From: "BELL, Russ" <rjb@nei.org>
To: "Michael Scott" <MLS3@nrc.gov>
Date: 2/10/05 10:49AM
Subject: FW: Dr. Beckner Letter w/Attachment

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From: "BELL, Russ" <rjb@nei.org>

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NUCLEAR ENERGY INSTITUTE

Adrian P Heymer
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GENERATION DIVISION

February 10, 2005

Dr. William D. Beckner
New, Research and Test Reactor Program
Division of Regulatory Improvement Programs
Office of Nuclear Reactor Regulation
US Nuclear Regulatory Commission
Washington, DC 20555-0001

Project 689

Dear Dr. Beckner,

This letter provides the industry feedback and position on the extent of NRC environmental reviews at the combined license (COL) stage when an applicant references an Early Site Permit (ESP), as requested in the NRC-industry meeting on January 18, 2005. The enclosed white paper, "Environmental Review at the COL Stage of Nuclear Plant Licensing," provides the basis for the industry position that there should be no re-review at COL of environmental issues that were evaluated at ESP.

NEI disagrees with NRC staff statements in the January 18, 2005, meeting that environmental topics resolved in an ESP are subject to re-review at COL to determine whether new and significant information exists. These NRC staff statements are contrary to the finality provisions of Part 52.

The Part 52 framework provides finality for previously resolved issues that is fully consistent with the requirements of NEPA. Under NEPA, ESP and COL are "connected actions" because the Environmental Impact Statement (EIS) prepared for ESP considers the potential environmental impacts of constructing and operating one or more new nuclear plants at the proposed site. There is no requirement for NRC to re-review previously resolved issues or to prepare an EIS for a subsequent (COL) proceeding regarding impacts that were considered in the ESP proceeding.

The industry agrees that COL applications must address "any other significant environmental issue not considered in any previous proceeding" and that these issues would be subject to NRC review during the COL proceedings. These would include issues deferred from the ESP stage to the COL stage and newly identified significant issues. Other environmental issues would be addressed for purposes of

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the COL by incorporating the ESP by reference in the COL application and may only be re-opened in accordance with 10 CFR 52.39, or by a waiver of NRC rules.

The regulations clearly state that re-review of environmental matters reviewed and closed in the ESP is not allowed. Section 52.39 states, "the Commission shall treat as resolved" those matters resolved in the ESP proceeding. Moreover, Section 52.89 states:

> "If the application references an early site permit or a certified standard design, the environmental review must focus on whether the design of the facility falls within the parameters specified in the early site permit and any other significant environmental issue not considered in any previous proceeding on the site or the design."

And, 10 CFR 52.79 states:

> "...if the [COL] application references an early site permit, the application need not contain information or analyses submitted to the Commission in connection with the early site permit, but must contain, in addition to the information and analyses otherwise required, information sufficient to demonstrate that the design of the facility falls within the parameters specified in the early site permit, and to resolve any other significant environmental issue not considered in any previous proceeding on the site or the design."

We ask for your prompt consideration of this information because this is a critical issue for maintaining industry and third party confidence in the NRC's Part 52 licensing process. If you have any questions regarding this letter, please contact me (202-739-8094, aph@nei.org) or Russ Bell (202-739-8087, rjb@nei.org).

Sincerely,

A. Heymer

Adrian Heymer

Enclosure

c: Mike Scott, NRC/NRC

Environmental Review Required at Combined License Stage of Nuclear Power Plant Licensing

This paper examines the scope of environmental review in connection with an application for a combined construction permit and operating license (COL) when that application references an early site permit (ESP) for the site. As explained in this paper, Part 52 requires that all issues resolved in an ESP proceeding shall be treated as resolved in a COL proceeding, and environmental review at the COL stage (when an ESP is referenced) is therefore limited to a showing that the facility design falls within the parameters specified in the ESP and to consideration of other significant environmental issues, if any, not considered in the previous proceedings. As discussed below, this regulatory approach is entirely consistent with the National Environmental Policy Act (NEPA).

The NEPA Framework

An ESP and a COL are "connected actions," which, under NEPA case law and consistent with Council on Environmental Quality (CEQ) regulations, are to be addressed by the NRC in a single environmental impact statement (EIS). There is no requirement for any agency to prepare a new EIS for the latter of two connected actions that were previously evaluated together in a single EIS. E.g., Village of Grand View v. Skinner, 947 F.2d 651, 656-57 (2d Cir. 1991). There may, however, be a need to prepare a supplement to the EIS at the COL stage if "new information [regarding the action] shows that the remaining action will affect the quality of the environment 'in a significant manner or to a significant extent not already considered.'" National Committee for the New River, Inc. v. FERC, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989)); see 10 C.F.R. § 51.92(a). Many U.S. Courts of Appeal decisions have held that "a supplemental EIS is only required where new information provides a seriously different picture of the environmental landscape." Id. (emphasis in original, internal quotations omitted) (quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002)).[1] "To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 373. Thus, if the NRC addresses environmental issues in the EIS for an ESP, there is no need under NEPA for NRC to re-address the same issues in the COL proceeding.

[1] See also Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); South Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999) ("seriously different picture of the environmental impact"); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (same); Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) (same).

The Intent of the NRC Regulations

10 CFR Part 52 is explicit regarding the Commission's intent to resolve environmental issues at the ESP stage. *See, e.g.,* 54 Fed. Reg. 15,372, 15373 (1989),[2] describing one of the aims of the Part 52 rules as the "early resolution of safety and environmental issues in licensing proceedings." (emphasis added) The clear intent of the Part 52 regulations is to not reconsider environmental issues in a COL application where that application references an ESP for which those environmental issues have previously been assessed.

The Framework of the NRC Regulations

Consistent with this intent, Section 52.39 provides that in making findings necessary for the issuance of a COL (which includes any findings required by NEPA), the Commission shall "treat as resolved" (with limited exceptions) those matters resolved in a proceeding on the ESP application. 10 CFR 52.39(a)(2).[3] Section 52.39(a)(2) provides that issues previously resolved in an ESP proceeding may only be reopened in the following respects: (i) a contention may be filed alleging that a reactor does not fit within one or more site parameters in the ESP; (ii) a petition (supported by NRC or permit-holder documentation or admissible evidence) may be filed alleging that the site does not satisfy the acceptance criteria of the ESP; or (iii) a Section 2.206 enforcement petition may be filed alleging that the terms and conditions of the ESP must be modified. Of course, a party in an adjudicatory proceeding may request the Commission to waive NRC rules, in accordance with 10 CFR 2.335, on the basis that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purpose for which the rule or regulation was adopted."

Because an ESP proceeding includes the preparation of an environmental impact statement addressing the environmental impacts of reactor construction and operation (10 CFR 52.18), it follows directly that the environmental issues resolved in that EIS must, in accordance with 10 CFR 52.39, be treated as resolved in the COL proceeding. Reflecting the Commission's clear intent not to revisit previously resolved issues, the environmental information that an COL applicant must provide is limited to "information sufficient to demonstrate that the design of the facility falls within the parameters specified in the [ESP], and to resolve any other significant environmental issue not considered in any previous proceeding on the site or the design." 10 CFR 52.79(a)(1). Similarly, the NRC staff's environmental review of a COL application referencing an ESP "must focus on whether the design of the facility falls within the parameters specified in the [ESP] and any other

[2] Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, Final Rule.

[3] Section 52.63(a)(4) provides similarly for treating as resolved any matters resolved in connection with the issuance or renewal of a reactor design certification.

significant environmental issue not considered in any previous proceeding on the site or the design." 10 CFR 52.89. These provisions define the scope of environmental review at the COL stage, and this scope may not be exceeded, absent the Commission granting a waiver under Section 2.335.

Because review of previously resolved issues is neither intended nor required, an applicant referencing an ESP is not required to submit an Environmental Report (ER).[4] Similarly, the Part 52 regulations do not require the NRC staff to prepare an EIS at the COL stage when one was prepared for an ESP. In proposing the Part 52 regulations, the Commission explained that "only an environmental assessment need be prepared in connection with the application for a combined license." 53 Fed. Reg. at 32,066. Presumably, if this environmental assessment determines that issuing the COL would affect the quality of the environment in a significant manner or to a significant extent not already considered, only then would the staff prepare an EIS supplement. Such an EIS supplement would be limited to the matters not previously considered.

In sum, regarding environmental matters in a COL proceeding in which an ESP is referenced, the Commission has provided that a COL applicant must demonstrate and the staff must confirm that the reactor falls within the parameters specified in the ESP. Intervenors may challenge that demonstration in the course of the COL proceeding. The applicant and the staff must also assess any significant issues not previously addressed in the ESP or the design certification proceedings. Intervenors may challenge those assessments in the COL proceeding as well.

Scope of Environmental Information in a COL Application

The COL applicant is required to submit environmental information that:

- Shows that the facility design falls within the parameters specified in the ESP, or evaluate the environmental effects of any design features that are not bounded;
- Addresses any environmental issues that were deferred from the ESP EIS; and

[4] See 10 CFR 52.79(a)(2) (requiring an ER only when an ESP application is not referenced). See also 53 Fed. Reg. 32,060, 32,065 (1988) (notice of proposed rule explaining that "an environmental report is not required if a pre-approved site is proposed for the facility."). The fact that a COL applicant referencing an ESP is not required to submit an ER underscores once more the Commission's intent not to revisit the environmental review performed at the ESP stage. A COL applicant must provide information regarding environmental matters that were not resolved at the ESP stage, as required by 10 CFR 52.79(a)(1), but the applicant is not required to provide updated information for all matters specified for an ER by Part 51.

- Addresses any other significant environmental issues[5] that were not considered in a previous proceeding.

The NRC staff would then consider this information in and prepare an Environmental Assessment (EA). If the NRC staff determines that any design features beyond the bounds of the ESP are not significant in that they do not "present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned," South Trenton Residents, 176 F.3d at 663, the staff would document that determination in the EA. If the NRC staff determines that there are design features exceeding the parameters specified in the ESP that do present a significantly different environmental impact, or if there are significant environmental issues that were deferred from the ESP EIS or otherwise not considered, the NRC staff would then prepare an EIS Supplement, but limited solely to those matters. The federal courts have concluded that under NEPA, the significance of new information with respect to the need to prepare a supplement to an EIS depends on its bearing on the anticipated environmental impacts of the proposed action, not whether it is significant or interesting in some other context. South Trenton Residents, 176 F.3d at 664; see National Committee for the New River, 373 F.3d at 1330 (information not significant unless it "significantly transform[s] the nature of the environmental issues" discussed in the EIS). Therefore, the NRC's evaluation of new issues that were not previously addressed should remain focused on the environmental impacts of the granting of the COL and not the significance of the issues in any other respect.

Reconsideration of Impacts Previously Evaluated in the ESP EIS

In general, a COL applicant is not required to collect or review new information about the site environs or update the information in the ESP Environmental Report to reflect new environmental studies or data. However, in preparing its COL application, a COL applicant may become aware of significant new information that materially and adversely affects conclusions on environmental impacts previously considered in the ESP. In this event, it would be appropriate for the applicant to inform the NRC of the significant new information. In particular, an applicant would be expected to identify and provide its evaluation of new information that is determined to change a previously evaluated environmental impact level from "small" to "moderate" or "large," or from "moderate" to "large."[6] The NRC staff

[5] As used in the NRC regulations, environmental "issues" refers to the types of environmental impacts that must be considered in an EIS. See, e.g., 10 CFR Part 51, App. B, Table B-1 (identifying the "issues" relevant to a license renewal proceeding).

[6] These terms are defined as follows in Table B-1 of 10 CFR Part 51:

- SMALL--For the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. For the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in this table.

would then consider this information, and if it determines that there are changes to previously established environmental impact levels, it would supplement the ESP-stage EIS.[7] Such matters would become part of the scope of the COL proceeding and thus be subject to hearing. New information determined by the COL applicant to not alter a previously determined environmental impact level would not be included in the scope of the COL application.

As discussed above, environmental issues considered and resolved in a referenced ESP proceeding are not open to re-review by the NRC staff at the COL stage. Section 52.39(a)(1) explicitly states that such issues are to be treated as resolved. The NRC staff would reconsider previously resolved environmental issues only 1) in answer to a petition filed under Section 52.39(a)(2)(ii), or 2) if, as discussed above, the COL applicant identifies significant new information that adversely affects conclusions on environmental impacts previously considered in the ESP.

Contentions and Petitions Under Section 52.39(a)(2)

Section 52.39(a)(2) allows only three exceptions to the finality of issues resolved in an ESP and it specifies how such issues would be handled in connection with a COL proceeding:

- As discussed above, a COL application must contain sufficient information to show that the facility design falls within the parameters specified in the ESP, or provide an evaluation of the environmental effects of any design features that are not bounded. Per Section 52.39(a)(2)(i), a contention that a reactor (facility design) does not fit within one or more of the site parameters included in the ESP would be litigated in the same manner as other issues material to the proceeding.

- If a party has new information about the site that it believes indicates that the site is no longer in compliance with the terms of the ESP, Section 52.39(a)(2)(ii) provides for petitioning the Commission to admit the new information into the COL proceeding and re-open one or more issues previously resolved in an ESP. The petition must include or clearly reference official NRC documents, documents prepared by or for the permit holder, or evidence admissible in a Part 2, Subpart G, proceeding that show, *prima facie*, that the acceptance criteria have not been met. After consideration of applicant and NRC staff responses to the petition, the Commission may admit the contention.

- MODERATE--For the issue, environmental effects are sufficient to alter noticeably, but not to destabilize, important attributes of the resource.
- LARGE--For the issue, environmental effects are clearly noticeable and are sufficient to destabilize important attributes of the resource

[7] In license renewal proceedings, the Commission has indicated that the NRC staff should ask the Commission for a waiver in order to address previously resolved environmental issues. See SECY-93-032 at 3-4; 61 Fed. Reg. 28467, 28470 (1996)

In order to clarify the applicability of this section to environmental issues, it would be appropriate for the NRC to specify the impact levels of environmental issues evaluated in the ESP-stage EIS as acceptance criteria in the early site permit (e.g., the environmental impact levels indicated in summary Tables 4-1 and 5-21 of the North Anna Draft EIS – NUREG-1811).

Petitions under Section 52.39(a)(2)(ii) would be granted if the Commission concluded that the new information raises a genuine issue of material fact (i.e., a substantial matter not addressed in the COL application that could, upon thorough evaluation, potentially result in a change to a previously evaluated environmental impact level from "small" to "moderate" or "large," or from "moderate" to "large"). When considering such petitions, the Commission would also consider whether the "new" information was, in fact, available prior to the preparation of the ESP EIS.[8] In this way, Section 52.39(a)(2)(ii) would allow a contention where there is *prima facie* evidence that impact levels are changed, while preserving the finality of previously resolved issues in all other cases.

- Section 52.39(a)(2)(iii) provides for petitions under Section 2.206 to modify the terms and conditions of the ESP.

In addition, as identified above, a party in an adjudicatory proceeding may request the Commission to waive the finality provisions of Section 52.39(a)(2) and 52.89, in accordance with 10 CFR 2.335, on the basis that "special circumstances [exist] such that the application of the rule or regulation (or a provision of it) would not serve the purpose for which the rule or regulation was adopted." This waiver request approach is consistent with the approach followed in license renewal proceedings where the NRC staff (or an intervenor) is required to apply to the Commission for a waiver before any Category 1 issue (i.e., any issue previously resolved generically) can be reconsidered, based on significant and new information. See SECY-93-032 at 3-4; 61 Fed. Reg. 28,467, 28,470 (1996).[9]

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[8] Although it appears to be a minority position among the federal courts, the NRC might take the position that information available before the preparation of the ESP EIS but not submitted until afterwards is unduly late and does not require the agency to go back and re-evaluate previous determinations in the ESP EIS. See Roanoke River Basin Assoc. v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991) ("An issue never presented to [an agency] 'must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.'") (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1976)); Hughes River Watershed Conservancy, 81 F.3d at 451 (Hall, J., dissenting); Oregon Natural Resources Council v. Marsh, 52 F.3d 1485, 1495 (9th Cir. 1995) (Rymer, J., dissenting); c.f. Apache Survival Coalition v. United States, 21 F.3d 895, 912 (9th Cir. 1994) (denying on the grounds of laches claim under National Historical Preservation Act known of by plaintiffs but not raised until after completion of NHPA process).

[9] See also Highway J Citizens Group v. Mineta, 349 F.3d 938, 959-60 (7th Cir. 2003) (agency-requested expert analysis); Hodges v. Abraham, 300 F.3d 442, 446, 448 (4th Cir. 2002) (agency record of decision based on review of previous NEPA documents); Idaho Sporting Congress v. Alexander,

Except as provided by Section 52.39(a)(2)(ii) as discussed above, there must be no reconsideration of environmental impacts evaluated in the ESP EIS without the granting by the Commission of a waiver under 10 CFR 2.335 of Sections 52.39(a)(2) and 52.89. To allow reconsideration of impacts without satisfying the petition requirements of Section 52.39(a)(2)(ii) or the waiver requirements of Section 2.335 would cause the finality provisions of Part 52 to have no regulatory effect, because any intervenor would be able to litigate a previously evaluated impact simply by alleging that there is new information that could affect the prior conclusions. That would be contrary to the Commission's intent in promulgating Part 52 and unnecessary under NEPA. Indeed, the federal courts have stated that were public participation required on the decision whether to prepare a supplemental EIS, that threshold decision "would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information . . . could prolong NEPA review beyond reasonable limits." Friends of the Clearwater v. Dombeck, 222 F.3d at 560 (9th Cir. 2000). Therefore, it is appropriate for the Commission to grant a waiver request only upon concluding that the new information would show that that matter would have a seriously different impact on the environment than what was considered in the ESP EIS.

Conclusion

The Commission has established a specific scope of environmental review for COL applications referencing an ESP that requires treating all environmental matters addressed in the ESP proceeding as resolved. This approach, which fully complies with NEPA, is essential to effectuate the Commission's intent and to preserve the ESP process as it was intended – as a process that allows for site suitability and environmental issues to be conclusively resolved in advance of a combined license proceeding and plant construction.

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222 F.3d 562, 566 (9th Cir. 2000) (agency supplemental information report); Price Road Neighborhood Assoc. v. DOT, 113 F.3d 1505, 1509-10 (9th Cir. 1997) (assessments by other agencies or agency's own "statement of explanation"); Marsh, 490 U.S. at 383-85 (agency supplemental information report based on agency-requested expert analysis).