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MEMORANDUM

FROM: David Lewis

DATE: May 29, 2000

RE: Consideration of New and Significant Information in License Renewal Proceedings

I. INTRODUCTION

The NRC's Generic Environmental Impact Statement (GEIS) on license renewal, NUREG-1437, is intended to resolve generically a large number of issues (designated as Category 1 issues) so that they do not have to be addressed again in specific license renewal proceedings. The NRC's rules do require an applicant to include, in its Environmental Report, any "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." The rules also state, however, that the Environmental Report is not required to contain analyses of the impacts of Category 1 issues; and in response to comments during the rulemaking, the Commission stated that it did not see any reason to require an applicant to perform a site-specific validation of the GEIS conclusions. Further, the statement of consideration for the NRC's rule explains that if the NRC Staff believes that furnished information is new and significant and alters a generic analysis, the Staff must seek Commission approval to waive or suspend the rule to allow the supplemental environmental impact statement to reflect the corrected analysis.

These statements in the rule and rulemaking history indicate that an applicant is not required to perform an analysis of Category 1 issues, but is only required to identify new and significant information that might alter a Category 1 determination if it becomes aware of such information. They also indicate that the NRC Staff must seek Commission authorization if it wants to reanalyze a Category 1 issue.

The NRC Staff appears to have interpreted the rules more expansively. The Staff has indicated that a license renewal applicant must describe in its Environmental Report the process used by the applicant to identify whether there is new and significant information. See Draft Regulatory Guide DG-4005 at 4; Environmental Standard Review Plan (NUREG-1555, Supplement 1) at 10-12. This requirement has no basis in the NRC rules. By requiring an

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applicant to show that it has a process to look for new and significant information, the staff has in effect forced the lead applicants to validate Category 1 issues, even though the rule and rulemaking record indicated that such validation was not required. Further, in the Supplemental Environmental Impact Statements on Calvert Cliffs and Oconee, the NRC Staff did not just rely on the Category 1 conclusions from the GEIS, but made separate findings on each of the Category 1 issues. On occasion in conversations, the NRC staff or its contractors have referred to the GEIS as a "tiering" document, which connotes a document that may be summarized and referenced but does not have conclusive effect.

The approach that the NRC Staff has taken is troubling because it may impose an obligation on applicants to reanalyze Category 1 issues despite the explicit Commission statement in the rulemaking record that such reanalysis is unnecessary. The approach is also troubling because it allows the NRC Staff to launch into reviews of Category 1 issues without the discipline of first requesting and justifying Commission approval, and thereby increases the time and expense of the NRC's environmental review.

II. DISCUSSION

On its face, the NRC rules governing the environmental review of license renewal applications do not require an applicant to provide any analysis of Category 1 issues. 10 C.F.R. § 51.53(c)(3)(i) provides:

> The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in Appendix B to subpart A of this part.

The supplementary information published with the rule indicates that, absent new and significant information, the NRC's generic analyses of Category 1 issues need only be incorporated by reference in an applicant's Environmental Report. 61 Fed. Reg. 28,467, 28,483 (1996).

In undertaking this rulemaking, the Commission made clear that its intent was to resolve issues generically so that they would not need to be addressed in individual license renewal proceedings. "The purpose of this rulemaking is to resolve as many National Environmental Policy Act (NEPA) issues as possible before beginning plant-by-plant license renewal reviews." 56 Fed. Reg. 47,016, 47,023 (1991).

> Those impacts that cannot be evaluated generically will have to be evaluated for each plant before its license is renewed. However, the environmental impacts that can be evaluated generically <u>will not have to be evaluated for each plant</u>.

<u>Id.</u> at 47,016 (emphasis added).

> By assessing and codifying certain potential impacts on a generic basis, no need exists to address these impacts for each future license renewal.

Id. at 47,017.

During the rulemaking, the Council for Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) submitted comments expressing concern that the GEIS would limit public comment and ability to challenge conclusions on Category I issues. See SECY-92-198, Enclosures 2 and 3. After considerable discussions with the CEQ and EPA, the NRC agreed resolve this concern by considering all comments that might be submitted on a renewal application to determine whether such comments raise new and significant information; and, if the NRC Staff determines that information furnished is significant and new, the NRC Staff will seek Commission approval either to suspend the rule (if the significant new information is generic) or waive the rule (if the significant new information is plant specific). SECY-93-032 at 3-4; 61 Fed. Reg. at 28,470, 28,485.[1] The final rule also included a provision that "[t]he environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv).

This approach taken to resolve the CEQ and EPA comments reflected a carefully crafted compromise focused on allowing the pubic to comment fully, and requiring the NRC staff to evaluate such comments to determine whether they raise significant new information warranting a request that the Commissioners waive or suspend its rule to allow further analysis of a Category I issue. There is nothing in the agreement with CEQ and EPA or the statement of considerations suggesting that the NRC staff would be required to evaluate Category I issues absent receipt of a comment or information from the applicant identifying significant new information. In fact, in considering ways of resolving the CEQ and EPA comments, one of the options that the Commissioners did not approve was to make the GEIS a "tiering (reference) document." See SECY 92-198 at 4-5; SECY-93-032 at 1.

The NRC regulations do not require an applicant to provide or prepare additional analyses. The requirement in section 51.53(c)(3)(iv) is carefully worded to require no more than the provision of information "of which the applicant is aware." This implies that an applicant has an obligation to identify significant new information when it knows of such information, but has no obligation to perform further studies or reviews to develop such information.[2] Reflecting

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[1] The Commission indicated that litigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues [now combined] unless the rule is suspended or waived. SECY-93-032 at 4.

[2] This provision is analogous to 10 C.F.R. § 50.9, which requires licensees to report significant information to the NRC but does not require new studies or analyses to develop such information. An analogy may also be drawn to the obligation developed in licensing proceedings to report material information. See Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976). Here too, the obligation is to report information that is discovered, not to require the creation or generation of new information.

the agreement with CEQ and EPA, the Statement of Considerations similarly states that the "NRC will also review and consider any new and significant information presented during review of individual license renewal applications."[1] 61 Fed. Reg. at 28,468 (emphasis added). This statement indicates that the NRC staff should consider information that is "presented" to it (presumably to determine whether to request that the Commissioners waive or suspend the rule if warranted), and does not authorize or endorse independent efforts by the NRC staff to reevaluate and validate all Category 1 issues.

The NRC's response to comments when it finalized the rule makes this intent clear. The Department of Interior commented that even if a GEIS is used for license renewal, each applicant should be required to confirm these conclusions with documentation. The NRC responded:

> The NRC believes that its analysis is sufficiently broad so as to apply to all plants considering license renewal. Based on the NRC's confidence in the applicability of its generic review, it does not see any reason to require that an applicant perform a site-specific validation of GEIS conclusions. The NRC believes that such a requirement eliminates the efficiency and stability sought by the Part 51 rulemaking.

NUREG-1529 at p. C9-14. Thus, the Commission has explicitly stated that an applicant need not attempt to validate the generic conclusions in the GEIS.

The manner in which the categories of issues were developed also shows that an applicant is under no obligation to demonstrate that it is bounded by the Category 1 determinations. The proposed rule placed issues into three categories. Category 1 issues were those where the NRC had reached a generic impact that applies to all affected plants. Category 2 issues were those where the NRC had reached a conclusion that applies to all affected plants within certain bounds. Category 3 issues were those where the NRC had concluded that a plant-specific evaluation was required. 56 Fed. Reg. at 47,019. This is significant because it indicates the NRC's intent only to require bounding analysis for the original Category 2 issues. Further, the Commission explicitly stated that it was "proposing to limit the scope of environmental review for each plant license renewal to only those issues for which no generic conclusion could be reached (i.e., Categories 2 and 3)." Id. at 47,020. While the final rule subsequently combined all Category 2 and 3 issues (61 Fed. Reg. at 28,474), it made no change that would alter the treatment of Category 1 issues. The explicit requirements in 10 C.F.R. § 51.53(c)(3) to assess certain Category 2 issues if a plant does not fall within stated bounds belies any requirement for an applicant to provide or perform bounding analyses of other issues.

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[1] This statement must be read in a manner consistent with the NRC's more detailed explanation later in the statement of consideration that it will consider all comments, and if comments raise significant new information, request that the Commissioners suspend or waive the rule. Any broader reading (such as interpreting this sentence to mean that the NRC staff has an independent obligation to analyze Category 1 issues when no person has presented new information) would render NRC's agreement with the EPA and CEQ meaningless.

III. CONCLUSION

For all of these reasons, the NRC rules cannot be read either as requiring or implying any need for evaluation of Category 1 issues (absent a waiver of the rules). As a practical matter, any such requirement would seriously threaten the efficiency and stability intended to be created by the rules.

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