowledge that the 2.206 process has a remarkably high Commission denial rate; for that reason, we recently participated in a Commission-sponsored workshop on this process, much of which was devoted to our Thermo-Lag petitions. This case, however, "takes the cake," and is a perfect example of "missed opportunities," as NRC Chairman Dr. Selin described the 11-year history of the NRC handling of the Thermo-Lag 330-1 issue in his report to the Subcommittee on Oversight and Investigations with the House Committee on Energy and Commerce on March 3, 1993.

It is our understanding that the Commission decision to deny the NIRS petition was largely based on the relief requested by the petitioner with particular emphasis focused on "the immediate suspension of the operating licenses of all nuclear power plants which use the material Thermo-Lag as a fire barrier, until the Thermo-Lag is removed and replaced." In fact, NIRS requested, as a perfectly reasonable alternative (although not a legal alternative under the current 2.206 process), "Alternatively, NIRS requests that the NRC order each reactor to remove and replace its Thermo-Lag during its next refueling outage."

In denying the NIRS petition without adequately answering the issues brought forward by the petition, the NRC has closed out an opportunity for our informed involvement in addressing the multiple problems created by the continued installation of Thermo-Lag in 79 nuclear power plants. Admittedly, in the transcript of the NRC public workshop on the 2.206 process held on

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the Reassessment of the NRC Fire Protection Program." Re-assessment of the NRC Fire Protection Program, February 27, 1993, Enclosure 1 "Safety Significance of Nuclear Power Plant Fires," Appendix G, H, and J.

July 28, 1993, Jack Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation, in responding to a NIRS concern that the Thermo-Lag 2.206 had been denied prematurely, Mr. Partlow responded "*On the specific Thermo-Lag issue, to the extent the petitioner has continuing information to bring to the process, I agree with you. We may have closed it out too early, to the extent that you might continue to have meaningful information to bring to the process.*"[3]

The NRC resolution of the Thermo-Lag problem continues to trend towards protectionism and favoritism of the manufacturer of an inferior fire barrier product rather than mitigating the identified inadequacies resulting from its use. Why has NRC not simply required TSI to comply with the original E119 standard? Why does the NRC not require Thermo-Lag to meet the same critieria competing products already have met? Instead, it is becoming more apparent that the NRC is conducting its investigation of TSI so as to rewrite the fire protection standards to accommodate an inferior product and indeed provide for the installation of additional Thermo-Lag as the resolution. This can only result in a weaker standard and the exemption of nuclear power plants from meaningful fire protection regulations. This is pure and simply favoritism, by a federal agency toward a single supplier, that has a serious effect on the public health and safety. It is immoral, unethical, and possibly illegal. We urge the Inspector General to take every action to ferret out the cause of this favoritism, to require the NRC Commissioners and Staff to enforce their own regulations, and to take every action necessary to protect the health and safety of the American people and their environment.

Sincerely,

Michael Mariotte
Executive Director

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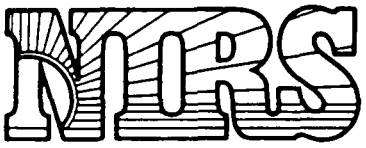
[3] Official Transcript of Proceedings, "Review of the 2.206 Petition Process," July 28, 1993, p. 187-189.

(8)



Nuclear Information and Resource Service
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August 27, 1993

COMMENTS ON NUCLEAR REGULATORY COMMISSION'S REVIEW OF THE 2.206 PROCESS

Recognizing the need to strengthen meaningful public participation in identifying and mitigating safety issues at operational nuclear power plants, Nuclear Information and Resource Service (NIRS) offers the following comments on the Nuclear Regulatory Commission's Review of the 2.206 process.

Judicial Review of the 2.206 Petition

First and foremost, NIRS supports a provision for the judicial review of any Nuclear Regulatory Commission (NRC) denial of a 2.206 request that is based on material evidence that reasonably demonstrates a significant noncompliance with the terms of the license and/or activities by the licensee that pose significant health and safety hazards to the public.

NRC has argued that because it is an enforcement agency, and since no other federal enforcement agency is subject to judicial review, that it is inappropriate to subject NRC to judicial review. In fact, as Commission Chair Ivan Selin addressed the issue before Senator Joseph Lieberman's Subcommittee on Clean Air and Nuclear Regulation June 30, 1993 hearing on S.1165, it is a matter of "honor" that NRC not be subjected to such unfair treatment.

To the contrary, NIRS submits its complaint filed August 18, 1993 with the NRC Inspector General regarding NRC mishandling and denial of the NIRS 2.206 petition on Thermo-Lag 330-1 fire barrier material. The complaint alleges NRC favoritism and protectionism of the manufacturer of the fire barrier material resulting in the ongoing noncompliance of 10 CFR 50 Appendix R, "Fire Protection Program for Nuclear Power Plants" as installed in seventy-nine U.S. nuclear power plants. The NIRS complaint is presented in context of the current investigations by a Federal Grand Jury into product claims made by the manufacturer and investigations by both the Inspector General and the House Energy and Commerce Committee's Oversight and Investigation Subcommittee into the lack of NRC oversight.

15 years of service to the grassroots environmental movement

In another example, the U.S. General Accounting Office Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce "Nuclear Safety and Health: Counterfeit and Substandard Products Are a Governmentwide Concern" (GAO/RCED-91-4, October, 1990) states in its principle finding that "the NRC is deferring its regulatory responsibility." The report goes on to state that "the magnitude of the problem, cost to the taxpayers, and potential dangers resulting from using such products are not known."

It is the NIRS position that NRC because of its dual responsibilities to both an increasingly economically burdened industry and an ever more safety minded public could welcome the inclusion of judicial review in the 2.206 process as an opportunity to restore its accountability.

Increasing interaction with the petitioner

It is our experience that the petitioner under the current 2.206 process has little or no reciprocal interaction with the NRC process. Again using the example of the Thermo-Lag petition, rather than being regularly notified about issues, meetings, etc; germane to our petitions, and being included in them, NIRS had to learn about them on our own, and interaction was generally between NRC and industry, with no inclusion. The only NRC communications with NIRS regarding theThermo-Lag petition were decision notifications.

NIRS submits that the NRC can increase the interaction with the 2.206 process by placing the petitioner on a NRC service list to receive all relevant public documents, including but not limited to information notices and bulletins, generic letters, SECYs, Operating Reactor Event Briefings, and other NRC information pertinent to the petitioner's issue, such as public meeting notices. NIRS recognizes that this might place an economic burden on the NRC to absorb all the copy cost of documentation and postage. Consequently, the fall back would be to place the petitioner on a service list that would include notification of issuance of NRC documentation with information on accessing the information at a NRC Public Document Room or placing an order for documentation through the NRC PDR copy service. The computer experienced petitioner could also be given retrieval access through the NRC computer network.

Focusing on resolution of safety issues rather than on requested enforcement action

The resolution of public safety issues raised by 2.206 petitions is paramount to both the petitioner and the regulator. In our real world, however, resolution often requires enforcement. NRC has already demonstrated a reluctance or inability to enforce implementation of safety issues as documented by NUREG-1435 Supplement 2 "Status of Safety Issues at Licensed Nuclear Power Plants" (December, 1992). In light of the significant lack of implementation of identified safety issues, NIRS comments would focus on strengthening NRC enforcement actions, in that NRC must carry and use a much bigger stick to implement meaningful resolution of licensee safety issues.

The 2.206 process is phrased in limiting terms of the requested action, i.e. "to modify, suspend, or revoke a license, or for such other action as may be proper." While requests for license modifications, suspensions and revocations should remain among the options open to petitioners,

we believe the 2.206 language should be broadened to encourage a focus on resolution of safety issues rather than the current focus on requesting imediate shutdowns. For example, there is currently no legal basis for a petitioner to request (for a hypothetical example) that portions of electrical wiring used in 3 reactors be replaced during each reactor's next refueling outage because it has been proven faulty. Instead, the petitioner must request the more drastic stop of shutdown or license modification. (Of course, without judicial review, there is little legal clout behind the process at all). This could make the 2.206 process both less controversial and more meaningful for all parties.

Categorizing petitions and allocating resources according to importance of issues raised

NIRS recognizes that the 2.206 process is focused on safety related issues. Petitioners generally do not submit non-safety related petitions.

NIRS submits that the obvious problem with NRC categorizing petitions and allocation of resources according to importance of issues raised is contingent on which interests are prioritized first: public safety or the economic interests of the nuclear industry. Industry and regulator are currently looking at the elimination of issues marginal to safety based largely on the economic burden compliance with safety regulations place on the industry. On the other hand, a significantly large portion of the public sector lacks confidence that NRC will consistently prioritize legitimate issues of public safety over the economic interests of licensees.

The NIRS Thermo-Lag 2.206 is again a case in point. NRC staff relegated the petition on the defective fire barrier into a catagory defined as not a significant safety issue. NRC staff declared that compensatory measures were adequate so that the "continued operation does not pose an undue risk to the public health and safety."[1] NIRS argued strenuously that fire watches do not constitute an adequate substitute for passive fire barrier systems, nor do they comply with regulations. In so doing, NIRS contends that NRC staff prioritized the industry's economic interests by the continued operation of 79 nuclear power plants over public safety and compliance with fire safety regulations.

NIRS submits that an independent review mechanism needs to be incorporated into the 2.206 process. Initially perhaps, the NRC Inspector General's office could review the petitions pending congressional approval of judicial review.

Respectfully submitted,

Paul Gunter
Nuclear Watchdog Project

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[1] Partial Director's Decision Under 10 CFR 2.206, DD-93-03 (2-01-93), p.14.

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August 31, 1993

BY HAND

Mr. Samuel J. Chilk
Secretary, U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

Re: Commission Review Of Regulations And Practice Governing Petitions Under 10 C.F.R. §2.206; 58 Fed. Reg. 34726 (June 29, 1993)

Dear Mr. Chilk:

On June 29, 1993, the Nuclear Regulatory Commission ("NRC") initiated a review of its regulations and practice governing petitions under 10 C.F.R. §2.206 requesting the NRC to take enforcement action (58 Fed. Reg. 34726). In connection with this review, the NRC requested public comment on the §2.206 process and, in particular, on a background discussion paper prepared by the NRC Staff. In response to that request, we submit these comments on behalf of Florida Power Corporation, Niagara Mohawk Power Corporation, Northeast Utilities, Public Service Electric & Gas Company, the Tennessee Valley Authority, and Washington Public Power Supply System.

I. INTRODUCTION

The §2.206 petition is the primary formal procedure for a member of the public to request the NRC to take enforcement action. It is in addition to the many mechanisms for the identification and resolution of safety and regulatory issues by licensees and the NRC. The vast majority of issues are routinely identified and resolved by licensees. In addition, the NRC maintains comprehensive oversight of the operation of its licensees through extensive and intensive inspection and regulatory programs.

The §2.206 process provides the public with a valuable mechanism to bring concerns to the attention of the NRC, and thereby aids the NRC in assuring that its enforcement

responsibilities are carried out. Through the development of this petition practice, the NRC has created an innovative procedure that encourages public participation in the enforcement arena. In this respect, the §2.206 process has worked well as one part of the Commission's overall framework for identifying and resolving safety issues. Therefore, while some improvements to the process of review of §2.206 petitions by the Staff may be appropriate, significant alterations to the NRC's current §2.206 practice are unnecessary.

The §2.206 process, while providing this opportunity for public participation in the enforcement context, also preserves the NRC's discretion to determine whether action is warranted in a given situation. This discretion is essential for the NRC to evaluate the complex factors that lead to a decision to enforce or not to enforce. As the Supreme Court has stated:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.[1/]

The NRC staff must have this flexibility to react to new safety issues and to prioritize its resources. Excessive formalism associated with one class of issues would only detract from the agency's ability to carry out its mission.

Consistent with the concerns noted by the Supreme Court, and the NRC's recognition of "the reality of shrinking rather than expanding resources,"[2/] we concur that the NRC's review of its §2.206 practice should seek to accomplish two goals:

1/ Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655-56 (1985).

2/ 58 Fed. Reg. 34726.

(1) maximize public participation to the extent practicable, given limited NRC Staff and licensee resources; and

(2) avoid over-proceduralization of the §2.206 process that might detract from the Staff's ability to exercise its discretion in considering §2.206 petitions or lead to judicial review of Directors' Decisions.

With these goals in mind, the remainder of our comments address specific issues outlined in the Staff background discussion paper, as well as concerns regarding judicial review of citizen petitions (as discussed at the NRC's public workshop on July 28, 1993). We also provide specific recommendations for improvements to the §2.206 process.

II. DISCUSSION

The Staff background discussion paper prepared in anticipation of the public workshop focused on three specific areas of potential change to the NRC's §2.206 practice:

- Increasing interaction with the petitioner;
- Focusing on resolution of safety issues rather than on requested enforcement action;
- Categorizing petitions and allocating more resources according to importance of issues raised.

We examine each of these areas below and also discuss issues surrounding the possibility that changes to §2.206 might result in judicial review of Director's Decisions.

A. Increasing Interaction Between The NRC Staff And The Petitioner

Although the NRC Staff makes every effort to foster public participation in the regulatory process and openness in its decisionmaking, petitioners sometimes complain that, from their perspective, the §2.206 process appears to be a "black box." At the public workshop, public interest group representatives stated that they sometimes submit petitions and subsequently receive denials from the NRC with no intervening communication with the Staff. Therefore, the Staff background discussion paper offers

several suggestions for increasing interaction between the Staff and the petitioner.

Of those suggestions, we agree that the NRC should assure that the petitioner receives copies of all correspondence related to the petition in question until the disposition of the petition by the NRC. In addition, the NRC should expand its practice of opening informal lines of communication with the petitioner after a petition is filed to focus or narrow the issues in question. Such improvements to the process could enhance public participation without over-proceduralizing the practice or adding to Staff or licensee burdens. Participants in the public workshop also expressed a related concern that the NRC sometimes treats letters from members of the public to the NRC as §2.206 petitions regardless of whether the writer actually intended to file a formal petition. Increased informal communication between the Staff and members of the public writing to the NRC -- e.g. asking the writer if a §2.206 petition was intended -- could alleviate this concern.

The NRC should not, however, create formal procedures for meetings involving the Staff, licensee, and petitioners, licensee responses under oath pursuant to 10 C.F.R. §50.54(f), or public discussions of issues raised in the petition. Informal use of these practices depending upon the particular circumstances surrounding a petition might improve interaction between the petitioner and the Staff. In many cases, this type of informal interaction already exists. For example, licensees often provide unsolicited responses to §2.206 petitions. However, institutionalization of meetings or responses under oath would create a significant drain on Staff and licensee resources and would not offer any offsetting increase in safety. In addition, any new regulatory requirements concerning §2.206 procedures might be interpreted as "law to apply" to a given case and thereby subject Directors' denials of petitions to judicial review (see Section II.D below).[3/]

3/ See Greater Los Angeles Coun. On Deafness v. Baldridge, 827 F.2d 1353, 1360 (9th Cir. 1987) (Department of Commerce regulations requiring Department official to "make a prompt investigation whenever a compliance review, report, complaint or any other information indicates a possible failure to comply" constituted law to apply for reviewing court). See also, Wallace v. Christensen, 802 F.2d 1539, 1552 n. 8 (9th Cir. 1986) (en banc); Abdelhamid v. Ilchert, 774 F.2d 1447, 1450 (9th Cir. 1985).

B. Focusing On Resolution Of Safety Issues Rather Than On Requested Enforcement Action

The Staff background discussion paper examined two options to refocus the §2.206 petition process towards resolution of safety issues, rather than specific enforcement actions. The first option raised in the paper was that if the Staff decides that an issue of some importance has been raised, and the Staff decides that it should make additional inquiries, inspections, or investigations, the petition could be granted with the actual outcome of the additional efforts left open. According to the background paper, this would serve to acknowledge the legitimacy of the petitioner's concerns.

The Staff should not, however, leave open the outcome of a petition simply to acknowledge that issues were raised by a petitioner. §2.206 petitions request that the NRC take specific actions, such as shutting down a plant or modifying or revoking a license. Thus, postponing a final determination would place a licensee in the difficult position of not knowing for extended periods of time whether a particular license provision is valid or, indeed, whether a plant may be operated at all. This uncertainty would complicate licensee planning efforts and result in significant expenditures that might not otherwise be necessary.

The second option examined in the background discussion paper would involve a change in the regulation permitting petitioners to request that the Commission consider a safety issue or issues, alleging violation of a Commission rule or policy, rather than requesting a specific enforcement action. According to the paper, this would de-emphasize the enforcement implications of a petition and focus on more general safety concerns.

There is no need, however, to promulgate additional regulations to permit a petitioner to ask the Commission to consider general safety issues. Petitioners could more appropriately address generic issues by filing a petition for rulemaking under §2.802, or by informal means, such as a letter to the Staff. In addition, §2.206 petitions already often raise general safety concerns in the context of requesting enforcement action, and the NRC may effectively act on these safety concerns, even though it denies the specific relief requested in the petition. The recent Thermo-Lag petition provides a notable example of this. Finally, as previously noted, additional regulatory requirements could be interpreted as triggering judicial review of Directors' denials of petitions.

C. Categorizing Petitions And Allocating More Resources According To Importance Of Issues Raised; Providing An Internal Review Process For Directors' Decisions

The background paper noted that one option being considered by the Staff would be to establish internal criteria for determining the level of effort and the types of procedures to be used on each petition. In addition, for the category of petitions which the Commission has determined raise the most significant issues, the paper stated that the Staff might consider explicitly amending §2.206 to provide some type of internal review of the Director's decision.

The NRC should not formalize the §2.206 process in this manner. As the Staff stated in the discussion paper, a "disproportionate" amount of time and resources are already spent coordinating decisions on §2.206 petitions. In addition, the Staff indicated in the public workshop that safety issues -- including §2.206 petitions -- are categorized depending upon safety significance utilizing the same standards and procedures as for all issues before the Staff. Thus, formal categorization of petitions would further divert limited Staff and licensee resources from other direct regulatory responsibilities, such as processing license amendment requests, inspection and enforcement activities, research, and promulgation of regulations. The three categories of petition proposed by the Staff[4/] are too inflexible to account for the complex range of technical and regulatory issues that may be raised by a petition. The Staff must have the flexibility to address each petition individually and expend the appropriate level of effort.

In particular, the NRC should not amend §2.206 to provide for internal review of Director's Decisions, or, as some public interest groups have recommended, to provide for Atomic Safety and Licensing Board ("ASLB") review of these decisions. There is no need for such review. With its combination of regulatory experience and technical expertise, the NRC Staff is the organization most qualified to decide upon §2.206 petitions. A

4/ The background discussion paper divides petitions into three categories: (1) those that merely raise issues and cite information previously evaluated by the NRC Staff; (2) those that raise a significant issue or issues with regard to a specific licensee; and (3) those that raise large significant unresolved generic safety issues affecting one or more licensees.

subsequent review by persons less qualified would only add to the time and resources spent on petitions without offering any corresponding safety benefit. Furthermore, ASLB judges should not review Director's Decisions. The ASLB panel was designed specifically to rule only after the compilation of an exhaustive administrative record and a hearing, rather than to consider enforcement decisions and compile such a record itself. Thus, the ASLB panel, while containing both legal and technical judges, should not be put in the position of second-guessing NRC Staff determinations regarding the myriad of factors -- including decisions concerning complex technical matters and resource allocation considerations -- that inform a decision to enforce or not to enforce.

In addition, during the public workshop, Staff representatives stated that the NRC Office of General Counsel ("OGC") reviews Directors' Decisions to ensure that the Staff has adequately addressed issues raised in petitions. Thus, there is already an informal review of Staff determinations under §2.206. Finally, as explained in detail below, any regulatory change specifying a formal review process or categorization of petitions could potentially constitute "law to apply" in a given case and thereby subject Directors' Decisions to judicial review. Such a result would consume Staff time and would impose further costs on licensees with no countervailing benefit.

D. Judicial Review Of §2.206 Petitions

The Supreme Court has recognized for over a century that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion and presumptively unreviewable.[5/] The Court has noted that such enforcement decisions are unsuitable for judicial review because they involve factors within the peculiar expertise of the agency, such as resource allocation considerations and technical expertise, and because "an agency generally cannot act against each technical violation of the statute it is charged with enforcing."[6/] With respect to §2.206

5/ Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649 (1985); United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198 (1979); United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967); Confiscation Cases, 7 Wall. 454 (1869).

6/ Heckler v. Chaney, 470 U.S. at 831, 105 S. Ct. at 1656.

petitions in particular, courts have generally found that Director's Denials are within the NRC's enforcement discretion and therefore judicially unreviewable.[7] Chairman Selin, in his introduction to the public workshop on July 28, 1993, reiterated his opposition to judicial review of §2.206 petitions requesting enforcement action, noting that agency enforcement decisions in general are not subject to such review.

The NRC should avoid promulgating regulatory changes to the petition process that would provide specific, formal standards or procedures for review of §2.206 petitions. One of the bases of the Supreme Court's Heckler v. Chaney holding that enforcement decisions are presumptively unreviewable was that Congress had provided no "law to apply."[8] That is, Congress did not indicate an intent to circumscribe agency enforcement discretion or provide meaningful standards for defining the limits of agency discretion.[9] Several U.S. Court of Appeals decisions subsequent to Heckler v. Chaney have found that agency regulations could provide a court with "law to apply" and thereby subject agency decisions to judicial review.[10] Thus, when considering

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[7] See, e.g., Safe Energy Coalition v. NRC, 866 F.2d 1473 (D.C. Cir. 1989); Massachusetts v. NRC, 878 F.2d 1516 (1st Cir. 1989). Nonetheless, Congress is currently considering legislation that would amend Section 189 of the Atomic Energy Act ("AEA") to provide for judicial review of §2.206 petitions. (See S.1165, "Nuclear Enforcement Accountability Act of 1993," proposed by Senator Joseph Lieberman (D-Conn.) on June 24, 1993.) The NRC should oppose this legislation. It is unnecessary, and would result in placing costly burdens on licensees and, ultimately, utility ratepayers. As Chairman Selin stated at the public workshop on July 28, 1993, the NRC already has an extremely thorough inspection and enforcement regime, and Congress should not single out the NRC for review of enforcement decisions.

[8] Heckler v. Chaney, 470 U.S. 834-35, 105 S. Ct. 1657.

[9] Id.

[10] See Greater Los Angeles Coun. on Deafness v. Baldridge, 827 F.2d 1353 (9th Cir. 1987); Wallace v. Christensen, 802 F.2d 1539, 1552 n. 8 (9th Cir. 1986) (en banc);

(continued...)

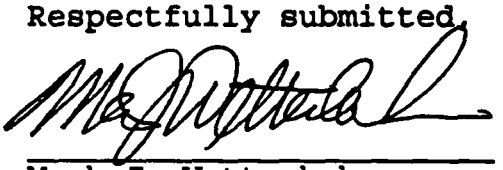
regulatory changes, the NRC must take into account the possibility that creating a more formal, structured process could restrict its enforcement discretion and subject Director's Decisions to review by the courts.[11/]

III. CONCLUSION AND RECOMMENDATIONS

The §2.206 process has worked well in the past and does not need significant modification. However, informal measures to enhance public participation may be desirable. Such measures could include increased communication between the Staff and petitioner, and/or providing petitioner with correspondence related to issues raised in the petition. In addition, the NRC might clarify the procedures that it currently follows in reviewing §2.206 petitions and update petitioners as their requests for enforcement action move through each step of the §2.206 process.

The NRC should not, however, make any formal changes to its §2.206 practice, including provision of an independent review of Director's Decisions, categorization of §2.206 petitions, or a modification of NRC regulations governing the petition process. These steps are unnecessary, and would divert scarce Staff and Licensee resources from other important regulatory responsibilities.

Respectfully submitted,



Mark J. Wetterhahn
Mark J. Hedien
WINSTON & STRAWN

10/ (...continued)
Abdelhamid v. Ilchert, 774 F.2d 1447, 1450 (9th Cir. 1985); State Bank of India v. NLRB, 808 F.2d 526, 536 n. 12(7th Cir. 1986); Hill v. Group Three Hous. Dev. Corp., 799 F.2d 385, 394-95 (8th Cir. 1986).

11/ If the NRC does decide regulatory changes are necessary, any new regulations should plainly protect agency discretion. See Webster v. Doe, 486 U.S. 592, 602 n. 7, 108 S. Ct. 2047, 2053 (1988).

(10)

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Revisions in the NRC's Petition 2.206 process are vital in two essential areas. The present petition process allows a minimal of interaction between the petitioner, the licensee, and other local interested parties who may be impacted by the petitioner's requests. This results in a continued animosity between all concerned as well as a total lack of communication between the licensee and the petitioner. It ought to be clear that the old " he said, they said, she said" routine with the NRC as the messenger boy can only breed distrust and confusion for all parties involved. The second area of needed change is in the total lack of representation by the segment of the population who support the licensee yet are often times negatively impacted by decisions made concerning the licensee by the NRC in response to petitions filed against the licensee in the 2.206 process. This failing must be redressed in any revision of the petition process.

I would like to propose the following suggestion as a possible revision in the current petition process. The process should be broken up into three stages. The first stage following a petitioner's letter of concern would be for the NRC to arrange a meeting between the petitioner and licensee with or without the NRC present as a mediator or facilitator. If at this stage an agreement about the concern can be reached between the petitioner and licensee then the action can be dropped without NRC intervention. However, should one or both parties feel unsatisfied with the outcome of this meeting, the NRC after listening to both parties (either while in attendance at the meeting or after reading a transcript of the first stage meeting) should proceed to initiate the 2nd stage of the process in which the NRC would offer its <u>suggestions</u> as to actions to be taken by either the licensee or the petitioner. For example, the NRC may wish the licensee to investigate more fully a specific health or safety problem (with which the petitioner is concerned) and then present their findings at the 2nd stage meeting. The 2nd stage meeting should be open to the public (the local population should always be kept informed of any potential threat since <u>they</u> are the people impacted by the plant's presence). The NRC may also make the suggestion to the petitioner that the licensee has adequately addressed the petitioner's concern and unless they find new evidence that would support their concern then they should drop their petition (a reasonable time limitation should be set so that the initial petition process may be resolved). The third and final step in the

process would entail official action by the NRC after reviewing the petitioner's and licensee's response to the stage 2 suggestion. In addition to this third stage, the local citizens living in the area of the facility should be given 30 days to respond to the NRC action and counter the petition's concerns if they can show possible higher risks to their health, safety, and economy due to the proposed actions of the NRC. In revising the petition process in this manner, the NRC gives the local people who are most directly impacted by decisions concerning the facility a voice in the regulating of their communities' health, safety, and economic standards.

The present petition process does not allow representation from local people in support of the licensee. It is designed only to address the complaints of a radical few who often times are not directly impacted by the operations of the licensee or the repercussions of NRC actions which they initiated. Also, a petitioner should be limited to one petition action in process at a time. This should help to hold down cost and focus attention on the most important and immediate concerns without wasting valuable resources on trivial matters which lack substantial evidence of a health or safety problem.

All petitions' transcripts from the initial first stage should be kept on file. If another petitioner duplicates a previous petition, a copy of the transcript of the resolved petition should be sent to them. If they can provide new information not previously used, the NRC may initiate a new petition process.

I further suggest that the NRC in the best interest of the local population publish any petitions, licensee responses, or NRC actions in the local media. The NRC should request local public input on these items to better gage the level of concern for these issues among people who are directly impacted by the facility.

I respectfully submit these suggestion in the hopes that the NRC may be able to put them to use in remedying a an ailing process which presently robs many of a voice in their own future.

Sincerely,

Angie Ellis

Angie Ellis, Sec./Tres. SAFEST
Sequoyah Advocates For
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Technology

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Ted C. Feigenbaum
Senior Vice President and
Chief Nuclear Officer

NYN-93122

August 30, 1993

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attention: Docketing and Service Branch

Subject: Comments on the NRC's Review of the 10CFR2.206 Petition Process

Gentlemen:

On June 29, 1993, the Nuclear Regulatory Commission (NRC) published notice (58FR34726) of its intent to review the regulations and practice regarding the 10CFR2.206 petition process. In connection with this review process, the NRC prepared a background discussion paper that addressed the present practice regarding the treatment of 10CFR2.206 petitions and proposed several alternatives to the present process. The June 29, 1993 notice invited comments on both the published notice as well as the background paper.

North Atlantic Energy Service Corporation (North Atlantic) is responsible for the management and operation of Seabrook Station. Personnel from North Atlantic attended the workshop held on July 21, 1993 and have reviewed the discussions in both the notice and the background paper. North Atlantic appreciates the opportunity to present the following comments on the present 10CFR2.206 petition process and the alternatives proposed.

North Atlantic believes, based upon its experience, that information related to the safe operation of commercial power plants is being brought to the Commission's attention through existing processes and no change to the basic process is warranted. It is through our own self-assessment programs and the NRC's extensive inspection and allegation managment programs that the vast majority of issues are identified and resolved. In addition, the 10CFR2.206 petition process does provide a formal mechanism by which the public can identify and resolve those few issues not resolved by other means.

This is not to say that there are no improvements possible in the 10CFR2.206 process. The NRC's proposal to enhance communication with the petitioner will improve the credibility of its regulatory role. The specific proposal to place the petitioner on the service list for written communications is an appropriate one. Further, informal NRC efforts to discuss the issue with the petitioner would potentially serve to narrow the issue such that the impact on NRC and licensee resources is minimized. However, North Atlantic opposes any formal process by which meetings of the NRC, Petitioner and Staff are held or by which formal responses are required and rebuttal responses allowed. Aside from the problem of who gets the "last word", such formal activities would have a significant impact on both NRC and licensee resources.

Given that the 10CFR2.206 process, in combination with the other processes available, has been achieving the objective of raising safety issues, North Atlantic sees no need for the more drastic modifications to the program suggested in its background paper.

Finally, North Atlantic strongly opposes the recommendation by several of the representatives of public citizen groups at the workshop that Director's decisions be reviewed by the Atomic Safety and Licensing Board (ASLB). Having gone through extensive ASLB proceedings associated with the licensing of Seabrook Station, North Atlantic is absolutely certain that such proceedings would require a significant expenditure of licensee, NRC and petitioner resources. This is clearly counter to the NRC's expressed goal of improving petitioner participation without adding significantly to existing resource burdens.

To summarize, North Atlantic believes that the 10CFR2.206 petition process has worked well and needs little in the way of improvements. The proposal to add informal measures to improve information flow to petitioners may be desirable to enhance the credibility of the process and the results.

Very truly yours,

T. C. Feigenbaum for
Ted C. Feigenbaum

TCF:AMC/act

cc: Mr. Thomas T. Martin
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September 1, 1993

Mr. Samuel Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attn: Docketing and Service Branch

Reference: 58FR41061 Request for Comments on Proposed Rule on Equal Access to Justice Act: Implementation

Dear Mr. Chilk:

These comments are submitted by the U.S. Council for Energy Awareness on behalf of its Facility Operations Committee (FOC). These comments were prepared in response to the U.S. Nuclear Regulatory Commission's (NRC) request for comments on the proposed rule on implementation of the Equal Access to Justice Act (EAJA).

The FOC membership consists of the owners and operators of fuel fabrication facilities, conversion facilities, uranium enrichment plants, material processing facilities, as well as transporters and other related service and supply facilities. A number of the FOC members would qualify as eligible applicants under this proposed rulemaking. We are, therefore, very interested with the final outcome of this rulemaking.

In reviewing the proposed rule, we endorse the basic concept; however, as proposed, the rule appears to go beyond the requirements established by the EAJA. As indicated by the court in the West Chicago, IL v. U.S. Nuclear Regulatory Commission case, licensing proceedings for material licensees were determined to be not "required by statute to be determined on the record." Our understanding is that only proceedings under the Program Fraud Civil Remedies Act (PFCRA) are required to be "on the record" and as such are covered by the EAJA as it applies to NRC proceedings. The proposed rule, however, states the EAJA applies to "any" adversary adjudications conducted by the commission. Therefore, this is well beyond the appropriate scope for the rule as discussed above.

Additionally, as drafted, section 12.103(b) appears to invite parties to file applications for awards. This could result in the NRC spending resources, provided through licensee fees, to evaluate these claims. We would suggest the NRC rephrase this to indicate that, while this rule does not preclude a party from filing an application, they will not provide awards under the EAJA if those proceedings are not under the PFCRA or otherwise required to be on the record.

We have reviewed and endorse the comments submitted by NUMARC on behalf of its' members. If you have any questions concerning our comments, please call Felix Killar, or myself.

Sincerely,

Marvin S. Fertel

cc: Felix Killar

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September 1, 1993

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTN: Docketing and Service Branch

RE: Notice of Workshop
Section 2.206 Petitions Requesting Institution of a Proceeding to Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper; 58 Fed. Reg. 34726 (June 29, 1993

Dear Mr. Chilk:

We participated in the development of the comments submitted by NUMARC's General Counsel with respect to NRC's initiative to re-examine its section 2.206 process. These comments, which we support, are comprehensive, and they are well-directed to the issues being considered by the NRC.

On a personal note, my participation as a panel member at the workshop was a very beneficial experience. I believe the exchange of diverse views among panel members furthered mutual understanding. One diverse viewpoint warrants further comment, however.

Some of the panel members were critical of the section 2.206 process because of a perception of agency bias in it's decisionmaking. They seemed to believe that agency 2.206 decisions either unduly favor the nuclear industry and/or unduly protect the NRC's regulatory posture at the expense of a fair assessment of the issues raised by section 2.206 petitioners. This lack of trust motivated the panel's critics to urge that NRC Staff 2.206 decisions be subjected to re-examination through adjudicatory hearings or less formal procedures under the aegis

of the Atomic Safety and Licensing Board Panel.[1] The NRC, in our judgment, should not seriously consider these recommendations because their underlying premise is specious.

No credible evidence of agency bias exists, and none was provided at the Workshop. Moreover, it would be improper to ascribe such bias to the NRC, as some may, from the fact that most requests for action by 2.206 petitioners are denied. As explained in NUMARC's comments, the high number of 2.206 denials is a function of the many other mechanisms and processes already in place and available to the NRC to address safety issues. In short, no 2.206 petitioner should be surprised that the NRC, which was created to protect public health and safety, has addressed or is already addressing a proffered safety concern in the normal discharge of the agency's regulatory responsibilities.

In our view, the critics' complaints of bias and distrust stem from a basic disagreement with the structure of the Atomic Energy Act of 1954, which, among other things, permits power reactor operations so long as NRC-determined measures to protect public health and safety are satisfied with reasonable assurance. Neither adjudicatory hearings nor ASLB reviews of NRC 2.206 decisions will resolve the objections of those who disagree with the Act or the manner by which the NRC prudently exercises the discretion granted by the Act to discharge its regulatory responsibilities. Their recourse more properly lies with the ballot box.

We appreciate the opportunity to provide these comments.

Sincerely,

Gallo and Ross

by: Joseph Gallo

JG/as

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[1] See transcript of 2.206 Workshop entitled "Review of the 2.206 Petition Process", pp. 145, 159, 182-83, 198-99, 205-06, 230, 232-33, July 28, 1993.

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Energy Systems

Nuclear and Advanced Technology Division
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ET-NRC-93-3959

'93 SEP 10

September 3, 1993

Mr. Samuel C. Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Chilk:

SUBJECT: REQUEST FOR COMMENTS ON 10 CFR SECTION 2.206

Westinghouse Electric Corporation ("Westinghouse") files these comments on 10 CFR 2.206 in response to the invitation to comment set forth in the Notice of Workshop on Section 2.206 set forth at 58 Fed. Reg. 34726 (June 29, 1993). In the Federal Register Notice, the NRC stated that it was initiating a review of its regulations and practice governing petitions under 10 CFR 2.206. As part of that review, the NRC held a public workshop on July 28, 1993, to obtain an exchange of information on the objectives of the Section 2.206 petition process, its effectiveness and what, if any, revisions should be made to the process. Representatives of Westinghouse worked with Nuclear Management and Resources Council ("NUMARC") in development of the nuclear industry position in connection with this important matter, and Westinghouse representatives attended the Workshop.

Westinghouse endorses the comments filed by NUMARC on behalf of the nuclear industry on August 27, 1993, in connection with this matter. We believe that the 2.206 process as currently operating appropriately meets the objective of providing members of the public with an effective mechanism to bring to NRC attention safety concerns with respect to the operation of nuclear power facilities outside of a licensing or rulemaking proceeding. As noted by NUMARC, the 2.206 process is intended to be part of the NRC enforcement process and provides a method readily available to the public to have the NRC apply its significant resources to evaluate the concerns stated in the 2.206 petition and consider whether any enforcement or other action is appropriate. As such, the process is in addition to many other mechanisms employed by the NRC to become aware of potential safety issues. Thus the effectiveness of the 2.206 process must be evaluated in the context of NRC enforcement, taking into consideration the availability to the Commission of the various methods by which the NRC addresses safety issues.

Westinghouse also agrees with NUMARC that some enhancements can be made such that the 2.206 process is better understood. It is to the benefit of the Commission, its licensees and the public that the process actually be and be viewed as open. Thus, the suggestions in the NUMARC comments with respect to additional procedures which might be part of the 2.206 process are supported by Westinghouse. These procedures, of course, must be kept within the framework of NRC enforcement, an area where the NRC is entitled to exercise its informed discretion. It would be counterproductive if enhanced procedures were to increase the formality of the 2.206 process or overjudicialize the process. The ultimate goal of Commission regulation is to assure the health and safety of the public and the common defense and security. Additional procedures which involve

increased commitment of time and resources without commensurate safety benefits would not be warranted.

Westinghouse appreciates the opportunity to comment on this matter and would be pleased to discuss these views on the 2.206 process with the NRC.

Very truly yours,

N. J. Liparulo, Manager
Nuclear Safety and Regulatory Activities

/p