SEP 2 5 1985

MEMORANDUM FOR: William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive Legal Director

FROM: Darrell G. Eisenhut, Deputy Director
Office of Nuclear Reactor Regulation

SUBJECT: FINAL RULE 10 CFR 50.12(a) "SPECIFIC EXEMPTIONS"

Enclosed are our comments on the text of the final rule amending the Commission's criteria for granting exemptions from the requirements of 10 CFR Part 50. Editorial comments were provided by phone to Sherry Lambe on August 13, 1985.

We concur with not invoking the Office of Nuclear Regulatory Research Independent Review procedures for this rule change.

(S)

Darrell G. Eisenhut, Deputy Director
Office of Nuclear Reactor Regulation

Enclosure:
As stated

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ENCLOSURE

COMMENTS ON FINAL RULE

I. BACKGROUND PAGE 5

If the Commission intends to periodically evaluate its exemptions practice to identify potential rule changes, some consideration should be given to who would do these evaluations, how they would be accomplished, and on what schedule they would be expected to occur.

III. PUBLIC COMMENTS

E. Temporary Noncompliances

The present staff practice of granting permanent exemptions, schedular exemptions, and schedular relief for temporary noncompliances through license conditions for newly licensed plants is consistent with both §50.12(a) and §50.57. Notice that a distinction is made between items requiring schedular exemptions which require a finding under §50.12(a) (typically documented in the Safety Evaluation Report), and items requiring only schedular relief (temporary noncompliances) which are referred to in the Safety Evaluation Report (SER), but are of such a nature that a formal exemption finding under §50.12(a) is not required. License conditions are provided for all incomplete items at the time of licensing, whether they be permanent exemptions, schedular exemptions, or schedular relief for temporary noncompliances.

At the time of licensing, a plant is presumed to be in compliance with all applicable regulations. If a plant is subsequently found to be in noncompliance, it is subject to enforcement action. The fact that a plant may have a special set of regulations that are applicable at the time of licensing because certain regulations are exempted for a definite time interval does not change the status relative to enforcement. The case of schedular relief for temporary noncompliances granted through license conditions at the time of licensing is considered a special circumstance where the Commission's discretion is being exercised relative to enforcement, similar to a special case on an operating reactor found to be in noncompliance and allowed to operate for a brief period without penalty.

We believe this approach provides a formal and systemmatic evaluation of the issues of importance and is based on clear regulatory authority. In all cases, a finding is made by the Region that construction is substantially complete, and generally only minor construction activities that do not impact safe operation are granted schedular relief as temporary noncompliances. Where there is a question regarding the significance of deferred construction items, an exemption finding under §50.12(a) is made and documented in the SER. The responsibility for this judgment rests with the Regional Administrator and the Director, Division of Licensing.

We would also point out that there is a difference in the handling of exemptions for Operating Reactors. For Operating Reactors the license is generally not conditioned for either temporary or permanent exemptions. Rather, separate exemption documentation is issued and published in the Federal Register. In general, only in cases where Technical Specifications would need revision as a result of granting an exemption would a license amendment accompany the exemption package. Schedular relief for temporary noncompliances is handled by the Office of Inspection and Enforcement and the Regions as a matter of enforcement discretion.

We have not read the proposed rule to mean that the Commission wishes the staff to conform the exemption process for NTOL's with that for Operating Reactors. In our view, §50.57(b) requires the license to be conditioned for schedular exemptions in the case of NTOL's and we see no harm (although it is admittedly not consistent with the practice for Operating Reactors) in placing the permanent exemptions granted at the time of licensing in the license itself. Further, as long as the documentation provided in the Safety Evaluation Report supporting the exemption (whether permanent or temporary) meets the requirements of §50.12(a), we see no benefit to be gained from issuing separate exemption correspondence for NTOL's apart from the SER. On the contrary, such a practice would be an additional administrative burden at a time when resources are already stretched to their limit.

We recommend that consideration be given to clarifying the term "temporary noncompliance" so that the distinction between schedule exemptions and schedular relief is clear.

In summary, we agree with the Commission's intent to formalize the exemption process, and with the additional guidance in the proposed rule concerning special circumstances, and we believe that our present practices for both NTOL's and Operating Reactors are adequate and should be continued without change.

F. Relationship to Other Commission Regulatory Actions

Change the last three lines on page 52 to read as follows:

"...necessary, provided the applicant or licensee can not demonstrate that their proposed alternative method of..."

This change is intended to clarify the situation when an exemption is necessary.

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

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JUL 31 1985

MEMORANDUM FOR: Darrell G. Eisenhut
Deputy Director
Office of Nuclear Reactor Regulation

FROM: William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive Legal Director

SUBJECT: FINAL RULE 10 CFR 50.12(a) "SPECIFIC EXEMPTIONS"

Attached for your review and concurrence is the text of the final rule amending the Commission's criteria for the granting of exemptions from the requirements of 10 CFR Part 50. I have also enclosed a set of the public comments on the proposed rule for your information.

We have not submitted the final rule for review under the Office of Nuclear Regulatory Research Independent Review procedures because the proposed rule was not reviewed under these procedures due to the Commission directing expedited staff action on this issue. If you feel that the Independent Review is essential, I would request that you provide the necessary documentation to the Office of Nuclear Regulatory Research. I have, however, forwarded the final rule to Research, Inspection and Enforcement, and NMSS for review and concurrence.

I would appreciate your comments by August 19, 1985. If you have any questions on this package, please contact Chip Cameron at extension 28689.

Thank you.

William J Olmstead

William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive
Legal Director

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Specific Exemptions

AGENCY: Nuclear Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to clarify the standards that will be applied when it considers whether to grant exemptions from the requirements codified in 10 CFR Part 50.

EFFECTIVE DATE: [insert date 30 days after publication]

FOR FURTHER INFORMATION CONTACT: F.X. Cameron, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: 301-492-8689.

SUPPLEMENTARY INFORMATION:

I. Background

On April 26, 1985 the Commission issued a proposed rule modifying the criteria for granting exemptions from the requirements of 10 CFR Part 50 for the licensing of production and utilization facilities. 50 Fed. Reg. 16506. Section 50.12(a) of Chapter 1, Title 10 of the Code of Federal Regulations provides that the Commission may grant exemptions from the regulations in Part 50 that it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. Traditionally, this authority has been delegated by the Commission to its staff which determines whether exemptions are needed and justified. The Commission believes that it is not possible for its regulations to predict and accommodate every conceivable circumstance. Consequently, it has historically provided mechanisms to grant exemptions where application of the regulation would not serve the public interest and no undue risk to the public health and safety would occur as a result of not requiring literal adherence to a particular requirement.

In reviewing Section 50.12(a) requests for exemptions, the focus of the NRC staff ("staff") has been on whether any undue risk would result from the granting of a particular exemption. This determination was, in general, the result of a qualitative engineering analysis of the purpose of the regulatory requirement and of the specific methods specified in the regulation for achieving the regulatory purpose. The staff would then compare the proposed

method of operation to ensure that the regulatory purpose was satisfied and that the method to be used in a particular case was, under the particular circumstances before the staff, appropriate and technically sound as a method for accomplishing the regulatory purpose. In recent years when probabilistic quantitative assessment techniques have been available, these techniques, along with engineering judgment, have been used to ensure that the exemption involved was acceptable from a safety standpoint. In summary, the staff would evaluate an exemption request to determine if there was a justifiable reason for the proposed exemption and, in addition, whether adequate protection of the public health and safety would be maintained if the exemption were granted.

As noted in the Supplementary Information to the proposed rule, several recent adjudicatory proceedings reviewed by the Commission, had made it evident that it would be desirable to attempt to state clearly the circumstances where the Commission believes that exemptions are warranted for the guidance of applicants, licensees, the staff and the public. For example, the Commission's recent decision on an exemption request for the Shoreham nuclear power plant, 1/ represented a departure from past staff practice in the exemption area. In Shoreham, the Commission requested the

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1/ In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, (May 16, 1984) (hereinafter "Shoreham").

applicant, in addressing the determinations to be made under the 10 CFR § 50.12(a) exemption criteria, to include a discussion of:

1. The 'exigent circumstances' that favor the granting of an exemption under 10 CFR 50.12(a) should it be able to demonstrate that, in spite of its noncompliance with GDC 17, the health and safety of the public would be protected.

2. Its basis for concluding that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified onsite A/C power source.

In the context of exemptions related to plant operations, these determinations regarding "exigent circumstances" and "as safe as" are not explicitly stated in 10 CFR § 50.12(a). Although the Commission later specified that Shoreham was only to apply to the particular circumstances of that case, the decision did underscore the need to review existing Commission practice in the exemption area. The proposed rule was an attempt to fashion a comprehensive, consistent, practicable, and appropriate framework for reviewing exemption requests, based on past staff practice and on the Commission's concerns, as evidenced in the Shoreham decision and related discussions.

The Commission would emphasize that it expects the intent of its regulations to be met and normally this requires conforming to the regulations as stated. The Commission recognizes, however, that there are circumstances where on balance it would not be equitable or in the public interest to require literal adherence to regulations particularly where to so require would not result in an improvement in overall safety or a reduction in risk to the

public. The objective of the proposed rule was to identify the criteria to apply in such circumstances and to provide a means for considering these circumstances so that consistent regulatory decisions can be made concerning exemptions to Commission regulations.

Finally, the Commission would note that its exemption authority must be exercised with an awareness of the Administrative Procedure Act's requirements for informal rulemaking, i.e. the regulatory policy for a particular area cannot be developed through the exemption process. Therefore, the Commission will exercise its discretion to limit exemptions in any particular area if the "exceptions" to the rule threaten to erode the rule itself. The Commission is also aware that exemptions can serve as warning signals that a particular rule may need to be revised and intends to periodically evaluate its exemptions practice to identify any of these areas.

II. The Proposed Rule

The proposed rule retained the existing criteria of section 50.12(a) in a slightly modified form, as general standards for the granting of exemptions. Under proposed Section 50.12(a)(1), the Commission could grant exemptions which:

> "are authorized by law, will not present an undue risk to the public health and safety, are consistent with the common defense and security, and are in the public interest."

In a departure from the text of the existing rule, the proposed rule would have required a finding that the exemption will not "present an undue risk to the public health and safety" and would be "consistent with the common defense and security." These standards provide an explicit recognition of traditional staff practice in evaluating the safety implications of a particular exemption.

As is currently required by Section 50.12(a), the proposed rule would have also required that the exemption be in the "public interest." However, in recognition of the Commission's decision in Shoreham, the Commission explicitly stated that the public interest determination will consist of a consideration of the special circumstances that justify the exemption. This determination would be confined to the consideration of the equities of the situation, similar to those cited in the Shoreham decision, including the stage of the facility's life, any financial or economic hardships, any unusual difficulties in complying with the regulation, any internal inconsistencies in the regulation, the applicant's good faith effort to comply with the regulation from which the exemption is sought, the public interest in adherence to the Commission's regulations, and the safety issues involved.

In addition to the general standards of proposed Section 50.12(a)(1) the Commission proposed to add a new Section 50.12(a)(2), which would require that one of several conditions exist before an exemption could be granted. The Commission stated that these conditions represent situations in which

it would be reasonable to grant an exemption, provided that the general standards of Section 50.12(a)(1) are also met. The conditions were selected on the basis of exemption criteria that have been noted by the courts with approval (special circumstances, hardship, equity, more effective implementation of overall policy, circumstances substantially different from those considered in the rulemaking proceeding) and on the basis of examples from past Commission exemption practice where the circumstances underlying the exemption appeared to be relevant and appropriate for exemption relief. The Commission emphasized that the conditions in proposed Section 50.12(a)(2) constitute a specific application of either the safety criterion or the public interest (special circumstances) criterion stated in the general standards of proposed Section 50.12(a)(1). Although an exemption request could satisfy one of the conditions in proposed Section 50.12(a)(2), the general criteria in proposed Section 50.12(a)(1) must <u>also</u> be satisfied.

Proposed Section 50.12(a)(2) would have required that one of the following be satisfied before an exemption could be granted:

(i) Application of the regulation in the particular circumstances would be in conflict with other rules of the Commission; or

(ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or

(iii) Alternative or compensatory means exist to achieve the underlying purpose of the regulation; or

(iv) The exemption would result in an overall benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or

(v) Application of the regulation would result in treatment of the particular applicant or licensee in a manner substantially different than other similarly situated applicants or licensees; or

(vi) The exemption would provide only temporary relief from the applicable regulation; or

(vii) There is present any other material circumstance not considered when the regulation was adopted.

The Commission directed the staff to utilize existing staff practice, pre-Shoreham, in evaluating exemptions, pending the effective date of this rulemaking. Commissioner Asselstine requested comments on the following proposed rule as an alternative to that proposed by the Commission:

Section 50.12 Specific Exemptions

(a)(1) The Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations in this part.

(2) The Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever:

(i) compliance with the regulations would be inconsistent with some other Commission requirement;

(ii) compliance with the regulation would decrease overall facility safety, or would not achieve or not be necessary to achieve the purpose of the regulation;

(iii) compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated;

(iv) a compliance issue is raised late in the licensing review that cannot be fully resolved in a timely fashion despite good faith efforts;

(v) compliance would result in applicant or licensee being treated in a manner significantly different from others similarly situated; or

(vi) there is present any other material circumstance not considered when the regulation was adopted.

(3) No exemption will be granted unless the Commission finds that it would be authorized by law and would be in accord with the common defense and security, and that there would be no undue risk to the health and safety of the public.

III. PUBLIC COMMENTS

The Commission received seventeen comments on the proposed rule. Sixteen of these were from the nuclear industry, comprised of electric utilities, law firms representing electric utilities, architect engineers, and a trade association. One comment was submitted by the law firm of Harmon & Weiss, representing the Union of Concerned Scientists (UCS). The industry comments were generally supportive of the Commission's objective in attempting to

clarify its exemption policy. However, industry commenters did recommend revision of selected details of this proposed clarification. They also expressed both favorable and unfavorable comments on the specific provisions of Commissioner Asselstine's proposal, noting that in many respects there did not seem to be any substantial differences between the two versions. The comments submitted on behalf of the UCS focused exclusively on the Commission's basic authority to grant exemptions, and requested that the Commission withdraw the proposed rule as being outside of the Commission's authority. The discussion of the comments has been organized into the following segments--

A. Commission authority in the exemptions area
B. The "no undue risk" and "common defense and security" standards
C. The "public interest" standard
D. The "special circumstances" criteria
E. Temporary noncompliances
F. Relationship to other Commission regulatory actions
G. Rule versus policy statement

A. THE EXTENT OF THE COMMISSION'S AUTHORITY IN THE EXEMPTIONS AREA

The UCS requested that the Commission withdraw the proposed rule because, among other reasons, the Commisssion does not have the statutory authority to grant any exemptions from its regulations. The UCS cites the Supreme Court in

E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 97 S.Ct. 965 (1977), for the proposition that the authority of an administrative agency to issue exemptions must be granted by Congress, either through the specific language of the enabling statute or its legislative history. According to UCS, because the Atomic Energy Act and its legislative history contain no specific provisions allowing the Commission to grant exemptions from its regulations, the "Commission lacks the grounds to establish rules for exemptions from its regulations." As evidence for this proposition UCS cites Section 103b(2) of the Atomic Energy Act which states that the Commission shall issue production or utilization licenses to persons who--

> ...are equipped to observe and who agree to observe such safety standards to protect health and to mininmize danger to life or property as the Commission may by rule establish. 42 U.S.C. §2133(b)(2).

In addition, no variance from the above requirement can be found in Section 161h of the Atomic Energy Act, 42 U.S.C. §2201(h), characterized by UCS as the provision that "governs consideration of license applications."

As the Commission stated in the Supplementary Information to the proposed rule, the authority of an administrative agency to provide for exemptions from its regulations is well-established. In United States v. Allegheny-Ludlum Steel, the Supreme Court recognized the authority of an

agency to establish exemption procedures to address peculiar factual situations. As stated by the Court--

> It is well-established that an agency's authority to proceed in a complex area...by means of rules of general application entails a concomitant authority to provide exemptions procedures in order to allow for special circumstances. 406 U.S. 742, 755 (1972).

In a case involving regulations of the Federal Communications Commission, the United States Court of Appeals for the District of Columbia Circuit emphasized that "a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties" because the power of an agency to promulgate general regulations in the public interest "does not relieve it of an obligation to seek out the 'public interest' in particular individualized situations." WAIT Radio v. FCC , 418 F.2d 1153, 1157 (D.C. Cir. 1969). The court noted further that--

> [t]he agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exception based on special circumstances. Id.

Furthermore, as noted by the Court of Appeals for the District of Columbia Circuit, and contrary to the thrust of the UCS comment,--

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailabilty under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them. Alabama Power Co. v. Costle, 636 F.2d 323, 357 (D.C. Cir. 1979).

The Supreme Court decision cited by UCS, E.I. duPont de Nemours & Co. v. Train, supra, was based on the Court's interpretation of the specific statutory scheme embodied in the Federal Water Pollution Control Act Amendments of 1972 (FWPCA). In duPont, the Court concluded that EPA did not have the authority to issue variances for individual plants unable to comply with the national standards of performance promulgated by EPA for the discharge of pollutants from "new sources" (as opposed to "existing sources"). The Court's conclusion was based on the clear congressional intent that the new source standards should be absolute prohibitions. As the Court noted--

> ...a variance provision would be inappropriate in a standard that was intended to ensure national uniformity and "maximum feasible control of new sources." Supra at 138.

Notably, from the standpoint of the UCS assertion that a statute must explicitly provide for the authority to issue exemptions, the Court did find that EPA had the authority to issue individual variances from the effluent

limitations required to be applied by July 1, 1977 for existing sources, despite the failure of the FWPCA to explicitly provide for such variances.

In regard to the the provisions of the Atomic Energy Act cited by UCS, the Commission cannot find any evidence in the general licensing standards of Section 103b(2) that Congress intended to foreclose the Commission from issuing exemptions in limited circumstances. Furthermore, it is unclear what the relevance of the UCS citation of Section 161h has to the matter of exemptions. Section 161h authorizes the Commisssion to--

> consider in a single application one or more of the activities for which a license is required by this Act, combine in a single license one or more of such activities, and permit the applicant or licensee to incorporate by reference pertinent information already filed with the Commisssion. 42 U.S.C. §2201(h).

The Commission believes that its exemption policy, part of the Commission's regulations since 1956, is within its statutory authority. As noted above, the unavailability of exemptions should not be presumed except in the face of "the most unambiguous demonstration of Congressional intent to foreclose them." Alabama Power, supra. Nothing in the Atomic Energy Act prohibits the Commission from providing for exemptions, and Section 161p. of the Atomic Energy Act authorizes the Commission to--

make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act. 42 U.S.C. 2201(p).

On a related issue, UCS asserts that, even if the Commission does have the statutory authority to grant exemptions from its regulations, the Commission may not consider economic factors in granting an exemption. Therefore, any of the proposed criteria that address economic considerations must be deleted. According to UCS this would include the public interest criterion in proposed §50.12(a)(1), the specific condition in §50.12(a)(2)(v) where application of the regulation would result in treatment of the particular applicant or licensee in a manner substantially different than other similiarly situated applicants or licensees, and the specific condition in §50.12(a)(2)(vi) where the exemption would provide only temporary relief from the applicable regulation. Citing Power Reactor Development Coroporation v. International Union of Electrical, Radio,and Machine Workers, 367 U.S. 413 (1961), and Porter County Chapter of Izaak Walton League v. NRC, 606 F.2d 1363 (D.C. Cir. 1979), UCS asserts that "[t]he courts have made it clear that the Commission may not consider the cost of meeting its safety requirements in making decisions whether to allow the operation of nuclear power plants." Applying this proposition to the area of exemptions, UCS concluded that "[t]he Commission may not rely on economic issues in order to change an operating license to permit operation at less than the same assurance of safety as provided by compliance with the regulations."

The Commission believes that judicial precedent and long-standing Commission practice confirm that, within the confines of carrying out its paramount responsibility to protect public health and safety, it may consider economic factors in its decision making. The Commission's regulatory mandate is couched in terms of "adequate protection of the public health and safety," 42 U.S.C 2232. The courts have held that absolute safety or zero risk is not required, and have interpreted the Atomic Energy Act to confer considerable discretion on the Commisssion to determine what level of protection is adequate. 2/ Consequently, the basic standard is inherently broad and general, rather than precise. As long as a Commission decision adheres to the primary "adequate protection" standard, the decision can legitimately take into account cost considerations.

In regard to the judicial decisions cited by the commenter, the Power Reactor Development Corporation, supra, concerned the validity of the two-step licensing process. A majority of the U.S. Supreme Court held in that context that the Commission is absolutely de ed any authority to to consider the enormous investment made during construction in making the definitive safety findings for purposes of operation. The case did not concern the general question of whether costs could otherwise be considered in licensing and regulatory decisions. This conclusion is also applicable to Porter County, supra.

2/ See, for example, Siegel v. AEC, 400 F2d. 778 (D.C. Cir. 1968); Nader v. Ray, 363 F. Supp. 946 (D.C.D.C. 1973).

Finally, the Commission would emphasize that Section 50.12(a)(1) of the proposed rule requires a safety finding that the exemption will not present an undue risk to the public health and safety and is in accord with the common defense and security. It is only after these statutorily based findings have been made that the Commisssion may then consider whether the additional requirements for the grant of an exemption have been met, some of which include economic considerations.

B. THE NO UNDUE RISK AND COMMON DEFENSE AND SECURITY STANDARDS OF PROPOSED §50.12(a)(1)

UCS also challenges the "no undue risk" standard of the proposed rule on the basis that it lowers the existing safety standard for granting exemptions. However, the existing safety standard that the commenter refers to is the "as safe as" standard that was controlling in the Commission's Shoreham decision, rather than the existing requirement of Section 50.12 that the exemption will not "endanger life or property." UCS argues that "there is no acceptable lower safety standard" than the "as safe as" standard employed by the Commisssion in Shoreham. This argument is based on the proposition that "the regulations establish the minimal requirements for safe operation of a nuclear power plant...they do not eliminate all risks from nuclear power plant operation, but are intended to provide a reasonable assurance of safety." According to the UCS, the Commission may not "retreat" from the levels of protection established in its regulations. Granting an exemption

based on anything other than a standard that demonstrates an equivalent assurance of safe operation would degrade the safety of a nuclear power plant because the license would have been issued based on compliance with the regulations, and the exemption would allow the reactor to operate in noncompliance based on some lower standard.

The Commission calls to the commenter's attention the fact that, as emphasized in the Supplementary Information to the proposed rule, that the Commission's Shoreham decision is intended to only apply to the particular circumstances of that case. 50 Fed.Reg 16506, 16508. Consequently, it is not appropriate to characterize the "as safe as" standard applied in Shoreham as the "existing safety standard." As also noted in the Supplementary Information to the proposed rule, the "no undue risk" standard of proposed §50.12(a)(1) is an explicit recognition of, not only traditional staff practice in evaluating the safety implications of a particular exemption, but of the statutory findings required by Section 182 of the Atomic Energy Act. 50 Fed.Reg. 16506, 16508. The 10 CFR 50.12(a) exemption provision was originally added to the Commisssion's regulations in 1956 and has a long history of implementation, 21 Fed. Reg. 355, January 19,1956. The staff evaluates an exemption request to determine if there is a justifiable reason for the proposed exemption and, in addition, whether adequate protection of the public health and safety would be maintained if the exemption were granted. Contrary to what UCS suggests, the grant of an exemption does not lower the existing safety standard for granting exemptions, but rather explicitly reaffirms the existing safety standard. This safety standard

represents the statutory requirements of Section 182 of the Atomic Energy Act for "adequate protection to the health and safety of the public." 42 U.S.C. 2232.

In regard to the UCS assertion that the Commisssion's regulations establish the minimum requirements for providing adequate protection of the public health and safety, the Commission believes that, while it is true that compliance with all NRC regulations provides reasonable assurance of adequate protection of the public health and safety, the converse is not correct, that failure to comply with one regulation or another is an indication of the absence of adequate protection, at least in a situation where the Commission has reviewed the noncompliance and found that it does not pose an "undue risk" to the public health and safety.

Two industry commenters, Bishop, Liberman, Cook, Purcell & Reynolds, representing several utilities, and Northeast Utilities, requested that the Supplementary Information to the final rule reiterate that the "no undue risk" standard includes the consideration of compensatory measures, length of time of the exemption, and the power level involved. As the Commission noted in the Supplementary Information to the proposed rule, it is anticipated that the staff review of the safety significance of the requested exemption will take into account the type of plant operation contemplated (fuel loading, low power testing, power ascension, or full power operation), the length of time that the exemption would be in effect, the existence of compensatory measures, and other safety factors.

One industry commenter, Baltimore Gas & Electric, requested that the Commission include some discussion of the criterion in proposed Section 50.12(a)(1) that the exemption would be "consistent with the common defense and security." The commenter also noted that the wording of the current §50.12(a)(1), that the exemption would "not endanger..the common defense and security...," may be easier to apply.

In response, the Commission does not intend for the change in wording in the proposed rule on the security finding to change the nature of that standard. The proposed rule would include the statutory safety and security findings, based on Section 182 of the Atomic Energy Act for "adequate protection to the health and safety of the public" and "accord with the common defense and security." 42 U.S.C. 2232. This is in contrast to the language in the current rule to the effect that the exemption must "not endanger life or property or the common defense and security." The Commission believes that the "not endanger" language in the current rule was never intended to embody any special standards for exemptions that differed from the statutory standards that the licensing must provide adequate protection to the health and safety of the public and be in accord with the common defense and security. For an example of how "common defense and security" has been applied in the context of an exemption request, see In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343,1400 (October 29, 1984).

C. THE "PUBLIC INTEREST" STANDARD OF PROPOSED §50.12(a)(1)

A number of comments from the industry addressed the "public interest" standard of proposed Section 50.12(a)(1). Two of these commenters, Duke Power Company, and Bishop,Liberman,Cook,Purcell & Reynolds recommended that the "public interest" standard of Section 50.12(a)(1) would be more appropriately termed a "balancing of the equities" or "special circumstances" standard. These two commenters noted that in the Supplementary Information to the proposed rule, the Commisssion stated that "the public interest determination will consist of a consideration of the special circumstances that justify the exemption," and that the "determination will be confined to the equities of the situation." 50 Fed. Reg. 16500. Both commenters believed that the "special circumstances/balancing of equities" standard is consistent with the NRC staff practice in granting of exemptions, and gives the staff the necessary flexibility to evaluate the full range of potential requests. Therefore, they recommended deletion of the "public interest" standard in proposed Section 50.12(a)(1). A third industry commenter, Northeast Utilities, also endorsed the idea that a "special circumstances" standard is more appropriate than a "public interest" standard because it is more in keeping with traditional staff practice. Baltimore Gas & Electric stated that, on this issue, it preferred Commissioner Asselstine's version because that version deleted the "public interest" standard. This commenter believes that the "public interest" standard is too subjective, and no supporting guidance was given for its interpretation.

Both Duke Power, and Bishop,Liberman,Cook,Purcell & Reynolds suggested that the use of the broad "public interest" language in proposed

Section 50.12(a)(1) could also "cloud" the application of the "special circumstances" standard, citing the Commission's Shoreham decision where the traditional public interest test was expanded to include a requirement of "exigent circumstances." These commenters recommended that the Commission refine the language of the porposed regulation to explicitly define the type of assessment involved in evaluating exemption requests, i.e. " public interest" or "special circumstances" stated as an equitable balancing test, and include a list of factors to be considered in applying this test. Somewhat in contrast, the Atomic Industrial Forum (AIF) believed that the Commission had selected the correct general standards. Furthermore, the AIF noted that the "special circumstances" standard in §50.12(a)(2) of Commissioner Asselstine's version of the proposed rule, 50 Fed. Reg. 16509, appears to be unnecessary because it is the intent of the entire Commission that exemptions are only to be granted in special circumstances. Another industry commenter, GPU Nuclear, criticized Commissioner Asselstine's proposal for deleting the "public interest" standard, although no further explanation was offered as a basis for this criticism.

On a related issue, Duke Power Company and Bishop,Liberman,Cook, Purcell & Reynolds, asserted that the situations in proposed Section 50.12(a)(2), in which it would be reasonable to grant an exemption, "gives the regulation a slightly illogical structure." This results from the specific situations of proposed Section 50.12(a)(2) being used to define and limit the general standards. According to these commenters, it would be adviseable to state the standard in terms of a definition, rather than by limiting example. In

addition, they suggested that the list of factors to be considered under the "public interest" standard of proposed Section 50.12(a)(1) would in many respects parallel the specific situations of proposed Section 50.12(a)(2). Therefore, Section 50.12(a)(2) is unnecessary, and also deprives the Commission of needed flexibility in considering exemption requests. However, these commenters requested that, if the Commission does adopt the approach set forth in proposed Section 50.12(a)(2), that Section 50.12(a)(2)(vii) be retained to provide for unanticipated circumstances. Another industry commenter, GPU Nuclear stated that the addition of the specific situations in proposed Section 50.12(a)(2) does not provide any clarity to the exemption criteria, and merely adds more requirements. This commenter also criticized the Commission's proposal generally for not stating any more clearly than the existing rule the circumstances where an exemption would be warranted. However, Northeast Utilities believed that the seven criteria in proposed §50.12(a)(2) appear to encompass most of the relevant bases which might be advanced in support of an exemption request, and endorsed the general approach of Commissioner Asselstine, which they characterized as "adopting two general standards for exemptions rather than prescribing specific criteria to be met." The commenter further noted that the specific list of special circumstances in Commisssioner Asseslstine's proposed §50.12(a)(2) was too narrow and didn't reflect all the possible factors which should be considered. Another industry commenter, Yankee Atomic, found Commissioner Asselstine's "special circumstances" attractive in that it identifies "safe harbor" special circumstances without excluding any other circumstances.

Yankee Atomic further suggested that the specific conditions of proposed §50.12(a)(2) and the equitable factors cited in the Commission's Shoreham decision, be consolidated under the "public interest" standard in proposed §50.12(a)(1). Explicitly listing these factors in the text of the regulation would, according to this commenter, provide more guidance on interpreting the "public interest" standard. The commenter also noted that this would be a way of more clearly indicating that the proposed rule was not intended to substantially alter existing staff practice in the exemptions area. Two other industry commenters, GPU Nuclear and Stone & Webster Engineering Corporation, concurred in the recommendation to include the equitable factors cited in Shoreham, in the text of the rule.

After careful consideration of the public comments, and further evaluation of the proposed rule, the Commission has decided to delete the public interest standard of proposed 50.12(a)(1). As the commenters noted, the public interest determination consists of the consideration of the special circumstances that justify the exemption. Therefore, "special circumstances" is a more appropriate terminology for this standard. In addition, the Commission is concerned that the framework of the proposed rule could be somewhat awkward to implement and could result in inefficiency and confusion. In addition to meeting the general "no undue risk" and "public interest" standards of proposed Section 50.12(a)(1), proposed Section 50.12(a)(2) requires that one of several specific situations exist before an exemption may be granted. These situations represent specific applications of the general "public interest" or "no undue risk" standards in proposed Section

50.12(a)(1). This presents the potential problem of determining the extent to which the analysis and conclusions on the specific situations of proposed Section 50.12(a)(2) will be applicable in determining whether the proposed Section 50.12(a)(1) standards have been met, particularly whether any further analysis is necessary at all on the general standard to which the specific situation applies. Although the Commission believes that the framework of the proposed rule could be implemented, the Commission desires to fashion the clearest and most efficient implementation process possible, that is consistent with the objectives of the proposed exemption policy. In this latter regard, the factors that would be considered in determining whether the "public interest" standard has been met, would in large part, also be considered under the "special circumstances" standard in Section 50.12(a)(2) of the final rule. However, the "special circumstances" of Section 50.12(a)(2) of the final rule are an attempt to strenghthen and clarify the Commission's exemption policy and practice. The deletion of the "public interest" standard in proposed Section 50.12(a)(1) reflects a conclusion that an exemption would always be in the public interest, if special circumstances are present, and the safety and security findings are made. The Commission would again emphasize that a finding of "special circumstances" only limits the situations where exemptions will be considered. Even if special circumstances are present, no exemption will be granted unless the safety, security, and other findings of Section 50.12(a)(1) can be made.

As noted above, several of the commenters recommended a general "special circumstances" standard, rather than a standard that is defined by specific

criteria. Although the Commission is mindful of the need to retain the flexibility to consider unanticipated circumstances in the exemptions area, the Commission also desires to establish a rigorous, predictable, and consistent exemption policy. The most effective way to accomplish these objectives is to establish definitive, albeit broad, standards. Consequently, the Commission is employing the specific situations of proposed Section 50.12(a)(2) as the criteria for the "special circumstances" standard in Section 50.12(a)(2) of the final rule. As discussed more fully below, the Commission has modified some of the provisions of proposed Section 50.12(a)(2) in response to the public comments. However, the final rule does retain the criterion in proposed Section 50.12(a)(2)(vii) to give the Commission some flexibility to deal with unanticipated circumstances. The Commission believes that the "special circumstances" criteria in the final rule does not simply add more requirements, but in fact, does add clarity to the exemptions process and provides additional guidance to licensees on when exemptions may be appropriate. In response to the suggestion by Yankee Atomic that the proposed rule is not intended to substantially alter the Commission' exemption policy, the Commission would agree that the final rule does rely substantially on existing staff practice in the exemptions area. However, the final rule is also an attempt to strengthen the Commission's exemption policy by establishing more defintive standards, and by providing for a systematic and formal analysis of exemption requests. Finally, the Commission would most emphatically disagree with the assertion made by the UCS that the special circumstances in proposed Section 50.12(a)(2) are "conditions so vaguely described or so unremarkable as to invite widespread abuse of the provision."

As stated in the Supplementary Information to the proposed rule, the courts have cited several broad rationales that are permissible for an agency to employ in granting exemptions. 50 Fed.Reg. 16507. For example, the D.C. Circuit in Wait Radio v. FCC noted that--

> The agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function. 418 F.2d 1153, 1157 (D.C. Cir. 1969).

However, the D.C. Circuit found that an exemption or waiver provision could legitimately take into account considerations of "hardship, equity, or more effective implementation of overall policy." Supra at 1159. Certainly, the Commission's attempt, in this rulemaking, to clarify its exemption standards and to establish more definitive criteria, is not an exercise of "unbridled discretion" as asserted by UCS. The criteria of the final rule are the types of considerations that would be consistent with those cited above in Wait Radio and other judicial decisions.

D. THE SPECIFIC CRITERIA IN PROPOSED §50.12(a)(2)

A number of commenters addressed the specific situations in proposed Section 50.12(a)(2). As noted above, these specific situations now form the basis for the "special circumstances" standard in Section 50.12(a)(2) of the final rule. On a general matter, Stone & Webster Engineering and GPU Nuclear recommended that, to the extent they are not already incorporated, the

equities cited in the Commission's Shoreham decision should be incorporated into proposed Section 50.12(a)(2). The equities cited in Shoreham were the stage of the facilities life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicants good faith effort to comply with the regulation, from which an exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved. Id.at 1156.

The Commission believes that most of these equities were already reflected in the specific situations set forth in proposed Section 50.12(a)(2)(i) through (vi), or could be considered under the broader category established in proposed Section 50.12(a)(2)(vii), and consequently would be considered under the "special circumstances" standard in Section 50.12(a)(2) of the final rule.

The law firm of LeBoeuf,Lamb,Leiby & MacRae, representing several utilities, requested that the Commission adopt Commissioner Asselstine's version of proposed Section 50.12(a)(2)(i). This version would recognize inconsistencies between the regulation from which an exemption was sought and "other Commission requirements," emphasis added, as a special circumstance, rather than the Commission's version which only recognizes inconsistencies "with other rules." Emphasis added. The commenter suggested that the Commission expand proposed Section 50.12(a)(2)(i) to include inconsistencies with "other rules and requirements." Yankee Atomic recommended that proposed Section 50.12(a)(2)(i) be revised to include inconsistencies with "other rules of the

Commission, with the staff's interpretation of other rules or requirements, or with other law." The rationale for this revision is that "... in many cases the Commission's rules are not detailed enough to cover all situations, and the staff is subsequently called upon to use a reasonable amount of guarded discretion in interpreting rules."

The Commission agrees that proposed Section 50.12(a)(2)(i) should be revised to recognize that exemptions from a regulation may be necessary because of conflicts with Commission requirements generally, and not only because of conflicts with Commission regulations. Therefore, the Commission has revised Section 50.12(a)(2)(i) in the final rule as follows--

> §50.12(a)(2)(i)--application of the regulation in the particular circumstances would be in conflict with other rules or requirements of the Commission.

However, as explained more fully below, the final rule only addresses exemptions from the regulations, and does not include situations where relief is sought from license conditions or amendments. The Commission believes that the above revision also accommodates the primary substance of the suggestion made by Yankee Atomic. However, the focus of Section 50.12(a)(2)(i) is on inconsistencies between the regulation from which an exemption is sought and other Commission rules and requirements, and not "other law" in general. Although the commenter did not provide any examples of potential inconsistencies with "other law", if such a special circumstance does occur,

the Commission would address it under Section 50.12(a)(2)(vi)of the final rule which provides for "any other material circumstance not considered when the regulation was adopted." In addition, the Commission does not believe it necessary to include, as suggested by Yankee Atomic, inconsistencies with "staff interpretations of ...rules or requirements" because these would seem to be an integral part of, and reflection of, the Commission's regulations and other requirements.

Proposed Section 50.12(a)(2)(ii) established a special circumstance where--

> application of the regulation...would not serve the underlying purpose of the rule, or is not necessary to achieve the underlying purpose of the rule.

Yankee Atomic suggested that the Commission revise this provision to include the concept of situations where application of the regulation would result in "a less effective implementation of overall policy." According to the commenter, this revision would capture "some of the language from WAIT Radio and would lessen the harshness of the criteria." The commenter further noted that this revision would involve a balancing based on whether overall policy is more or less effectively implemented. According to the commenter, without this change, proposed Section 50.12(a)(2)(ii) might result in denying an exemption if some insignificant portion of the underlying purpose would be served.

The Commission is somewhat unclear as to how this commenter viewed the relationship between the suggested "implementation of overall policy" and the substance of proposed Section 50.12(a)(2)(ii) which addresses the underlying purpose of a particular regulation. From one perspective, the purpose of a rule does serve to implement overall policy, and consequently, the existing text of this provision would already address the commenter's concern. From another perspective, if the commenter is referring to some broader policy, then the use of proposed Section 50.12(a)(2)(iv), which addresses situations where the exemption would result in an overall benefit to the public health and safety, would seem more appropriate. The Commission would also note that one of the objectives of the total exemption policy set forth in this final rule is to establish criteria that would allow more effective implementation of the overall policy of efficient and effective nuclear safety regulation. Although dependent on the particular facts involved, the Commission does not believe that Section 50.12(a)(2)(ii) would be implemented in a manner which would deny an exemption if only an insignificant portion of the underlying purpose would be served.

Proposed Section 50.12(a)(2)(iii) establishes a special circumstance when--

> alternative or compensatory means exist to achieve the underlying purpose of the regulation.

UCS asserted that this provision [3/] would "violate" the Commission's policy in 10 CFR 2.758(a) of the Commission's regulations which prohibit challenges to Commission rules. Consequently, the commenter asserts, "[e]ach exemption proceeding could be a forum for relitigation of the purpose of the rule and the acceptable means of achieving that purpose." This would waste agency resources and eliminate all consistency and reliability from the Commission's regulatory process. However, an industry commenter, Northeast Utilities, was supportive of this provision because it provides explicit recognition that generic regulations cannot consider all the relevant factors for a particular plant and that, in some cases, detailed plant requirements are inappropriate either because they would not, on a given plant, achieve the intended end result of the of the regulation, or because there are alternate and possibly more effective means for achieving the underlying purpose of the regulation.

After reviewing this provision of the proposed rule, the Commission now believes that the existence of alternative or compensatory measures for achieving the underlying purpose of a rule is more appropriately a consideration in making the "no undue risk" determination of Section 50.12(a)(1), rather than a "special circumstance." Originally, the specific

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3/ UCS consistently referred to the provisions of proposed Section 50.12(a)(2) as Section 50.12 (b). The Commission assumed that the commenter was referring to proposed Section 50.12(a)(2). 10 CFR 50.12(b) establishes a seperate exemption procedure to permit the carrying out of construction activities prior to the issuance of a construction permit. As noted in the proposed rule, the Section 50.12(b) procedures are not of concern here and are left undisturbed by this rulemaking. 50 Fed. Reg. 16507.

situations of Section 50.12(a)(2) were examples of either the no undue risk standard or the public interest standard in proposed Section 50.12(a)(1), and therefore it was appropriate to include "alternative or compensatory measures" as a special situation. With the change in focus in the final rule to "special circumstances", "alternative or compensatory measures" are no longer appropriate for consideration and the Commission has deleted this provision from Section 50.12(a)(2) of the final rule. Consequently, the Commission does not find it necessary to address the commenter's statement in regard to 10 CFR 2.758(a).

Proposed Section 50.12(a)(2)(iv) establishes a special circumstance when--

> the exemption would result in an overall benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption.

UCS stated that this provision, as well as proposed Section 50.12(a)(2)(ii) of Commissioner Asselstine's version, would allow an applicant or licensee to compensate for the decrease in safety caused by an exemption by increasing safety in some other part of a plant's design or operation. According to UCS, this would ignore the principle of "defense in depth." UCS characterized this principle by stating that "[e]ach of the Commission's safety regulations having a purpose in providing a reasonable assurance of safe operation of a nuclear power plant." According to the commenter, the Commission cannot license a plant based on some "overall" finding of reasonable assurance, but

must resolve the safety issues raised by noncompliance with each individual standard. UCS cited In the Matter of Vermont Yankee Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 3 AEC 520, 529 (1973) in support of the above arguments.

As noted earlier, the Commission believes that while it is true that compliance with all NRC regulations provides reasonable assurance of adequate protection of the public health and safety, the converse is not correct, that failure to comply with one regulation or another is an indication of the absence of adequate protection, at least in a situation where the Commission has reviewed the noncompliance and found that it does not pose an "undue risk" to the public health and safety. Furthermore, the Commission has never defined the concept of "defense-in-depth" to preclude the granting of an exemption from a regulation as long as the applicable exemption criteria are met. In fact, the Commission has recognized that its regulations may provide for the possibility of exemptions when an appropriately high level of safety is in fact achieved and the public interest is served. See, In the Matter of Consumers Power Company (Big Rock Point Nuclear Power Station), CLI-76-8, 3 NRC 598, 600 (1976). The Appeals Board decision cited by the commenter, Vermont Yankee, supra, concerned the correctness of a Licensing Board decision allowing continued plant operation pending the outcome of an operating license proceeding that had been reopened to consider one safety issue. In affirming the Licensing Board decision, the Appeals Board did state that "reactors may not be licensed unless they comply with all applicable standards," id. at 529, and that--

> "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. Id.

However, no exemption request was involved in this case, and the above statements of the Appeals Board were not made in the context of applying the exemption criteria embodied in the Commission's regulations. Rather, the issue in Vermont Yankee was whether the licensee had complied with a particular regulation. Furthermore, the Appeals Board, with a slight modification, upheld the Licensing Board's decision to allow continued operation. In summary, the Commission believes that the effect of an exemption on total facility safety is appropriate for consideration as a special circumstance.

Three comments addressed proposed Section 50.12(a)(2)(vii) which establishes a general category of special circumstance for--

> any other material circumstance not considered when the regulation was adopted. If such condition is relied on exclusively for satisfying paragraph (a)(2) of this section, the exemption shall not be granted until the Executive Director for Operations has consulted with the Commisssion.

Duke Power requested that some guidance be contained in the Supplementary Information to the final rule on the extent of the consultation process between the Executive Director for Operations (EDO) and the Commission. The consultation anticipated by this provision would consist of submitting the proposed staff action on an exemption request, which is based solely on this provision, to the Commission for determination of whether the particular fact situation constitutes a special circumstance within the meaning of this provision. If the Commission makes an affirmative finding on this issue, the staff will then determine if the other standards of Section 50.12(a) are met, and act accordingly on the exemption request.

Two other commenters, Baltimore Gas & Electric, and Yankee Atomic Electric Company, addressed the substance of this provision. Baltimore Gas & Electric requested that the provision be expanded to allow the introduction of any other material information which could support the exemption request and to include the evaluation of factors which had been considered when the regulation was adopted but may not have received the level of consideration necessary. To implement this suggestion, Baltimore Gas & Electric recommended the following wording--

> There is present any other material circumstance which clearly supports the request for exemption or which may not have been fully considered in the context of the requested exemption when the regulation was adopted.

In a similiar vein, Yankee Atomic recommended that this provision be revised to allow the consideration of material circumstances not carefully considered when the regulation was adopted or any other material circumstances which are substantially different from those which had been carefully considered in the rulemaking proceeding. According to this commenter, this revision would allow the Commission to consider the "novel proposal" rationale of Industrial Broadcasting Co.v. FCC, 437 F.2d 680 (D.C. Cir. 1970). Without such a revision, "a utility which presents a novel proposal might be denied an exemption on the grounds that the circumstance was somewhat although not fully considered." The commenter further stated that such a revision is particularly important to operators of nuclear power plants like Yankee Atomic, whose plants "have an overall good safety record, are of small size, and are remote from population centers." According to the commenter, it is these operators who are most likely to seek exemptions based on "novel proposals."

In response, the Commission does not deem it adviseable to include the consideration of whether a material circumstance was "fully" or "carefully" considered in the text of the final rule. Enough judgement and difficulty is already involved in determining whether the particular fact situation constitutes a "material circumstance not considered when the regulation was adopted," without trying to determine whether it was "fully" or "carefully" considered. However, in making a determination under Section 50.12(a)(2)(vi) of the final rule (redesignated from proposed §50.12(a)(2)vii), the Commission anticipates that it will of necessity have to consider the extent

to, and manner in which, the circumstances were considered in the rulemaking proceeding in order to determine whether this special circumstance is present. In addition, the Commission does not believe it necessary to include in this provision such considerations as "any other material circumstance" or "any other material circumstances which are substantially different from those which had been carefully considered in the rulemaking proceeding." Such considerations would seem to already be covered under either the other special circumstances in Section 50.12(a)(2) or under the criterion in §50.12(a)(2)(vi) of the final rule for "any other material circumstance not considered when the regulation was adopted." Finally, in response to the Yankee Atomic comment on "novel proposals," the Commission does not believe that the "special circumstances" criteria of Section 50.12(a)(2) would preclude consideration of such a proposal.

A number of industry commenters, LeBoeuf,Lamb,Leiby & MacRae, Baltimore Gas & Electric, Isham, Lincoln & Beale (representing Commonwealth Edison), and Yankee Atomic recommended that the special circumstances criteria include the consideration of undue hardship or excessive costs. Such a provision would be similiar to Section 50.12(a)(2)(iii) in Commissioner Asselstine's version which established a special circumstance whenever--

> compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similiarly situated.

These commenters recommended that, although financial hardships would be considered under the "public interest" standard of proposed Section 50.12(a)(1), it should also constitute a "special circumstance" under proposed Section 50.12(a)(2). This recommendation is based on the fact that undue hardship or excessive costs have traditionally formed the basis for exemptions granted by the Commission, by administrative agencies in general, and are clearly contemplated by the court decisions on the permissible scope of agency exemption criteria.

The Commission agrees that undue hardship or excessive costs would constitute an appropriate "special circumstance," particularly in light of the deletion of the "public interest" standard in proposed Section 50.12(a)(1). The final rule has been revised accordingly.

Because the "undue hardship or excessive costs" criterion would now cover the situations contemplated in proposed Section 50.12(a)(2)(v) on the treatment of the licensee or applicant in a manner substantially different than similiarly situated applicants or licensees, the Commission has deleted this provision from the final rule.

One commenter, Stone & Webster Engineering Corporation, recommended that the Commission adopt Section 50.12(a)(2)(iv) of Commissioner Asselstine's proposal, which establised a special circumstance whenever--

a compliance issue is raised late in the licensing review that

cannot be fully resolved in a timely fashion despite good faith efforts.

According to the commenter, "[t]his is a significant and not infrequent circumstance, e.g., a new rule, and should be incorporated in the proposed rule." Another commenter, LeBoeuf,Lamb,Leiby & MacRae, was critical of this provision in Commissioner Asselstine's version, because it provided only a very limited recognition of the need for schedular exemptions. According to this commenter, Commissioner Asselstine's Section 50.12(a)(2)(iv) is limited to a "compliance issues" "raised late in the licensing review," which the commenter characterized as "an undefined and ambiguous terms." Finally, the commenter noted that Commissioner Assesstine's finding would be conditioned upon "good faith efforts." The commenter did not feel that any of these limitations had any apparent relationship to the public health and safety, but "appear simply to be roadblocks to the timely issuance of operationg licenses." A third commenter, Isham, Lincoln & Beale, stated that Section 50.12(a)(2)(iv) of Commissioner Asselstine's version recognizes a real and substantial problem often faced by licensees. However, this commenter believed that the solution to the problem is to recognize that a compliance issue raised relatively late in the NRC license review process may result in undue hardship and excessive cost. The implications of this comment would seem to be that compliance issues raised late in the licensing review could be addressed under the special circumstance of "undue hardship or excessive cost."

The Commission does not see the need to include Section 50.12(a)(2)(iv) of Commissioner Asselstine's in the special circumstances criteria of the final rule. Proposed Section 50.12(a)(2)(vi) (redesignated as §50.12(a)(2)(v) in the final rule), which establishes a special circumstance for cases where the exemption would provide only temporary relief from the applicable regulation, adequately covers these situations. Alternatively, the Commission agrees with the commenter who suggested that such situations could also be covered by the special circumstance for undue hardship or excessive cost.

Two commenters, Bishop,Liberman,Cook,Purcell & Reynolds, and Northeast Utilities, addressed the possibility of including such factors as compliance with plant performance design objectives established in safety goals or in the integrated plant safety review concept as special circumstances. Specifically, Northeast Utilities recommended that the following text be included as Section 50.12(a)(2)(viii)--

> It is demonstrated to the satisfaction of the Commission through an integrated plant safety review that compliance with the regulation should not be required for the particular facility.

The commenter suggested that the Commission's Integrated Safety Assessment Program (ISAP) would support such a special circumstance. The commenter cited the Commission Paper on ISAP indicating that following the review of existing regulatory requirements at a particular plant, "the subsequent integrated

asssment process would likely cause some of the deferred NRC requirements to be modified or deleted on a plant-specific basis." U.S. Nuclear Regulatory Commission, "Integrated Safety Assessment Program," SECY-84-133 (March 23, 1984). The commenter implied that these modifications or deletions would be accomplished through the Commission's exemption process.

The commenter also noted that a similiar special circumstance could be established for the safety goal concept. Bishop, Liberman, Cook,Purcell & Reynolds elaborated on this idea by suggesting that a plant speicific exemption could be justified based on a quantitative assessment of overall power plant design and the potential risks to public health and safety. As an example, the commenter offered that an asessment of plant design may demonstrate that in a certain situation, regulatory compliance is unnecessary to satisfactorily protect public health and safety from undue risk. This conclusion could be based upon a showing that there would be no undue risk, because the risk of reactor core damage as a result of a particular noncompliance will not exceed the plant performance design objectives established in safety goals.

The Commission recognizes that implementation of a safety goal program, and the ISAP program, may demonstrate compliance with the "no undue risk" portion of the exemption equation. The Commission would also note that ISAP is a still at the pilot program stage, and that the Commission has not yet established the final safety goal implementation program. In regard to ISAP, the Commission believes that, at this stage of the process, it is more

appropriate to implement the results of the ISAP program within the specific framework of ISAP, rather than through the Commission's general exemptions policy. Any adjustments necessary to ISAP to reflect the revision of the Commission's exemption policy will have to be considered in the context of that program. In regard to the safety goal, the Commission has noted that the safety goals are a supplement to, but do not supplant, the regulations. Therefore, although the safety goals can assist in the review of exemption requests, they should not, in and of themselves constitute a special circumstance.

Two industry commenters, Northeast Utilities and Bishop.Liberman,Cook,Purcell & Reynolds, urged the Commission to include a provision in the specific situations of proposed Section 50.12(a)(2) for an exemption where generic regulations impose a backfit that is not justified on a plant-specific basis. The rationale for this proposal is that although a new regulation may be justified under the Commission's backfit procedures on a generic basis, there may be individual plants where the backfit standard is not met. These plants should be entitled to an exemption from the applicable regulation.

In order to regulate effectively, the Commission must be able to make generic determinations applicable to the industry as a whole, or to certain classes within the industry. When the commission does propose a generic backfit, it will evaluate whether a sufficient rationale exists under the applicable backfit standard, to justify imposition of the backfit on the entire industry, or on portions of the industry. If an adequate justification cannot

be made, either for the industry as a whole, or for certain classes within the industry, a backfit will not be imposed. However, within these limitations, the Commission must possess the discretion to include plants within the regulated class who may satisfy the backfit standard to a lesser degree than other plants within the class. Establishing the special circumstance recommended by the commenters would potentially require the Commission to do an individual cost/benefit analysis on all plants within a particular generic backfit category, thereby undercutting the benefits of generic regulation. The Commission does not believe that it is appropriate or adviseable to establish a special circumstance specifically directed at the backfit standard. This is not to say that an individual plant that does not fall within the class established by the Commission cannot qualify for an exemption under one of the other special circumstances. Information that demonstrates that an individual plant does not satisfy the standard for a particular backfit should also be presented to the Commission as a comment on the proposed generic backfit.

E. TEMPORARY NONCOMPLIANCES

Virtually all of the industry commenters objected to the Commission's intention to end the practice of granting temporary noncompliances for near term operating plants. As noted in the Supplementary Information to the proposed rule, for a typical power reactor under operating license review, the NRC staff normally would recognize that while the plant was ready for low

power operation, power ascension or even initial full power operation, the plant might not fully comply with each and every NRC regulation. In these circumstances, "noncompliances" were typically dealt with by license conditions requiring compliance before proceeding to a particular power level or by a particular time. The effect on safety of such "temporary noncompliances" was evaluated by the staff and discussed in the staff safety evaluation report. In situations where the noncompliance would be corrected in a relatively short time and did not prevent a finding of adequate safety, the staff would condition the operating license so that the requirements must be made at a later time or before a particular power level was reached. However, the staff did not expressly consider or grant an exemption under Section 50.12(a) for these temporary noncompliances. In the Supplementary Information to the proposed rule, the Commission noted its intent eliminate the granting of noncompliances without expressly granting an exemption under §50.12(a).

The industry comments on this proposal can best be summarized in the following excerpt from the Bishop,Liberman,Cook,Purcell & Reynolds comment letter--

> There is no particular language in the proposed rule, however, which would specifically mandate this change in practice. Moreover, as a practical matter, we do not believe the change is necessary or desireable. Where compliance with a regulation

for low power operation makes no technical sense, or presents no undue risk, an exemption request should not be necessary. A certain amount of flexibility should be assumed in the regulations, i.e., compliance should not be required for a level of operation for which the regulation has no effect or serves no purpose. The traditional license condition approach avoids unnecessary exemption paper work and prevents potential licensing delays which could result from non-compliances which are a relatively normal part of the evolution of the plant. Moreover, because the Staff has used the "no undue risk" in establishing acceptable license conditions, the license conditions provide the same level of public protection as would exemptions.

Duke Power offered its experience in the licensing of its Catawba 1 Unit to illustrate the potential problems of requiring all temporary noncompliances to be evaluated under the exemption criteria rather than being dealt with as license conditions. Duke Power asserted that the approach used in Catawba, of requiring a specific exemption from each regulatory provision for which compliance was lacking, did not make technical sense and delayed fuel load for approximately two weeks.

The industry commenters questioned why the Commission did not even mention that the practice of granting "temporary noncompliances" has explicit regulatory support in 10 CFR 50.57(b). This regulation provides that--

> [e]ach operating license will include appropriate provisions with respect to any uncompleted items of construction and such limitations and conditions as are required to assure that operation during the period of completion of such items will not endanger public health and safety.

The Atomic Industrial Forum asserted that nothing in the proposed rule modifies §50.57(b), and the AIF interprets the proposed rule as permitting the staff to proceed under §50.57(b) without the need to obtain a §50.12(a) exemption.

The Commission's rationale for ending the past practice of granting temporary noncompliances through license conditions is twofold - to ensure that all exemptions from the regulations are formally and systematically evaluated and documented, and to ensure that relief from the regulations is based on clear regulatory authority. Contrary to what has been suggested by the commenters, the Commission has not relied on 10 CFR 50.57(b) in issuing "noncompliances," and in fact, the regulatory authority for this practice had been unspecified. In contrast, the use of Section 50.12(a), in all cases where compliance with the regulations cannot be had, will provide clear regulatory authority for exemption relief. Although the literal wording of Section 50.57(b), read apart from the other provisions of Section 50.57, would seem to support the commenters' interpretation, the Commission has not used Section 50.57(b) in this manner, and the history of the provision and its relationship to the other parts of Section 50.57, would indicate that it cannot be used in the

manner suggested by the commenters. The predecessor to the current §50.57(b) was the provisional operating license provisions originally promulgated as 10 CFR 50.57(a) through (e), establishing the criteria and procedures for the issuance of a provisional operating license. 25 Fed.Reg. 8712, Sept. 9, 1960. The provisional operating license was established to allow an orderly and expeditious transition from a construction permit to an operating license in cases where--

> .the evidence would not support a finding of completion of construction, or
>
> .where it was desireable to obtain further experience before issuing the full operating license.

Specifically, the provisional operating license was used to allow fuel loading and low power testing to take place before the issuance of the full operating license. In order to ensure that the public health and safety was protected during the term of the provisional operating license, Section 50.57(c), the corresponding provision to Section 50.57(b) in the current rule, authorized the Commission to include in the provisional operating license--

> ...appropriate provisions with respect to any uncompleted items of construction or other matters covered by provisional findings.

These provisional findings, set forth in Section 50.57(a) addressed the following issues--

. construction of the facility has proceeded and there is reasonable assurance that the facility will be completed in conformity with the construction permit and the Commission's regulations

. reasonable assurance exists that activities authorized by the provisional operating license can be conducted without endangering public health and saftey and that such activities can be conducted in compliance with the regulations

. the applicant is technically and financially qualified

. proof of financial protection was furnished

. there is reasonable assurance that the facility will be ready for initial loading with nuclear fuel within 90 days from the date of issuance of the provisional operating license

In 1970, Section 50.57 was amended to eliminate the provisional operating license, to establish the standards for the issuance of a full term operating license currently in Section 50.57(a), to provide for the imposition of license conditions currently in Section 50.57(b). 35 Fed.Reg. 5317, March 31,

1970. In promulgating this rule, the Commission stated that the requirements for the issuance of a full operating license were "largely the same" as those which had been required for a provisional operating license. Because the findings were largely the same, the Commission did not believe that there was a need for a provisional operating license. Significantly, although utility commenters on the proposed rule had requested the Commission to state that the provisional operating license and full operating license requirements were the same, the Commission did not agree with the industry interpretation. One respect in which the standards are different is that for the issuance of a full operating license, Section 50.57(a) now requires that "construction of the facility has been substantially completed", rather than the provisional operating license finding that "construction of the facility has proceeded, and there is reasonable assurance that the facility will be completed." In promulgating the new rule, the Commission also retained the provision which authorized the Commission to include appropriate provisions in the operating license with respect to any uncompleted items of construction to assure that operation during the period of the completion of such items will not endanger public health and safety. The Commission was merely retaining a provision, similar to that in the provisional operating license procedures, which would allow the imposition of conditions on the full operating license for any uncompleted items of construction. However, all of the findings of Section 50.57(a) must have been made, including substantial completion of construction, before Section 50.57(b) would be applicable. The provisions of Section 50.57(b) must be read in conjunction with the provisions of Section 50.57(a). Finally, shortly after the promulgation of the current Section 50.57(a) and (b), the Commission promulgated the present version of Section

50.57(c) to allow for low power operation. 36 Fed. Reg. 886, May 14, 1971. The interpretation urged by the commenters, would also not be consistent with the promulgation of Section 50.57(c).

In order to to use an approach consistent with existing regulatory authority, and to ensure a documented and systematic consideration of exemption requests, the Commission is ending the staff practice of granting temporary noncompliances. The Commission believes that these objectives outweigh any additional administrative burden and delay associated with seeking exemption relief under Section 50.12(a). Noncompliance with the regulations in 10 CFR Part 50 must be addressed in context of the requirements of 10 CFR 50.12(a). No revision of the regulatory text has been made to implement this change because the Commission is merely ending a staff practice for which there was no specific authorization in the regulations. Finally, the Commission would note that it is not unsympathetic to the need for flexibility in applying its regulations at lower power levels. The Commission staff is currently evaluating a rulemaking that would provide for such flexibility.

F. RELATIONSHIP TO OTHER COMMISSION REGULATORY ACTIONS

Stone & Webster Engineering Corporation noted that a large number of Commission regulations are "criteria oriented without specifying a means to

accomplish the underlying intent of the regulation." The commenter requested that the Commission not interpret the exemption rule to require exemptions when a "...non-standard method is used as an alternative means of compliance other than that specified in guidance documents." On a related issue, Duke Power, and Isham, Lincoln & Beale, specifically addressed the issue of regulatory guidance. Both commenters criticized the staff practice of requiring a license applicant to request exemptions from NRC "requirements" contained in the Standard Review Plan, regulatory guides, or other guidance documents. Isham, Lincoln & Beale believed this to be an inappropriate and unnecessary use of the exemption requirements because the failure to meet these "requirements" often is a result of a change in NRC staff interpretation and not a change in the underlying regulation.

The Commission recognizes that some Commission regulations are broadly framed and susceptible of various methods of compliance. Compliance with the regulations may also be guided by the use of regulatory guides, branch technical positions, and the standard review plan. The Commission also recognizes that acceptable methods of compliance may change over time based on staff and licensee experience. If what Stone & Webster referred to as a "non-standard" alternative method of compliance is outside the scope of previous interpretations on acceptable methods of compliance, or the method currently acceptable to the staff, an exemption from the regulation will be necessary. This would apply to acceptable methods of compliance set out in Commission guidance documents. Under the existing regulatory framework, an applicant or licensee may demonstrate than an alternative method of

satisfying the regulation is acceptable. However, if the licensee or applicant cannot demonstrate compliance through the preferred or an acceptable alternative, an exemption from the regulation would be necessary.

Stone & Webster Engineering stated that the proposed rule only applies to 10 CFR Part 50 and also noted that an Appeals Board decision in the Shoreham proceeding held that an exemption request to 10 CFR Part 50 did not constitute an exemption request to 10 CFR Part 73. In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-800, 21 NRC 386 (February 21, 1985). This commenter recommended that the Commission consider the need for "similiar and consistent language throughout its regulations." In response, the Commission agrees that exemptions from the provisions of each part of the regulations must be evaluated and granted under the exemption provisions contained in that part. Therefore, a request for a Part 73 or Part 20 exemption would have to be evaluated under Section 73.5 or Section 20.501, respectively. The Commission has considered the need to revise other parts of its regulations to correspond to the criteria in Section 50.12(a). Because the overwhelming majority of exemption situations arise in the context of the 10 CFR Part 50 requirements, the Commission has determined that revisions to other parts of the regulations are not necessary at this time.

On a related point, the relationship between the general exemption criteria in Section 50.12(a) and other provisions in Part 50 that contain specific

exemption criteria or alternative methods of compliance, the Commission would emphasize that Section 50.12(a) is the exemption provision that applies generally to the provisions of 10 CFR Part 50. If a another regulation in Part 50 provides for specific exemption relief, or for alternative methods of compliance, the criteria of the specific regulation is the appropriate consideration. It is only in those cases where the specific exemption or alternative compliance criteria cannot be satisfied, will the application of the general criteria in Section 50.12(a) be appropriate. If the specific exemption criteria, or the alternative methods of compliance, can be satisfied, there is no need to also satisfy the criteria of §50.12(a). 4/

The AIF requested clarification on the relationship of the proposed rule to the Sholly amendment process, and to the "living schedule" concept. Public Service Gas & Electric also requested information relevant to the Sholly process. Georgia Power requested clarification on the relationship of the exemptions rule to requirements, which the commenter characterized as licensee "commitments", often made by a licensee to perform a particular activity, such as modification of facilities during a particular period or prior to a particular date.

4/ Note that the recent Appeals Board decision, In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-809, slip op.(June 17, 1985), reached an opposite conclusion. The Commission recognizes that the facts peculiar to that case may have influenced the Appeals Board decision, and the decision is merely noted here as an illustration of the need for clear guidance from the Commission on this issue.

The final rule applies solely to exemptions from the Commission's regulations. It does not apply to relief from license conditions or amendments, technical specifications, or other licensee "commitments." The "living schedule," although perhaps alleviating the necessity for some forms of exemption relief, involves the application of a license condition, and therefore,is not covered by the exemptions rule.

G. POLICY STATEMENT VERSUS RULE

GPU Nuclear suggested that the Commission, as an alternative to the proposed rule, may want to issue a policy statement that provides guidance on interpretation of the "public interest" standard. In issuing the proposed rule, the Commission did consider the use of a Policy Statement to clarify the exemption process. The Commission rejected this approach, believing that rulemaking would be the more appropriate approach for formalizing the substantive revisions to the exemption process which narrow and focus staff discretion in this area.

IV. THE FINAL RULE

§ 50.12(a)(1). Section 50.12(a)(1) of the final rule authorizes the Commission to grant an exemptions which--

are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.

As in the existing rule, an exemption must be "authorized by law." Apart from the very fact of granting the exemption relief itself, the granting of the exemption cannot be in violation of other applicable laws, such as the Atomic Energy Act, or the National Environmental Policy Act.

In a departure from the text of the existing rule, the final rule requires a finding that the exemption will not "present an undue risk to the public health and safety" and would be "consistent with the common defense and security." These standards provide an explicit recognition of traditional staff practice in evaluating the safety implications of a particular exemption. As noted above, it is anticipated that the evaluation of "no undue risk" will consider such factors as the type of plant operation contemplated (fuel loading, low power testing, power ascension, or full power operation), the length of time that the exemption would be in effect the existence of alternative means of compliance or compensatory measures, and other safety factors. The Commission believes that the "not endanger" language in the current rule was never intended to embody any special standards for exemptions that differed from the statutory standards that licensing must provide adequate protection to the health and safety of the public and be in accord with the common defense and security. The "no undue

risk" standard of the final rule is a refinement of the statutory standard that reflects current staff practice in the exemptions area.

As discussed earlier, the "public interest" standard of the proposed rule has been deleted.

§ 50.12(a)(2). Section 50.12(a)(2) of the final rule provides that the Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever--

(i) Application of the regulation in the particular circumstances would be in conflict with other rules or requirements of the Commission; or

(ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or

(iii) The exemption would result in an overall benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or

(iv) compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated;

(v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or

(vi) There is present any other material circumstance not considered when the regulation was adopted.

These conditions represent situations in which it would be reasonable to grant an exemption, provided that the general standards of Section 50.12(a)(1) are also met. The conditions were selected on the basis of exemption criteria that have been noted by the courts with approval (special circumstances, hardship, equity, more effective implementation of overall policy, circumstances substantially different from those considered in the rulemaking proceeding) and on the basis of examples from past Commission exemption practice where the circumstances underlying the exemption appeared to be relevant and appropriate for exemption relief. The Commission's objective in establishing the conditions of Section 50.12(a)(2) was to impose limits on the type of exemption requests that can be granted. The addition of Section 50.12(a)(2) is intended to reaffirm and strengthen the existing NRC policy and practice of evaluating and granting exemptions in a judicious and discriminating manner.

Section 50.12(a)(2)(i) would address those situations where application of a regulation in a particular circumstance would be in conflict with other rules or requirements the Commission. This provision is designed for those situations where an applicant or licensee would be in the anomalous position of satisfying two or more conflicting requirements.

Section 50.12(a)(2)(ii) would address those situations where application of the regulations in the particular circumstances is not necessary to achieve, or would not serve, the underlying purpose of the rule. This would include those situations considered in requests for exemptions under 10 CFR 2.758(b), where circumstances peculiar to that case, as opposed to any alleged generic inadequacy of the regulation, may result in the frustration of the the underlying purpose of the rule. For example, see, In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981); In the Matter of Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980); In the Matter of Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-79-9, 2 NRC 180 (1985). It must be understood here that the underlying purpose of the rule should be something more specific than achieving adequate safety protection. Otherwise all of the safety requirements in 10 CFR Part 50 become subject to open litigation, and the exemption process becomes open ended. Rather, the specific objective of the regulation must be ascertained from the rule itself or the underlying rulemaking proceeding (for example, the specific purpose of 10 CFR § 50.46 would be assuring a coolable core during and after postulated loss-of-coolant accidents).

Section 50.12(a)(2)(iii) addresses those situations where compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated. This is intended

to provide equitable treatment to applicants or licensees who, because of some unusual circumstance, are affected in a manner different than that of other similarly situated licensees or applicants. For example, see In the Matter of Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-79-9, 2 NRC 180 (1975).

Section 50.12(a)(2)(iv) would address situations where the exemption would result in an overall benefit to health and safety. This provision would focus on those circumstances where, on balance, the exemption would actually result in a net increase in overall safety or quality of plant operations.

Section 50.12(a)(2)(v) establishes a condition where the exemption would provide only temporary relief from the applicable regulation. This would cover the so-called "schedular" exemptions where the relief sought is limited to a specific amount of time or until a specific event occurs. The applicant's good faith efforts to comply with the required schedule would be one of the factors considered in determining whether this special cicumstance exists.

Section 50.12(a)(2)((vi) establishes a category of any other material circumstances not considered when the regulation was adopted. Although the Commission believes that the conditions in Section 50.12(a)(2)(i) through (vi) will cover most requests in which an exemption could reasonably be granted, Section 50.12(a)(2)(vi) recognizes that there may be circumstances, which could not have been foreseen in developing the conditions in Section

50.12(a)(2)(i) through (v), in which it would be equitable to provide relief from the regulations. In these cases, after documentation of the material circumstances not considered when the regulation was adopted and meeting the general criteria, including "no undue risk, in Section 50.12(a)(1), an exemption could issue. However, this provision would also require the Executive Director for Operations to consult with the Commission before the exemption could be granted.

The Commission notes that because the criteria in Section 50.12(a)(2) will now include consideration of hardships or unusual difficulties, as well as the level of safety, it is deleting the provision from existing Section 50.12(a) on additional requirements for exemptions from the fracture toughness requirements of 10 CFR Part 50, Appendices G and H. A corresponding deletion has been made to 10 CFR 50.60.(b).

Finally, the Commission emphasizes that relief from the regulations in 10 CFR Part 50 must be granted through application of the exemption procedures established in the regulations, rather than through the prior practice of granting "temporary noncompliances" for near term operating licenses by issuing license conditions.

FINDING OF NO SIGNIFICANT ENVIRONMENTAL IMPACT

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting

the quality of the human environment. Therefore the Commission has determined that it will not prepare an environmental impact statement for this action. The final rule modifies the criteria and procedures for the consideration of exemption requests under 10 CFR Part 50. The adoption of such criteria and procedures does not have an environmental impact in and of itself. The potential environmental impact of a specific exemption will be evaluated, as appropriate, in the context of the specific request for an exemption. The environmental assessment on which this finding is based has been incorporated into the regulatory analysis for this rulemaking. The availability of the regulatory analysis/environmental assessment is noted under Regulatory Analysis, infra.

PAPERWORK REDUCTION ACT

This final rule does not contain a new or amended information collection requirement subject to Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0011.

REGULATORY ANALYSIS

The Commission has prepared a regulatory analysis on this final rule. The analysis examines the costs and benefits of the alternatives, as well as the environmental assessment, considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, 1717 H Street NW, Washington, DC. Single copies of the analysis may be obtained from: F.X.

Cameron, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D. C. 20555, Telephone: 301-492-8689.

REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact upon a substantial number of small entities. The final rule primarily affects commercial power reactor licensees and license applicants, none of whom constitute a "small entity."

LIST OF SUBJECTS IN 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Part 50.

PART 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1246 as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10,92 Stat. 2952 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91, and 50.92 also issued under Pub. L 97-415 Stat. 2071, 2073 (42 U.S.C. 2133, 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152), Section 50.80-50.81 also issued under sec. 184,68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.100-50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10(a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10(b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 50.12, paragraph (a) is revised to read as follows:

§ 50.12 Specific Exemptions

(a) The Commission may, upon application by any interested person or upon its own initiative grant exemptions from the requirements of the regulations of this part, which --

(1) Are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.

(2) The Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever--

(i) Application of the regulation in the particular circumstances would be in conflict with other rules or requirements of the Commission; or

(ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or

(iii) compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated;

(iv) The exemption would result in an overall benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or

(v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or

(vi) There is present any other material circumstance not considered when the regulation was adopted. If such condition is relied on exclusively for satisfying paragraph (a)(2) of this section, the exemption shall not be granted until the Executive Director for Operations has consulted with the Commission.

3. In section 50.60, paragraph (b) is revised to read as follows:

§ 50.60 Acceptance criteria for fracture prevention measures for lightwater nuclear power reactors for normal operation.

* * * * *

(b) Proposed alternatives to the described requirements in Appendices G and H of this part or portions thereof may be used when an exemption is granted by the Commission under § 50.12.

Dated at Washington, D. C.
this _____ day of _____, 1985.

NUCLEAR REGULATORY COMMISSION.

_____
Samuel J. Chilk
Secretary of the Commission