

DEVELOPING CONSENSUS: THE BRC CONSENSUS PROCESS

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ABSTRACT

In response to the public concern over the implications of the Nuclear Regulatory Commission's July, 1990, Below Regulatory Concern (BRC) Policy, the Commission initiated a consensus-building process to re-evaluate the BRC Policy. This paper provides a description and evaluation of this process.

INTRODUCTION

The Commission published its BRC Policy Statement in the Federal Register on July 3, 1990 (55 Fed.Reg. 27522). The Policy provided a framework within which the Commission would promulgate rules or make licensing decisions to exempt from some or all regulatory controls certain practices involving small quantities of radioactive materials. The BRC Policy did not approve specific exemptions or establish binding standards, but rather provided guidance for making consistent decisions on whether to grant exemptions in such categories as:

1. Release of sites containing residual radioactivity for unrestricted use;
2. Distribution of consumer products containing small amounts of radioactivity;
3. Disposal of certain wastes containing very low levels of radioactivity at unlicensed facilities; and
4. Recycling and reuse of slightly contaminated radioactive materials.

The Commission's adoption of the BRC Policy in July, 1990, resulted in widespread public concern over the implications of the new policy. In an effort to better understand the nature of those concerns, and to ensure that Commission decisions related to BRC were based on clear and comprehensive information, the Commission initiated an evaluation of the potential use of consensus-building techniques to address BRC issues. This feasibility evaluation was based on a series of interviews with the broad range of organizations and entities that would be affected by the BRC Policy. These included state and local governments and governmental associations; industry associations, including those representing nuclear utilities, fuel cycle facilities, nuclear medicine, and solid waste disposal; citizens groups; and federal agencies such as the Environmental Protection Agency (EPA) and the Department of Energy (DOE).

One of the major findings of the feasibility evaluation was that there was widespread dissatisfaction among affected groups with the process that the Commission used to develop the BRC Policy. Many groups did not believe that clear and complete information was developed, or effectively communicated, by the Commission on the implications of the BRC Policy. There was also very little communication between the affected groups themselves, either on their respective positions in regard to BRC or on what the implications of the BRC Policy were for their interests. Although both criticism and support were expressed for various aspects of the content of the BRC Policy, the dissatisfaction with the process was nearly unanimous. On the other hand, substantial support was expressed for the use of a consensus process to address BRC

issues. Almost all of the groups recommended that the Commission should either suspend or withdraw the BRC Policy while the consensus process was being conducted. In addition, all of the groups interviewed believed that it was absolutely essential that representatives of all affected interests, including environmental groups, be included in the consensus process. There was also substantial agreement that all BRC issues, including whether there was a need for an overarching BRC Policy, should be open for discussion in the consensus process.

In response to the recommendations contained in the feasibility evaluation, the Commission, on June 28, 1991, approved the initiation of a phased consensus process to address BRC issues. The purpose of the consensus process was to provide advice to the Commission from the full range of affected interests on the broad spectrum of issues related to the subject of BRC. As in most processes of this type, the actual agenda of substantive issues that would be considered by the consensus body, as well as the procedures that would be used in the consensus process, would be determined by the participants to the process.

In connection with the initiation of the consensus process, the Commission declared an indefinite moratorium on the implementation of the July, 1990, BRC Policy. The purpose of the moratorium was to demonstrate the Commission's commitment to the consensus process and to ensure that the participants in the consensus process were provided the fullest opportunity to develop meaningful advice to the Commission on BRC issues. This moratorium is still in effect.

The Commission planned to implement the consensus process in three phases: I) the formation of a core group of leaders from the affected interests; II) the creation of a steering committee to plan for the organization of the plenary consensus body where the full discussions on the BRC issues will take place; and III) the formation of the plenary consensus body. The use of a phased process was intended to allow for a solid foundation to be built for the BRC consensus process before proceeding with substantive discussions. This foundation would have been provided by the support of a core group of leaders from the major interests affected by the BRC Policy, including a Commissioner from the Nuclear Regulatory Commission, and representatives from the nuclear utility industry, nuclear medicine, the environmental community, the EPA, and State Government. If the representatives of affected interests on the core group agreed to move the process forward, the Phase II steering committee of affected groups would be created to prepare a preliminary agenda and plan for the convening of the plenary consensus body. Phase III would involve the convening of the plenary consensus body. The plenary body would finalize the agenda and the ground rules

for the BRC consensus process and proceed to discuss the various issues related to the BRC Policy.

A critical recommendation of the feasibility evaluation was that it was essential for the representatives of all affected interests, including environmental interests, to be included in the consensus process. Accordingly, the Commission stated that it would not continue to pursue the consensus process in any phase unless representatives of the full range of parties who had demonstrated a major interest in the BRC Policy were willing to participate. Although there was strong and wide-ranging support for the BRC consensus process, the Commission was ultimately unable to persuade a major representative of the environmental community to participate in the Phase I core group. Consistent with the Commission's desire that the consensus process be fully representative of affected interests, the lack of participation from the environmental community effectively brought the consensus process to a halt before the core group could even convene.

Although the representatives of the environmental community declined to participate in the BRC consensus process at this time, those representatives did indicate that broader representation from the environmental community may be more likely once Congress had acted on the pending BRC legislation. After Congressional enactment of the BRC legislation, it was possible that the environmental community would seriously consider entering into a formal process to resolve remaining technical and policy issues. This possibility is consistent with statements in the legislative report on the House version of the BRC legislation (H.R. 645) that the Commission will still have a statutory responsibility under Section 10 of the Low Level Waste Policy Amendments Act to have a BRC policy in regard to waste streams and will be "required to promulgate a new policy from scratch." The Committee Report notes that "...it is the Committee's intent that such a new policy will initially be developed in the context of the consensus-building process, and that all interested parties - including the reluctant environmental groups - will therefore be motivated to participate in that process" (1). As of this writing, the pending BRC legislation has not been enacted.

It was clear that the availability of a pending legislative alternative to address the authority of State governments to set stricter BRC levels than those established by the Commission was one of the main obstacles to broad participation by the environmental community in the BRC consensus process. Therefore, it would be reasonable to assume that the removal of this alternative through either the enactment of the legislation, or the failure to enact, might open up prospects for participation by the environmental community in any future consensus process on BRC.

Even though the BRC consensus process did not reach fruition, it was, nevertheless, strongly supported by a broad range of organizations. In addition to those organizations that agreed to participate in the core group, many other organizations expressed a strong interest in the process. This included many individual state agencies and legislative committees, as well as governmental organizations such as the Western Governors Association, the National Conference of State Legislatures, the National Governors Association, and the Association of State and Territorial Solid Waste Management Officials. It also included environmental organizations at the state level, citizens advisory groups, and industry organiza-

tions representing fuel cycle facilities and the solid waste management industry. All of these groups viewed the Commission's initiation of the BRC consensus process as a positive and unique step to involve affected interests in the Commission's regulatory process. The Commission plans to build on this support for future activities, including the use of participative and consensus-building techniques in appropriate situations.

In this regard, the Commission had already designated an alternative course of action in its June 28, 1991 Staff Requirements Memorandum (SRM) in the event that one or more affected parties were unwilling to participate in the BRC consensus process. The SRM directs the staff to conduct a rulemaking on a single issue, such as the residual radioactivity criteria for purposes of decommissioning nuclear sites, and to provide an opportunity for the early involvement of those affected interests who wish to participate in developing the draft proposed rule. In accordance with the SRM, the staff is preparing a Commission Paper that recommends a plan for conducting the rulemaking alternative specified in the SRM.

Although, the staff paper has not been submitted to the Commission as of this writing, the basic thrust of the staff proposal would be to enhance participation in the rulemaking through a series of workshops involving affected interests. These workshops would be conducted at a very early stage of the rulemaking with the following objectives: a) to ensure that the relevant issues have been identified; b) to exchange information on these issues; c) to identify information gaps; d) to identify underlying concerns; and e) to identify areas of agreement and disagreement.

There are four important implications for the design of the alternative rulemaking process that derive from the Commission's experience with the BRC consensus process. First, participation in the alternative process should be broad-based, both in terms of providing an opportunity for the participation of a broad range of interests and in terms of providing for such participation at a regional level. The Commission intends to rely on the network of support established in the BRC consensus process as a resource for initiating the rulemaking process. Second, participants should be provided in advance with a document that provides a complete and neutral discussion of the issues to be considered in the rulemaking. This will contribute to a focussed and enlightened discussion during the workshops. Third, because of the Commission's difficulties in gaining the full representation of affected interests in the BRC consensus process, the objective of the alternative process should be early and meaningful participation in the decision-making process, rather than trying to reach a formal consensus which requires such full participation. Fourth, in reaching a decision on the draft final rule, the Commission should clearly document how the Commission considered the suggestions made during the workshops in selecting its final rulemaking approach. Although the Commission may not agree with all comments, a clear demonstration of how those comments were considered in the Commission's decision-making process is extremely important.

CONCLUSIONS

1. The inability to fully implement a consensus process in the BRC area, derived from the specifics of this particular case, rather than from generic difficulties of achieving

consensus on nuclear regulatory issues. In the matter of the BRC Policy, the Commission attempted to institute a consensus process after the Policy had already been formulated. By this time, positions of affected interests had already hardened, and legislative and litigative alternatives were being actively pursued. This made implementation of a consensus process particularly difficult.

2. There are a wide variety of participative techniques available to enhance the participation of affected interests in agency decision-making. These range from the simplest public comment mechanisms; through public hearings and more interactive meetings; to policy dialogues and forums among representatives of affected interests; to agreement-seeking structures such as negotiated rulemaking. The state of the art does not include standard definitions for these procedures and it is especially difficult to discern

distinct segments within the middle range. That range includes a variety of "third party" procedures which do not seek a negotiated formal agreement.

3. The techniques selected must be tailored to the particular situation under consideration. A full-blown consensus process may not be feasible or appropriate for many situations.
4. A convening evaluation which assesses the interest and concerns of affected parties is a prerequisite to the agency's decision on whether and how to proceed.

REFERENCES

1. H.R. REP. NO. 102-289, 102d Cong., 1st Sess., pt. 1, at 9 (1991).