U.S. NUCLEAR REGULATORY COMMISSION
Office of Inspector and Auditor

Date of transcription January 10, 1984

Report of Interview

Ms. Billie Pirner Garde, Director, Citizens Clinic, Government Accountability Project (GAP), Institute for Policy Studies, was interviewed concerning allegations about Catawaba Nuclear Power Station (CNPS), Units 1 and 2, made by GAP in their September 14, 1983, letter to the Commission. During the interview, Garde provided the following information:

Garde possessed a copy of testimony taken during recent hearings before the Atomic Safety and Licensing Board Panel (ASLBP) in the matter of Duke Power Company (DPC) and CNPS, Units 1 and 2 and had reviewed the testimony of NRC Region II Resident Inspectors and DPC welding inspectors at CNPS. During the hearings, matters presented in the GAP letters to the Commission on April 21 and September 14, 1983, were discussed and testimony of both NRC and DPC employees regarding these issues was recorded. Among these testifying about welding inspector concerns at CNPS were the welding inspectors who presented their concerns to NRC Resident Inspectors G. F. Maxwell and P. K. Van Doorn. Garde stated that testimony taken on December 2, 5, and 6, 1983, pertained to the allegations of NRC misconduct which were included in GAP letters to the Commission. Garde suggested that to simplify the OIA investigation, the ASLBP testimony considered pertinent to the allegations be incorporated as part of the OIA Report of Investigation. OIA interviews of the various individuals would elaborate on the testimony already given before the ASLBP.

Garde then summarized GAP concerns about CNPS which she stated were documented in a September 18, 1983, letter to the Commission. Essentially, in the letter GAP alleged that NRC Region II, in the persons of Maxwell, Van Doorn, the Regional Administrator James O'Reilly, and others, were aware of allegations (1) of violations of 10 CFR; (2) undermining of the quality assurance program at CNPS by Duke Power Company; and (3) harassment and intimidation of CNPS quality control inspectors by Duke Power Company management. However, NRC did not take appropriate corrective action on these complaints; instead, NRC informed DPC management of the allegations and allowed DPC to address the problems in their own way. GAP alleged that by doing this, Region II did not fulfill its regulatory responsibilities in that many of the complaints received by Region II about CNPS required an NRC investigation or inspection to ensure appropriate corrective action was taken. Garde explained that the GAP letter also alleged that Region II resident inspectors violated the confidentiality of DPC welding inspectors who brought problems to the attention of NRC. The breach of confidentiality occurred because the NRC resident inspectors allegedly identified the welding inspectors to DPC management.

Although not a matter for OIA investigation, Garde also questioned the enforcement policy of Region II Administrator, O'Reilly. Garde stated that Region II enforcement actions were consistently at a lower level than those of other NRC Regions for similar violations. Garde alleged the reason for this

Investigation on January 5, 1984 10 a.m.-12:15 p.m. at Bethesda, MD File # 83-52

by George A. Mulley, Jr. GAM Date dictated January 10, 1984

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was to enable Region II to resolve all problems at region level without interference from NRC Headquarters. Garde questioned the rationale provided by Region II for this enforcement policy, i.e. since the deficiencies were identified by licensee employees (welding inspectors) then elevated enforcement action was not required by regulations. Garde contended that the welding inspectors forced the issue by going to the NRC to report their concerns thereby forcing DPC to acknowledge the problems. Garde did not think DPC deserved the credit for exposing these deficiencies.

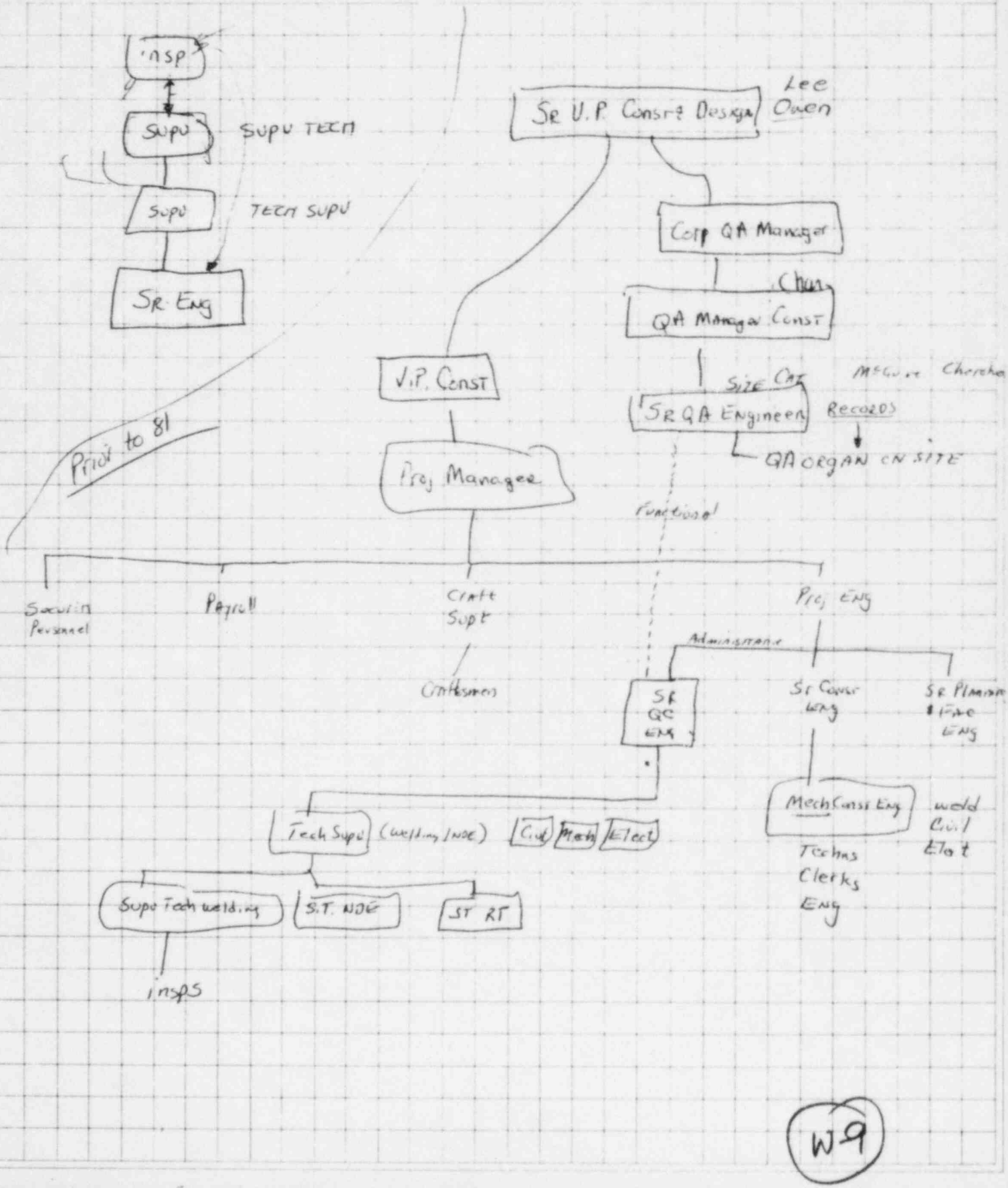
At the conclusion of the interview, Garde stated she realized the OIA investigation already had been ongoing for some time; however, GAP was not pressing for a quick resolution to their concerns regarding CNPS. GAP considered it more important that the problems at CNPS receive a thorough investigation by OIA.

Dev./Station _____ Unit _____ File No. _____

Subject _____

By _____ Date _____

Sheet No. ___ of _____ Problem No. _____ Checked By _____ Date _____



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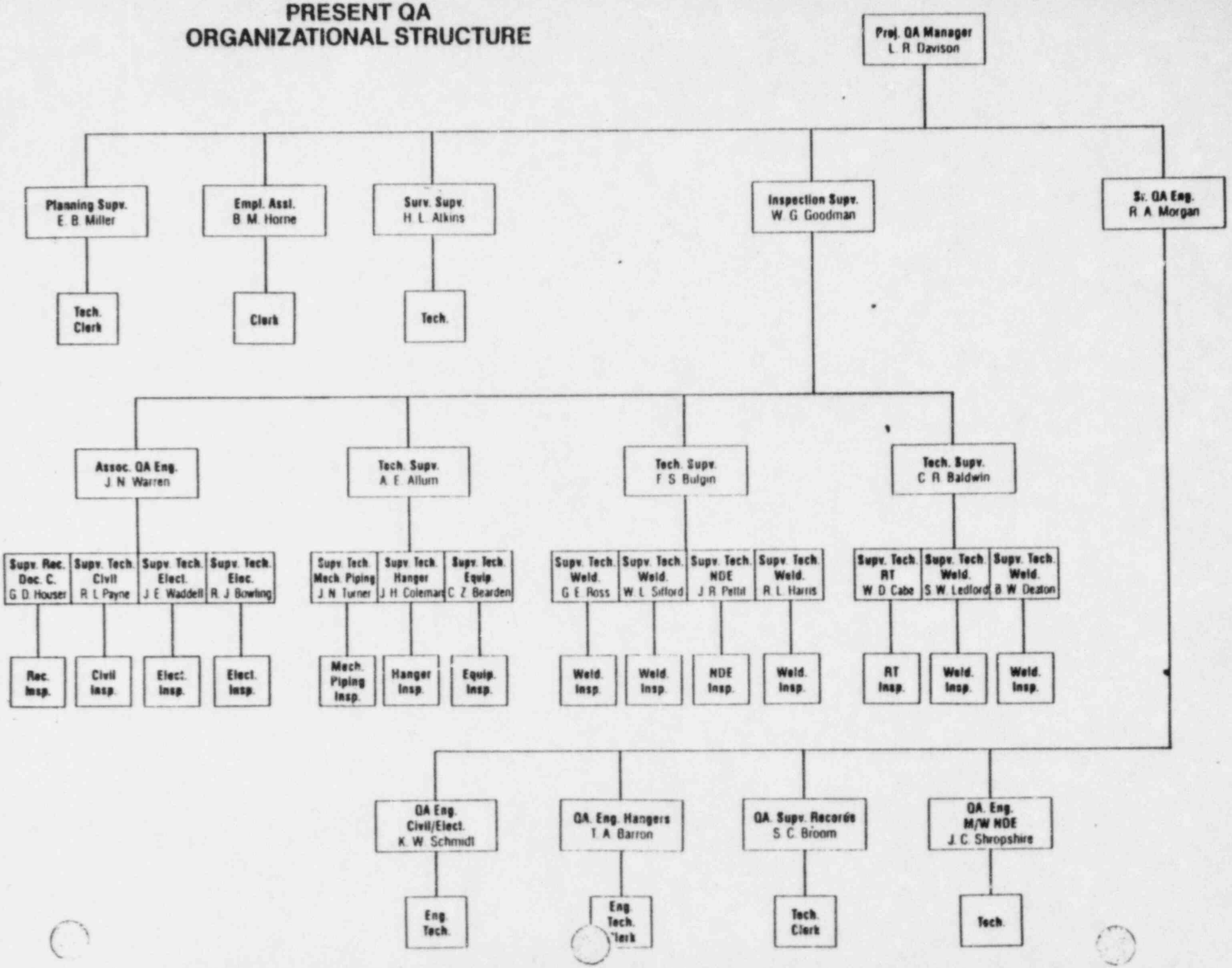
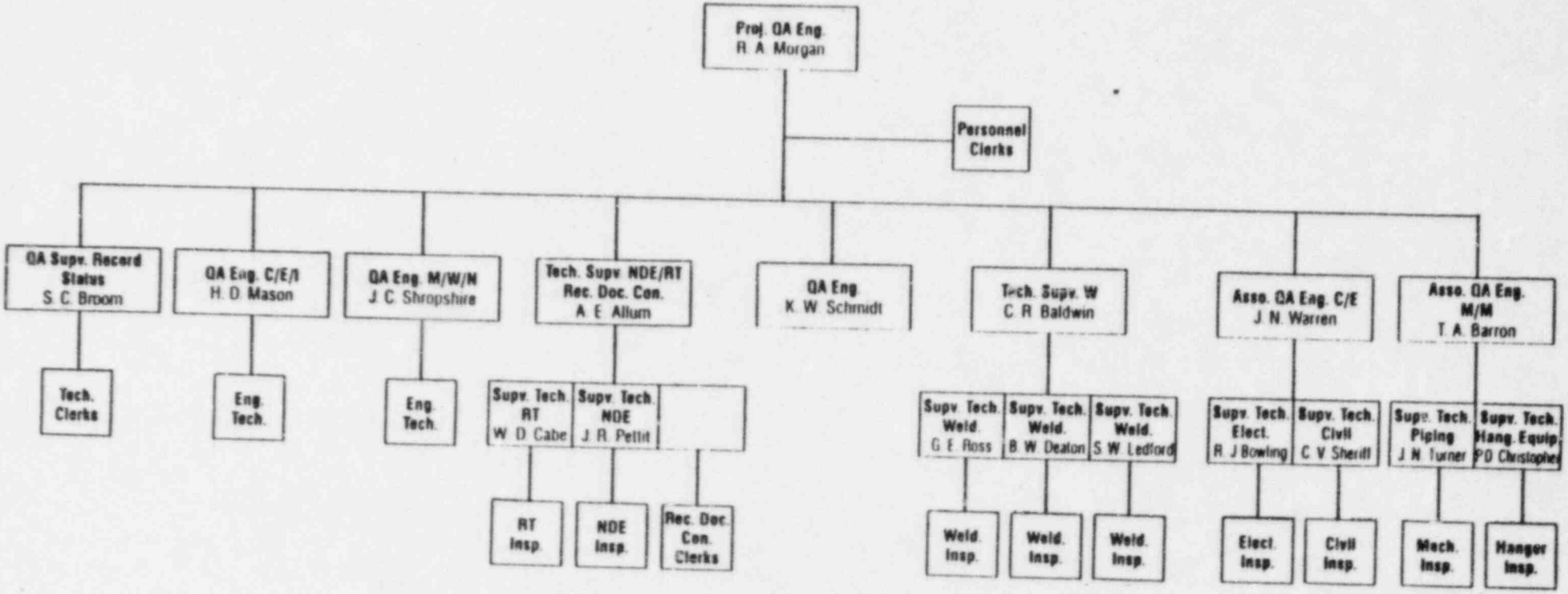
PRESENT QA ORGANIZATIONAL STRUCTURE



ATTACHMENT 2

ORGANIZATIONAL STRUCTURE — DECEMBER '81



Excerpt

Duke Power Company's Response to GAP's
September 27, 1984 Enforcement Action Request

I. Introduction

On September 27, 1984, the Government Accountability Project ("GAP") submitted a letter to the NRC's Office of Inspection and Enforcement requesting the issuance of a $250,000 civil penalty against Duke Power Company ("Duke") for alleged "deliberate and persistent harassment of quality control (QC) inspectors" at Duke's Catawba Nuclear Station (Petition at 1). As will be demonstrated below, Duke submits that the requested penalty is unwarranted.

The basic thesis of GAP's petition is that harassment (such as alleged at Catawba) affects the willingness of workers to come forward to the NRC with safety concerns and thus the requested relief is necessary to send a message not only to Duke, but to the industry at large (e.g., Petition at 2). The lengthy record already compiled before the Catawba Licensing Board, and the Board's conclusions based upon that evidence, contradict this thesis, however. In the case of the welding inspectors, the Licensing Board found that they did not hesitate to express all of their concerns to Duke and to the NRC. See 19 NRC at 1452-53, 1531-32, 1508-11. In the case of the craftsmen interviewed during the "foreman overide" inspection, a review of the 300 some affidavits in evidence demonstrates that these workers stated all of their concerns as well. See App. Ex. 118; 20 NRC at 1492-93, 1506-07. Indeed, the Board's questioning of those craftsmen whom

above in PDR # 85042
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Withheld Notations
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Appendix X-1A att. A

the intervenors (assisted by GAP) called to testify demonstrates that these workers did not raise concerns earlier with either Duke, the NRC, or the Licensing Board simply because they did not view the matters to which they testified as anything significant that would make the plant unsafe. See, e.g., Tr. 14146-47, 14189-91 (10/12/84); see also 19 NRC 1541-43 (access of Mr. Hoopingarner, a craft employee, to NRC). Thus there is no basis for the thesis underlying GAP's proposed civil penalty request, i.e., that a "climate of fear" has prevented Catawba workers from bringing forward concerns. See also 20 NRC at 1506-07.

Duke notes that all of the information upon which GAP's present enforcement request is based has previously been evaluated by the NRC -- either the Office of Investigations ("OI"), the Office of Inspection and Enforcement ("I&E"), and/or the Atomic Safety and Licensing Board ("Licensing Board") in the Catawba licensing proceeding.[1] This fact is not immediately obvious from GAP's petition, which refers to numerous incidents and allegations from the evidentiary record of the Catawba licensing proceeding without any citation. When these citations

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1/ See July 11, 1984 OI Report, entitled "Duke Power Company: Catawba Nuclear Station, Harassment and Intimidation," Case No. 2-83-038; July 6, 1984 I&E Director's Decision, Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), DD-84-16, 20 NRC 161 (1984)(issued in response to a September 1983 GAP petition on these same issues); June 22, 1984 Licensing Board Partial Initial Decision ("PID"), Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-24, 19 NRC 1418 (1984); November 27, 1984 Licensing Board PID, Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-52, 20 NRC 1484 (1984).

are supplied and the record is examined, it is immediately obvious that GAP has misrepresented many of the Board's findings and taken them significantly out of context. Additionally, four separate Duke task forces and at least eleven NRC I&E inspection reports investigated and evaluated Quality Assurance at Catawba. The results of these investigations were all evaluated by the Licensing Board.[2]

To assist I&E in addressing the assertions contained in GAP's petition, Part II of this response provides, wherever possible, record citations for the specific allegations made in the petition. A review of this record evidence provides a more accurate characterization of each incident, places each incident in its proper perspective, and is helpful in evaluating the significance of each incident. In Part III of this response, Duke presents a legal analysis explaining why the civil penalty requested by GAP would be improper.

2/ See App. Ex. 10, McMeekin, Att. 4 (Duke's Task Force I Report); App. Ex. 11, Cobb, Att. 4 & 5 (Duke's Technical Task Force Report); App. Ex. 12, Alexander, Att. 3 (Duke's Nontechnical Task Force Report); App. Ex. 116 (Duke's "Foreman Override" Investigation Report); Staff Exh. 3 (Insp. Report 80-12); Staff Ex. 4 (Insp. Report 79-21); Staff Ex. 8 (Insp. Report 82-21, 82-19); Staff Ex. 10A (Insp. Report 79-18); Staff Ex. 10B (Insp. Report 81-08); Staff Ex. 22 (Insp. Report. 83-53, 83-40); Staff Ex. 26 (Insp. Report 84-03); Staff Ex. 30 (Insp. Report 84-07, 84-06); Staff Ex. 31 (Insp. Report 84-31, 84-17); Staff Ex. 32 (Insp. Report 84-73, 84-32); Staff Ex. 33 (Insp. Report 84-88, 84-39).

II. Factual Matters

CAP's attempt to demonstrate that Duke Power Company undertook a deliberate and widespread "pattern of harassment, intimidation and discrimination" (Petition at 5) against certain of its employees seriously misrepresents the evidence heard in the Catawba licensing proceeding. As CAP correctly notes (Petition at 1) the Licensing Board did find that some QC welding inspectors "were subjected to harassment by craft workers and craft foremen for doing their job." June 22, 1984 PID, 19 NRC 1418, 1531. The Board went on, however, to place this problem in its proper perspective, stating that: "the dimensions of the harassment problem . . . should be viewed in the context of the duration and magnitude of the Catawba project -- some nine years of construction involving thousands of employees. In that perspective, the number of significant harassment incidents is relatively small." Id. Given all of the circumstances, the Board concluded, correctly, that "harassment was not a widespread phenomenon at Catawba." Id. at 1532; see also id. at 1439-40.

The Licensing Board concluded that in the few incidents where it found harassment had occurred, faulty conditions did not go uncorrected, and measures had been taken by Duke to improve working relations and reduce harassment. 19 NRC at 1530-31; see also Apps. Exh. 12, Att. 3, at 6-7, corrected at Tr. 3049, Alexander (10/13/83); Apps. Exh. 2, Grier, p. 54; Apps. Exh. 14, Davison, p. 35; Tr. 3139, 3541, 3597, Alexander (10/14 & 18/83);

Apps. Exh. 24, Dick, pp. 7-9, 12-13; Tr. 5381, 5616-17, Dick (11/01 & 02/83). The Board further concluded that these measures were generally appropriate: "[i]n most cases, the Applicants acted in a reasoned manner to discourage repetition." 19 NRC at 1532. While the Board did find that it would not have been unreasonable for Duke to have taken more "severe" corrective action, and that the company might have publicized their corrective actions more widely on the site, the Board concluded that clarification of Duke's harassment policy constituted an adequate remedy. Id.

With respect to GAP's assertion that there must now be a "severe" penalty issued against Duke to ensure that harassment does not recur (Petition at 3), Duke submits that the corrective measures imposed by the Board in the Catawba proceeding are both adequate and appropriate to assure such a result.[3] While GAP is free to disagree with the Board's findings on the harassment and intimidation issue, this does not impugn the validity of the

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3/ The corrective action required by the Licensing Board's PID was that Duke revise its written harassment policy (19 NRC at 1532). The only other corrective action required by the Board (19 NRC at 1585) was that Duke upgrade its welding filler material control procedure (19 NRC at 1474), confirm to the Staff investigation of socket weld gaps (19 NRC at 1496), and modify its M-4 inspection procedures if necessary (19 NRC at 1527). This corrective action is now complete and has been reviewed and approved by the NRC Staff. See Inspection Report 84-82, 84-36 and Inspection Report 84-102, 84-47. Duke's response to the harassment concerns included implementation of a harassment recourse procedure, and improving lines of communication, which produced positive results. See 19 NRC at 1530-31.

Board's finding, which was based upon approximately fifty days of hearings on the intervenors' quality assurance contention. During these hearings fifteen QA welding inspectors testified and were cross-examined at length by counsel for intervenors; additional inspectors submitted pre-filed testimony.

On pp. 3-4 of its petition, GAP lists seven alleged "actions taken by [Duke] management to negatively influence the reporting of Nonconforming Item Reports (NCI) by QC inspectors." The Licensing Board's discussion of these incidents[4] is summarized below. It should be noted that GAP has failed to provide any evidence that these incidents (some of which did not involve management at all) reflect management attempts to limit the writing of NCIs. (The numbers refer to those in GAP's petition.)

(1) The Board's findings on several incidents wherein inspectors interpreted instructions to mean "ease off" on inspections are set forth in the June 22, 1984 PID, 19 NRC at 1511-13. The Board concluded that these allegations were symptomatic of "problems with procedures and communication" because the inspectors felt they had to follow a procedure to the letter, while management felt that the inspectors should be accepting reasonable tolerances and using procedures other than

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4/ Since GAP provides no citations to the record for any of these allegations and couches its assertions in broad terms, it is difficult to pinpoint with absolute certainty the exact incidents to which GAP is referring. Duke has matched each of the alleged "actions" with what appears to be the proper referent in the Board's June 22, 1984 PID.

II. Harassment and intimidation at the Catawba nuclear power plant violates 10 C.F.R. 50.7 and §210 of the Employee Protection Act.

The evidence is clear that Duke, in fact, did violate the above-named rules and regulations. Further, that the violations began in the mid-1970's and continued up to and including the time period of the ASLB hearings. This harassment included a range of actions taken by management to negatively influence the reporting of Nonconforming Item Reports (NCI) by QC inspectors. Some of these actions are listed below.

1. Workers being told or ordered to slack off on their inspections or there would be retaliation;

NCIs. The Board also found "considerable evidence" that the inspectors tended to impose requirements on craft beyond those set forth in the procedures. The Board ruled that there was no "attempt by management to accept unsafe work"; and concluded that the confusion regarding procedures had been alleviated by changes made in these procedures. Id. at 1513.

(2) This allegation apparently refers to the Board's finding of discrimination against welding inspector supervisor Beau Ross in his internal performance evaluations. 19 NRC at 1513-1520. The Board concluded (based in part upon Mr. Ross' own testimony) that Mr. Ross' performance of his work was not negatively affected and that "the inspection process was not compromised." Id. at 1519.[5]

(3) A Catawba ironworker whose fit-up of containment plates had been repeatedly rejected by QC inspector Deaton pointed a rifle at Deaton from a passing car while both were on the way home from work. The ironworker was allowed to resign the next day rather than being fired because Duke was uncertain of its

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5/ The Board's finding (19 NRC at 1518), based solely on a memorandum to file written by Mr. Grier after a meeting with Mr. Ross (PA Exh. 33), that Duke's Corporate QA Manager George Grier "attempt[ed] to influence [Ross'] future testimony in this proceeding," is directly contrary to the record evidence. Not only did Mr. Grier deny any improper intent to influence testimony (Tr. 3833-85 (10/19/83); 4206-07 (10/20/83)), but Mr. Ross himself testified that Mr. Grier had made no attempt whatsoever to influence his testimony. Tr. 7049-50 (11/11/83). Indeed, Mr. Ross stated that he felt that his meeting with Mr. Grier was helpful. Tr. 6798-99 (11/10/83). Duke has asked the Atomic Safety and Licensing Appeal Board to reverse this finding.

2. Filing of bad performance ratings and reports against inspectors who found problems with procedures and hardware;

3. An inspector who was threatened with a rifle for rejecting work as unsafe;

legal position in an offsite incident. See 19 NRC at 1525-26 for the Board's discussion of this incident. The Board found that Duke "took a reasonable approach" which allowed the problem to be resolved quickly. It went on to note that it had no doubt about the company's "authority to discipline employees for offsite acts of harassment." Id. at 1526.

(4) The Jackson-McKenzie incident, in which pipefitter supervisor McKenzie threatened to strike QC inspector Jackson, is described in detail at 19 NRC at 1443, 1522-25. While the Board ruled that this incident did constitute harassment, the testimony also indicated that neither individual was entirely blameless. Id. at 1523. The Board also found that the corrective actions taken by Duke "were much more forceful and supportive of inspectors than the general perception on the job," suggesting that the reprimand to McKenzie's crew and the warning to McKenzie should have been communicated to all of the welding inspectors. Id. at 1525.

(5) This incident apparently refers to QC inspector Cauthen, although this is not entirely clear. The Board found that Cauthen was harassed by other welding inspectors, whose prior inspections had approved welds that Cauthen found to be substandard, and who did not like another inspector criticizing their work. See 19 NRC at 1526-27. The Board further noted that "craftsmen were not involved and there is no suggestion of construction scheduling pressures." Id. at 1526. Cauthen

4. Threats to "knock an inspector's eyes out."

5. An inspector being threatened with his job to follow NRC procedures in his inspec

testified that the resentment of some fellow inspectors did not make him "stop looking hard" for defects. Id.

(6) The incident in which ironworker foreman Mullinax threatened to "whip" QC inspector Harris or "knock his teeth out" if Harris did not "leave his men alone" is discussed at 19 NRC at 1527-28. This disagreement was referred by each individual to his supervisor, and the parties' relationship improved in a subsequent meeting. Id. at 1527. The Job Superintendent at Catawba also orally reprimanded Mullinax and cautioned him against any repetition. Harris had no continuing concerns and testified that his inspections were not affected. The Board found that Duke's corrective measures "were in the right direction," but should have been communicated to the welding inspectors. Id. at 1528.

(7) The Board's findings on the issue of alleged retaliation against inspectors for going to the NRC are set forth at 19 NRC at 1508-11. It concluded that while Duke "felt uncomfortable with complaints being made directly to the NRC" and urged employees to first take their problems to Duke management,[6] "we find no attempt to punish inspectors for going directly to the NRC." Id. at 1511. The testimony "reflected an understanding that employees could contact NRC without retribution" -- and some inspectors contacted the NRC frequently. Id. Thus, contrary to

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6/ Such position is consistent with the NRC notice (Form 3). App. Ex. 37, Att. E; see 19 NRC at 1508-11.

6. Another inspector was threatene
"his teeth knocked out" if he
NCI's;

7. Some employees and welding ins
for taking their concerns to t

GAP's allegation, there was ment of inspectors for contacting the NRC.

The allegation of Mr. Ho , a former Catawba employ who testified for intervenor Alliance, that he was tol not to talk to the NRC is di 19 NRC at 1541-43. In sum, the Board found that Ho was improperly instructed that he should not approach pector, that this directiv was withdrawn at least twice y thereafter, that the erroneous instruction was "a occurrence, not part of a pattern of restricting access ." and that Mr. Hoopingarner was clearly not om contacting the NRC. Id. at 1542. Indeed, he "ven nd any reasonable standard" in raising concerns RC during working hours. Id. at 1548. The Board did n t Hoopingarner was harassed.

On pp. 4-5 of its petitio ten additional incidents (#8-17) involving D s' alleged "intimidation about their freedom to bring t ns to the NRC under threat of some type of retalia he company." The Board's findings on these alle summarized below. GAP has failed to demonstrate how e incidents are related to access to the NRC.

(8) It is not clear wheth gation refers to the welding inspectors or the craf vent, the Licensing Board fully discussed access t both craft and QC inspectors, as detailed in (7).

8. A number of workers felt that they w by management for bringing their concern

(9) The meeting between QC welding inspectors and Duke Executive Vice President Construction and Engineering, Warren H. Owen, is discussed at 19 NRC at 1510-11. While one inspector testified that Mr. Owen's words suggested that he should not go to the NRC, other inspectors present at the meeting rejected this interpretation. The Board itself also listened to a tape of Mr. Owen's speech and found that "Mr. Owen's talk did not come across as threatening." Id. at 1510.

(10) This allegation apparently refers to an incident involving inspector Burr and his supervisor Mr. Ledford, which is discussed at 19 NRC at 1511-12. The Board found that each individual had misinterpreted the other, that Ledford had not intended to threaten Burr about future promotions, and that Ledford did not exert pressure on Burr "to let procedural violations go undocumented or uncorrected." Id. at 1512. See (1), above. Burr continued to do his job. 19 NRC at 1511; Tr. 5930-31, 5933, 5937, Burr (11/3/83); App. Ex. 29, Burr, p. 4.

(11) This allegation apparently refers to inspector Beau Ross' conversation with George Grier, discussed at 19 NRC at 1518-19. Duke disputes the Board's finding that "a reasonable person would interpret [Grier's] comments as an attempt to influence future testimony in this proceeding." Id. at 1518. See (2), above, and footnote 5.

(12) This allegation apparently refers to an incident involving inspector Bryant and a welder, discussed at 19 NRC at

9. A meeting at which QC inspectors were warned by top-level executives not to take their concerns to NRC at a meeting between the Executive Vice and welding QC inspectors;

10. Some inspectors were threatened, being told tha they did not "ease off" in their inspections,"th would not advance in employment;

11. One inspector who was going to testify at a hearin intimidated by a corporate official concerning his testimony at that hearing or future hearings;

12. An employee threatened to push a welding inspector off a scaffold for doing an inspection of his work;

1528-29. The situation was amicably resolved and the welder apologized to Mr. Bryant. Id. at 1528.

(13) See (2), above, relating to welding inspector supervisor Beau Ross (see especially 19 NRC at 1517-18). See also (5), above, relating to welding inspector Cauthen (see especially 19 NRC at 1526).

(14) This allegation apparently refers to inspector Cauthen. See (5), above.

(15) The vagueness of this allegation makes it difficult to tie to the PID. See 19 NRC at 1511-13. See also 19 NRC at 1505-08, wherein the Board discussed the welding inspectors' suspicions of Mr. Davison. The Board found "no substantial evidence that Mr. Davison actually did retaliate against welding inspectors for expressing their concerns." Id. at 1507-08.

(16) See (5), above.[7]

In response to the welding inspectors' concerns, Duke promptly responded by the creation of three separate task forces. See 19 NRC at 1434-37. Contrary to GAP's assertions (Petition at 5), the Licensing Board found that expression of the welding inspectors' concerns indeed were triggered by the inspectors' pay reclassification. See 19 NRC at 1446-47, 1449-50. In fact,

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7/ GAP asserts (Petition at 5) that the above facts fit the Catawba Licensing Board's definition of harassment. The Catawba Licensing Board concluded otherwise: only four incidents were identified as constituting harassment. See 19 NRC at 1443, 1522-25 (Jackson-McKenzie), 1443, 1525-26 (Deaton), 1526-27 (Cauthen), 1443-44, 1527-28 (Harris-Mullinax).

13. Other examples of inspectors were threatened with transfer if they continued to conduct proper inspections;

14. Inspectors were repeatedly harassed by other employees after they brought their concerns to some of their supervisors;

15. Inspectors were repeatedly warned by management that they were over-inspecting;

16. A number of inspectors were threatened with their jobs for conducting proper inspections; and

17. Inspectors were repeatedly harassed and hassled for doing their jobs.

during the course of the OI investigation, some of the inspectors acknowledged that pay was the root cause of the welding inspectors' concerns. See OI Report #2-83-038, Summary at p. 2.

GAP's assertion (Petition at 5) that harassment of an entire crew of inspectors was "condoned" by Duke management and "promulgated" by the Catawba QA Manager for five years is simply unsupported by the record in the Catawba proceeding. See 19 NRC at 1505-08 (Davison's relationship with inspectors Rockholt and Bryant); 1511-13 (Cauthen); 1520-32 (discussion of harassment incidents). As noted above, the Board did find discrimination against inspector supervisor Ross in his Duke performance evaluations, but this did not adversely affect the work done by Mr. Ross or his crew, let alone the numerous other aspects of the Catawba QA program unrelated to Mr. Ross. See 19 NRC at 1519-20.

In an attempt to show pervasive QA problems, Part III of GAP's petition quotes a portion of Welding Inspector Supervisor Ross' statement in the OI report alleging harassment and intimidation of two QC civil inspectors, Jim Norris and Wrenn Vassey (Petition at 6). GAP fails to mention that OI investigated Ross' statement, interviewing both Norris and Vassey, and both of them flatly denied that they had never been harassed or intimidated. See OI Report, #2-83-038, at pp. 72-73. The Licensing Board's conclusion that harassment was not a widespread problem at Catawba is fully supported by the extensive hearing record and sound reasoning. See 19 NRC at 1531-32. No

witness, including R. McAfee, a former QC electrical inspector called as a witness by Palmetto Alliance, raised harassment or intimidation as a concern outside the area of welding inspection. See 19 NRC at 1532-39. No record evidence supports GAP's allegations of a broader harassment problem at Catawba.

At the top of page seven of its petition, GAP apparently refers to the practice of "verbal voiding" of NCI's. After a thorough review of the record, the Licensing Board concluded that this was not a problem. 19 NRC at 1481, 1483-92, 1504.[8]

In part IV of its petition, GAP refers to what it purports to be "new evidence of an atmosphere of harassment and intimidation" (Petition at 8). The evidence GAP relies on is a series of over 300 affidavits taken by Duke investigators from approximately 217 Catawba construction workers, all done under the oversight of Region II. See 20 NRC at 1490-94. All of the affidavits, including those to which GAP alludes (see Petition at 8), were subsequently received in evidence by the Licensing Board as Applicants' Exhibit 118 ("App. Ex. 118"), with the identity of each affiant indicated by a code number. See 20 NRC at 1494; App. Ex. 118. This evidence was fully evaluated by the Licensing

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8/ See also App. Ex. 2, Grier, pp. 41-43; App. Ex. 9, Wells, p. 13; App. Ex. 14, Davison, pp. 30-1; App. Ex. 18, Morgan, pp. 8-9; App. Ex. 19, Shropshire, pp. 5-6; App. Ex. 20, Baldwin, pp. 7-8; App. Ex. 21, Allum, p. 4; Tr. 9842-43, Van Doorn (12/06/83); Tr. 4994-95, Baldwin (11/27/83); Tr. 5894-95, 5954, Burr (11/03/83); Tr. 5822-23, Deaton (11/13/83); Tr. 6986-87, 7052, Ross (11/11/83); Tr. 6365-67, 6379, Rockholt (11/08/83); Tr. 6160-62, Bryant (11/04/83); Tr. 8559, Gantt (11/29/83).

Board (see 20 NRC at 1494-1502), which properly concluded that the evidence does not indicate a significant breakdown in quality assurance at Catawba. Id. at 1506-07. The specific incidents that GAP mentions are put in the context of the rest of the record below.

The incident involving a violent statement (incorrectly quoted by GAP) by a foreman (Mr. Moore) was not connected with violating procedures. See App. Ex. 118, #70 at p. 2 (4/17/85). A second worker who was also present when the foreman made the statement did not view the incident as threatening anyone. App. Ex. 118, #32 (6/20/84). Mr. Moore was identified by both the NRC and Duke (20 NRC at 1489; see also id. at 1495) and Duke removed him from his supervisory position as a result of the investigation. Id. at 1507. Both above-mentioned workers are satisfied with Duke's resolution of the situation. App. Ex. 118, #32 (9/20/84), #70 (8/21/84).

The two individuals who expressed fear of losing their jobs nonetheless raised with the Duke investigators those concerns that they had. App. Ex. 118, #8 (6/4/84), #192. Individual #8's only concern was with his general foreman, Smith, who was removed as a result of the investigation. App. Ex. 118, #8 (6/14/84); 20 NRC at 1492-93, 1507. Individual #192 is satisfied with the resolution of his concerns. App. Ex. 118, #192 (8/22/84).

Only one worker speculated that his foreman (again, ex-foreman Moore) was on drugs, a charge that was never

substantiated or in any way corroborated. App. Ex. 118, #196 at p. 3 (6/15/94). This individual testified in camera at the licensing hearings and did not even mention any concern about foreman drug use. IC Tr. 2014-98 (10/12/84). All of his concerns were resolved through Duke's investigtion. App. Ex. 118, #196 (8/17/84).

The general allegation of pressure to meet construction schedules without regard to work quality was the basic thesis of Palmetto's contention 6, which was litigated during nearly fifty days of hearings and rejected by the Licensing Board as unsubstantiated. See 19 NRC at 1439-40, 1583-84; 20 NRC at 1507.

The issue of alleged excessive force on pipes ("cold springing") was litigated twice and found to be without safety significance. See 19 NRC at 1552-53; 20 NRC at 1499-1500.

Alleged welding interpass temperature violations were the primary subject addressed in the last phase of the Licensing Board hearings. After considering all the evidence (including that alluded to by GAP in its recent request for a civil penalty), the Licensing Board found instances of interpass violations to have been isolated and rare, involving only two foremen (primarily ex-foreman Moore), both of whom have been removed from supervisory positions. See 20 NRC at 1495-96, 1506. These incidents are without safety significance. See id. at 1503-06.

The concern over the adequacy of night shift inspector staffing was unfounded. The inspector who raised this concern is satisfied with Duke's investigation into the issue. See App. Ex. 118, #32 (9/20/84); see also Int. Ex. 151.[9]

GAP's allegations (Petition at 8) of impropriety and lack of zeal during the Region II investigation are belied by the Licensing Board record. See 20 NRC at 1488-89, 1493; Staff Ex. 33, 36; see also 19 NRC at 1499 n.19.

III. Legal Analysis

Apart from the fact that the imposition of a civil penalty is clearly unwarranted on the facts in this case, such a sanction also cannot be justified as a legal matter. Whatever else may be said about GAP's representations, an assertion that Duke has ever been held by the Department of Labor to have violated section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, is conspicuous by its absence. For this there is good reason, because in fact no such finding has ever been made.

To the extent that 10 C.F.R. § 50.7 purports to create independent authority to impose sanctions for violations of section 210, it is clear that the Commission never intended to place itself in the position of determining in the first instance that such a violation has occurred. This is apparent, first, from the structure of the regulation itself, in which the

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9/ GAP's allegation of bias in Duke's investigation was specifically refuted by expert testimony before the Licensing Board. See 20 NRC at 1490-94.

description of proscribed acts set forth in section 50.7(a) is immediately followed by a description in subsection (b) of the procedures available in the Department of Labor for employees believing themselves to have been the subjects of discrimination made unlawful by section 210. Moreover, the Statement of Considerations accompanying the promulgation of section 50.7 expressly couched the authority provided for in the regulation in conditional terms:

> In addition to redress being available to the individual employee the Commission may, upon learning of an adverse finding against an employer by the Department of Labor, take enforcement action against the employer because the employer engaged in illegal discrimination.

47 Fed. Reg. 30452 (1982).

Further evidence of an intention that NRC jurisdiction under section 50.7 was not to be exercised preemptively, but rather only in consequence of findings adverse to an employer initially made by the Department of Labor, is to be found in the response provided in the Statement of Considerations to concerns raised in comments to the proposed rule that it would engender harassment of employers by allowing employees to assert frivolous allegations. The Commission dismissed this concern out of hand, finding all necessary reassurance in the fact that "it appears that at an early stage, DOL denies complaints that are without merit." Id. at 30454. This observation would, of course, only beg the question if NRC jurisdiction under section 50.7 could be

invoked irrespective of whether there had first been a finding of a violation of section 210 by the Department of Labor.

The position assumed by the Commission in its Statement of Considerations on 10 C.F.R. §50.7, furthermore, is in all respects consistent with views expressed within the NRC at the time that the Commission was asked to comment on the bill (S. 2584) containing the provision that, with minor modifications not pertinent here, became section 210 of the Energy Reorganization Act. In a contemporaneous memorandum for the Commission, Howard K. Shapar, Executive Legal Director, gave voice to the conclusions that became the NRC's position on the pending legislation.[10]

There are two aspects of the positions embraced in that memorandum that are of particular relevance for the present discussion. First, one of the options evaluated was that the Commission support the conferral of the "whistleblowers" protection authority upon NRC. In rejecting that alternative, OELD acknowledged the clear desirability of deferring to the expertise of DOL with regard to questions concerning employment relationships:

10/ The memorandum is appended hereto as Attachment A. In addition, a September 18, 1978, memorandum from OELD is appended hereto as Attachment B. The latter confirms that the Commission endorsed the contents of OELD's original memorandum, and that OELD was directed to communicate the positions set forth in the memorandum to both majority and minority representatives of the Senate Committee on Environment and Public Works.

> As a second option, one could provide authority for NRC to investigate and take administrative action for discriminatory actions. * * * I&E, SD, NRR and ELD all agree that any legislation dealing with employer-employee relations (as would be the case if the remedies to be made available to the employee included reinstatement and backpay) should be implemented by an agency (such as the Department of Labor) with more expertise than NRC has on labor management relations.

Attachment A at p. 4. Thus, the decision to support S. 2584 as proposed, with its provision for reposing authority for determination of when unlawful discrimination had occurred solely in DOL, reflected a conscious recognition that the Commission possesses no special expertise that would qualify it "to investigate and take administrative action for discriminatory actions." Id. This clear and conscious choice to endorse a legislative scheme reposing authority only in the agency with the admittedly greater expertise with respect to such questions would be perverted if, as GAP's letter suggests, NRC were free to make its own determinations in such cases.

The second relevant point in the memorandum is its consideration of the necessity for and the desirability of providing for the imposition of civil penalties. Presuming that the Commission already had authority at the time by virtue of the then-current version of 10 C.F.R. Part 19[11] to impose civil

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11/ The version of 10 C.F.R. part 19 that was current in late 1978 bore the title "Notices, Instructions and Reports To Workers; Inspections," and addressed the occupational health

(footnote 11 continued on next page)

penalties on licensees that discriminated against employees for providing NRC information on radiological working conditions, the memorandum addressed the issue of whether "the bill [S. 2584] should be broadened as to non-licensee employers who discriminate against their employees for providing information to NRC so as to not only subject them to Department of Labor proceedings leading to remedial actions that would compensate the employee, but subject them to NRC or Labor civil penalty proceedings as well." Attachment A at p. 5. The OELD memorandum points out two difficulties with that approach:

(footnote 11 continued from previous page)
and safety of employees of nuclear licensees as they were affected by radiological working conditions. Section 19.16 provided, in relevant part:

> (a) Any worker or representative of workers who believes that a violation of the Act, the regulations in this chapter, or license conditions exists or has occurred in license activities with regard to radiological working conditions in which the worker is engaged, may request an inspection by giving notice of the alleged violation to the Director of Inspection and Enforcement, to the Director of the appropriate Commission Regional Office, or to Commission inspectors. Any such notice shall be in writing, shall set forth the specific grounds for the notice, and shall be signed by the worker or representative of the workers.
>
> * * *
>
> (b) No licensee shall discharge or in any manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under the regulations in this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such worker on behalf of himself or others of any option afforded by this part.

> Whether a civil penalty, when added to the "penalties" of employee reinstatement, awards of back pay and damages to the employee, and assessment of the costs of the proceedings before the Department of Labor, would provide any further dissuasion to employers considering discriminatory acts, is problematical. An NRC civil penalty provision would have the disadvantage of making the employer subject to two proceedings before two separate agencies on the same factual circumstances.

Id. In conclusion, the memorandum expressed opposition to the notion that S. 2584 should be amended to provide for civil penalties. The opposition of ELD, NRR and I&E was said to have been based on the perception that civil penalties would add no additional deterrence to that provided by the sanctions already provided for in the bill, and the memorandum noted that "SD believes that no showing has been made that such an employee protection program is needed, but that . . . S. 2584 . . . is adequate." Id. at p. 7.

Again, the clear and conscious decision of the Commission to eschew support of a civil penalties provision in the legislative proposal that was to become section 210 undercuts the application of 10 C.F.R. §50.7 that GAP seeks in this case. For one thing, the failure to pursue through the legislative process an acknowledged opportunity to obtain express congressional authority for additional administrative sanctions casts serious doubt on any argument that such authority existed implicitly all along. More to the present point, however, it is at best highly doubtful that the same agency that embraced the consignment of

employment disputes to DOL's superior expertise and spurned the opportunity to seek a civil penalty provision on the ground that such a provision could not improve on the proposal then before the Congress, would just over three years later promulgate a regulation arrogating to itself the power to decide in the first instance whether an employee had been discriminated against and, if so, then to impose a civil penalty.

Quite apart from this, however, the memorandum provides eloquent testimony to the fact that NRC has long since recognized that civil penalties can be employed only for remedial, not punitive, purposes. The consideration that figured most prominently in the Commission's decision not to seek a civil penalties provision in section 210 itself was the perception that the deterrent effect of such a provision was, to use the memorandum's term, "problematic." Yet GAP's entire argument for the imposition of a massive civil penalty on Duke is couched in terms of deterrence -- for Duke and for all of the rest of the nuclear industry. Where the Commission itself has expressed doubt about the incremental value of civil penalties in such cases and the ASLB has expressly found that any harassment was isolated and did not perceptibly diminish the effectiveness of the Catawba QA programs, however, deterrence is at most a weak reed on which to lean in justifying the imposition of a civil penalty.

Finally, it must be noted that most of the allegations raised by GAP in its effort to obtain the imposition of a penalty by their terms have nothing whatever to do with interference with an employee's right to provide information to the NRC. Indeed, only numbered allegations 7, 8, 9, and 11 even carry any suggestion of such interference. As has been pointed out supra (see p. 7), the first three of these were soundly refuted by express findings of the ASLB. The allegations that employees were "harassed" and "reprimanded" (nos. 7 and 8) for taking their concerns to the NRC can provide no basis for sanctions, inasmuch as the Board, after a lengthy examination of the issue in a full-blown trial, found "no attempt to punish inspectors for going directly to NRC" and that "the testimony reflected an understanding that employees could contact NRC without retribution." 19 NRC at 1511. Similarly, the allegation that "QC inspectors were warned by top-level executives not to take their concerns to the NRC at a meeting between the Executive Vice President and welding QC inspectors" (no. 9) cannot justify a civil penalty in the face of the ASLB's finding, after listening itself to a recording of the meeting in question, that the "talk did not come across as threatening." Id. at 1510.

Only with regard to the allegation (no. 11) of "intimidation" of an inspector scheduled to testify at a hearing was there any finding by the Board of an attempt to interfere with an employee's providing information to the NRC. As was pointed out

supra (see p. 7), however, this finding is manifestly at odds with the evidence of record, and cannot in any event be reconciled with the employee's own contrary testimony that no attempt was made to influence his testimony. Tr. 7049-50.

As to all of the remaining allegations, no sanctions may be imposed because it is clear that 10 C.F.R. §50.7 was intended only to authorize sanctions for retaliation against employees for providing information to the NRC. The very first sentence in the Statement of Considerations accompanying the issuance of section 50.7 plainly states: "The NRC is amending its regulations in regard to job protection for employees who provide information to the Commission." 47 Fed. Reg. 30452. To the same effect, the Commission's description of its purpose in its notice of proposed rulemaking said that the intention was to amend the Commission's regulations "in regard to protection for employees who provide the Commission" and to "make employers aware that discrimination against employees who provide such information to the Commission is prohibited . . . ." 45 Fed. Reg. 15184. Thus, all of the remaining allegations raised in GAP's brief are not cognizable under 10 C.F.R. §50.7.

IV. Conclusion

For the foregoing reasons, Duke submits that the NRC should deny GAP's enforcement action request as unwarranted by the facts and improper as a matter of law.

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August 19, 1985

FREEDOM OF INFORMATION ACT REQUEST
FOIA-85-584
Rec'd 8-20-85

J. M. Felton, Director
Division of Rules and Records
Office of Administration
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Freedom of Information Act Request
Regarding Enforcement Action EA 84-93

Dear Mr. Felton:

Pursuant to the Freedom of Information Act (5 USC §552) and the NRC's implementing regulations thereunder (10 CFR §9.3 et seq.) I hereby request on behalf of Duke Power Company all documents related to and underlying Enforcement Action No. EA 84-93 being taken against Duke Power Company. This enforcement action is reflected in the Notice of Violation and Proposed Imposition of Civil Penalty issued August 13, 1985.

This request extends not only to all relevant documents at NRC Headquarters relating to the enforcement action and the events surrounding Mr. Gary E. "Beau" Ross, but also to all such documents within NRC Region II including any such documents reflecting any communications between Region II and NRC Headquarters. This request includes, but is not limited to, all documents reflecting, underlying, or otherwise relevant to:

1. Any communications between NRC employees and/or representatives and members and/or representatives of Palmetto Alliance, the Government Accountability Project and/or any other outside group or individual concerning possible enforcement action based on the events surrounding Mr. Ross and/or the concerns expressed by the welding inspectors at Catawba Nuclear Station, and/or alleged harassment and/or intimidation of any quality control/quality assurance inspector at the Catawba Nuclear Station.

2. The June 4, 1985 Director's Decision (DD-85-9), including alternative drafts or proposals, and including all documents reflecting any independent fact-finding investigation conducted by NRC in connection with the enforcement action or concerning Mr. Ross.

3. Any decision to engage or not to engage in any independent fact-finding in connection with the enforcement action and Mr. Ross.

4. Deliberations regarding whether the record developed before the Atomic Safety and Licensing Board was adequate to support a finding of discrimination within the meaning of 42 USC §5851 and/or 10 CFR §50.7. This request also extends to any documents reflecting deliberations whether the

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record developed before the Atomic Safety and Licensing Board was adequate to support the Board's finding of discrimination.

5. Deliberations regarding the appropriate severity level to be assigned the alleged violation.

6. Any communications between representatives of the NRC and representatives of the Department of Labor relating to this enforcement action or the events surrounding Mr. Ross.

7. The Commission's decision not to review DD-85-9, including documents underlying and reflecting the majority votes of Chairman Palladino and Commissioners Bernthal and Asselstine, and documents underlying and reflecting the dissenting views of Commissioners Roberts and Zech.

8. The August 13, 1985 Notice of Violation including alternative drafts or proposals.

9. The August 13, 1985 Proposed Imposition of Civil Penalty, including alternative drafts or proposals.

I would appreciate your prompt response to this request within the ten working day period provided in 10 CFR §9.9. Duke Power Company's deadline for responding to the Notice of Violation and Proposed Imposition of Civil Penalty is September 12, 1985. The documents I am requesting could well prove to be significant to that response. Accordingly, I hope that this request will be met as expeditiously as possible. If you cannot meet this request within the period set out in the regulations, please notify me as soon as possible, and tell me when you will be able to respond.

Sincerely,

Albert V. Carr, Jr.

c: James N. Taylor
Jane A. Axelrad