COMGBJ-06-0002

March 8, 2006

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Lyons

FROM: Gregory B. Jaczko ***/RA/***

SUBJECT: VERMONT YANKEE'S EXTENDED POWER UPRATE LICENSE AMENDMENT

I have substantial concerns about the decision to make the license amendment approving the requested Vermont Yankee extended power uprate application immediately effective. While I understand that amendments to the Atomic Energy Act, and later revisions to NRC's regulations, allow for this to occur, they only do so if a "no significant hazards consideration" (NSHC) determination is reached. If such a determination is made, the NSHC then allows the license application to be issued prior to a hearing on the application. At first blush, the instance of the Vermont Yankee extended power uprate application does not appear unusual in this respect. As is permitted by statute and regulations, the license amendment application was made immediately effective following the staff's NSHC determination despite the pendency of an ongoing adjudicatory proceeding.

This case, however, is not quite that simple and it is this complexity that gives me reason for pause. At this point in time, the NRC staff has reviewed numerous power uprate requests and should, therefore, have ample experience with the issues surrounding a no significant hazards consideration determination for these applications. In this instance, however, the staff's determination regarding significant hazards did not come shortly after the filing of the application as you would expect with such routine amendments. Instead, the NSHC determination analysis came only after the issuance of the staff's safety evaluation report (SER). This in and of itself reveals that this determination was obviously complex - more of an analysis regarding whether there were *significant hazards* rather than an analysis of whether the application involved significant hazards *considerations.* A brief review of the legislative history surrounding the "Sholly amendment" which gave rise to this statutory provision, however, demonstrates that such a review is inconsistent with the intent of the provision.

Based upon this history, it appears that in complex cases like that confronting the NRC in Vermont Yankee's application, the agency has misapplied the implementation of the NSHC determination. The Conference Committee Report surrounding the relevant amendment to the Atomic Energy Act directed the NRC to establish standards to determine whether or not a license amendment involved a significant hazards consideration. According to the language of

the report, the standards

> "...should not require the NRC staff to prejudge the merits of the issues raised by the proposed license amendment application. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations. These standards should be capable of being applied with ease and certain[t]y, and should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration."[1]

Moreover, the Commission, in issuing the regulations that established these standards, emphasized that the standards for NSHC determinations and the examples cited in the rulemaking were "merely screening devices for a decision about whether to hold a hearing before as opposed to after an amendment is issued and [can] not be said to prejudge the Commission's final public health and safety decision to issue or deny the amendment request."[2] The Commission stated further that there was no intrinsic safety significance to the NSHC standard.[3] It is instead only a procedural standard - and a standard "not meant to be used to make the ultimate decision about whether to issue an amendment – that final decision is a public health and safety judgment on the merits, not to be confused with the decisions on notice and reasonable opportunity for a hearing."[4]

Yet despite all of this guidance, somewhere we strayed from our course. While originally, in the interim final rule regarding standards for the no significant hazards determination process in 1983, an increase in authorized maximum core power level was provided as an example of an amendment that the NRC considered likely to involve significant hazards considerations,[5] it appears that in July, 2001, the staff began to change this policy.[6] Regardless of the experience that was relied upon in changing this approach, the situation presented by the Vermont Yankee extended power uprate application should cause us to rethink these changes. A no significant hazards consideration determination that could not be finalized without the staff's safety evaluation report appears to meet none of the standards set by Congress or the Commission. It certainly does not appear that the determination was made with "ease" or "certainty". And it is difficult to see how such an NSHC determination can be referred to as a "screening device", or

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[1] House Conference Report No. 97-884, at p. 37, reprinted in 1982 U.S. Code Cong. & Ad.News 3592, 3607.

[2] "Standards for Determining Whether License Amendments Involve No Significant Hazards Considerations," Interim Final Rule, 48 Fed. Reg. 14864, 14869 (1983).

[3] 48 Fed. Reg. at 14,865.

[4] *Id.* at 14864.

[5] *Id.*

[6] *See* "Proposed No Significant Hazards Consideration Determinations for Amendments to Increase Rated Thermal Power for Nuclear Power Reactors," July 27, 2001, SECY-01-0142.

how the staff determined the NSHC without prejudging the merits of the issues raised in the license amendment application when it relied upon the staff's safety analysis in reaching its findings.

Rather than making the determination that the amendment did raise considerations of significant hazards, the NRC appears to have analyzed those hazards away through its safety analysis. This implementation of the NSHC determination process misses the point of the process - and its intent. If the staff had to make its reasonable assurance of public health and safety finding before it could conclude its NSHC determination, then the NSHC determination is no longer a tool to determine the necessity of a prior hearing, but instead simply becomes a tool to allow an amendment to be issued while a hearing is pending. The NSHC was always intended to be a quick review of questions raised by the application, and not about answering those questions. Applications receiving the NSHC determination were meant to be those that were non-controversial; those that would have nothing of safety significance to raise in a hearing. As Commissioner Asselstine noted in his separate views in a case involving an NSHC determination - views later validated in a 9th Circuit decision - the NRC made clear in its testimony to Congress that it considered the class of amendments that would receive a NSCH determination as those that involved no significant questions of public health and safety.[7] Unfortunately, that is not the case with the present Vermont Yankee power uprate application in which parties raised significant safety contentions in the hearings before the Board, and in which the staff has imposed numerous license conditions. To issue an NSHC in such an instance is, I believe, precisely what the Congress directed the agency <u>not</u> to do.

Essentially, the NSHC process currently in place, at least as it has been applied to Vermont Yankee, appears to be contradictory to original intent and essentially unworkable. Given these concerns, I have significant doubts about the validity of the immediate effectiveness of the Vermont Yankee extended power uprate license amendment. I believe that the Commission owes itself and its external stakeholders to stay the effectiveness of the requested license amendment until the outcome of the pending adjudication on this amendment. The Commission should also direct the staff to re-establish the policy that extended power uprates, those over 7%, are likely to involve a significant hazards consideration determination. Finally, the staff should review its no significant hazards consideration determination process and present the Commission with options to address these issues in order to ensure that there are not future instances in which an NSHC determination is not true to its original intent. In doing so the staff should consider whether or not regulatory changes to 10 C.F.R. §50.92 could aid the staff in setting more consistent parameters for NSHC determinations.

SECY, please track.

cc: OGC
EDO

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[7] *See Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 24 NRC 1, 19 (1986); *see also* <u>San Luis Obispo Mothers for Peace v. U.S. NRC</u>, 799 F.2d 1268 (1986)..