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(2)

From: "HEYMER, Adrian" <aph@nei.org>
To: <avc@nrc.gov>
Date: Tue, May 16, 2006 3:39 PM
Subject: Federal Register Notice 71 FR 12782, March 13, 2006, Notice of Proposed Rule for Licenses, Certifications and Approvals for Nuclear Power Plants

May 16, 2006

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Annette L. Vietti-Cook

Secretary

U.S. Nuclear Regulatory Commission

Washington, DC 20555-0001

ATTENTION: Rulemakings and Adjudications Staff

SUBJECT: Federal Register Notice 71 FR 12782, March 13, 2006, Notice of Proposed Rule for Licenses, Certifications and Approvals for Nuclear Power Plants

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI)[1] is providing this early, partial response to the subject Notice of Proposed Rule (NOPR). These specific comments are related to the finality at the combined license (COL) stage of NRC environmental findings in a referenced early site permit. We are submitting these comments early because this is a key issue for prospective COL applicants and further senior industry-NRC management interaction may be necessary.

Sincerely,

Adrian Heymer

Senior Director, New Plant Deployment

Nuclear Generation Division

Nuclear Energy Institute

Template = SECY-067

SECY-02

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[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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May 16, 2006

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTENTION: Rulemakings and Adjudications Staff

SUBJECT: *Federal Register* Notice 71 FR 12782, March 13, 2006, Notice of Proposed Rule for Licenses, Certifications and Approvals for Nuclear Power Plants

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI)[1] is providing this early, partial response to the subject Notice of Proposed Rule (NOPR). These specific comments are related to the finality at the combined license (COL) stage of NRC environmental findings in a referenced early site permit. We are submitting these comments early because this is a key issue for prospective COL applicants and further senior industry-NRC management interaction may be necessary.

A fundamental principle of Part 52 is to provide for the early resolution of safety and environmental issues. NRC design certifications and early site permits (ESP) provide the regulatory vehicles for resolving issues associated with standard plant designs and site suitability. Part 52 provides that, in any COL proceeding, the Commission "shall treat as resolved" those issues resolved in an ESP proceeding provided the terms and conditions of the referenced ESP are met.

Specific language in proposed Sections 51.50(c)(1)(iii), 51.107(b)(3) and 52.39(a)(2)(v) of the March 13, 2006 NOPR is contrary to the ESP finality principle of Part 52. The

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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proposals would, if implemented, lead to unnecessary and inefficient reconsideration, re-review and possible re-litigation of issues that have been resolved in an ESP proceeding, and could deter future use of the ESP process.

The enclosure describes the bases for our concerns and includes recommended rule language designed to resolve those concerns and affirm the ESP finality principle in the regulations. Our comments and recommendations are consistent with the intent of Part 52, National Environmental Policy Act (NEPA) requirements and precedents, and implementation of NRC license renewal regulations. The key points discussed in the enclosure are:

- Issues resolved in an ESP should have finality in a COL or other future licensing proceeding, provided the terms and conditions of the ESP are met.

- Consistent with NRC regulations and practice for license renewal, persons seeking to reopen previously resolved environmental issues should be required to obtain a waiver of the ESP finality rules under Section 2.335(b) and (c).

- A COL application that references an ESP must contain information necessary to:
    - Demonstrate that the actual facility falls within the site characteristics and design parameters specified in the ESP,
    - Resolve other significant environmental issue not previously considered in the ESP application or the ESP Final Environmental Impact Statement (EIS)
    - Identify new and significant information that the COL applicant becomes aware of regarding issues discussed in either the ESP application or the ESP Final EIS

- The COL Application Environmental Report (COL ER) should not be required to identify all new information regarding previously considered issues. Consistent with the process and practices used successfully for license renewal, a COL applicant would only provide information on a previously considered environmental issue if it is both new <u>and</u> significant.

- The COL applicant is responsible for determining the significance of new information about the site or design. New and significant information would be included in the COL application ER, as appropriate. The process for identifying and evaluating the significance of new information, and the actual evaluations, would be maintained in an auditable format and would be available for NRC audit and inspection.

- Members of the public and agencies may submit comments on previously considered issues during the environmental scoping process or during the comment period on any draft supplemental EIS that the Staff may prepare. The NRC staff would consider all such comments, and if they present significant new information, would obtain a waiver from the Commission to allow reconsideration of the affected issue. This is consistent with license renewal proceedings.

- Consistent with NEPA regulations and case law, an ESP and a COL can and should be considered closely related "connected actions." There is no need or requirement to prepare a new EIS for the second of two connected actions, or revalidate previous findings if neither the applicant nor others identify significant new information. For COL applications that reference an ESP, the NRC should prepare a supplemental EIS that incorporates by reference the findings and conclusions of the ESP final EIS. This is consistent with proposed new Section 51.75(c)(1).

Resolution of these environmental finality issues is essential to affirm the Commission's fundamental objective that Part 52 provides for the early resolution of safety and environmental issues. Establishing clear requirements and guidance on the finality of ESP information and the content of COL applications is vitally important to assure focused, effective and efficient preparation and review of forthcoming COL applications.

We believe that further public interactions between industry and NRC technical and legal staffs may be needed on this issue. This would help assure that a common understanding is reached and appropriate language for the proposed rule is developed to support the October 2006 schedule.

If you have any questions about the industry's perspective on the finality for COL of ESP environmental information as discussed in this letter or the enclosure, please contact me (202) 739-8094; aph@nei.org or Russ Bell (202) 739-8087; rjb@nei.org).

Sincerely,

Adrian Heymer

Enclosure

c: The Honorable Nils J. Diaz, Chairman, NRC
The Honorable Edward McGaffigan, Jr. Commissioner, NRC
The Honorable Jeffrey S. Merrifield, Commissioner, NRC
The Honorable Peter B. Lyons, Commissioner, NRC
The Honorable Gregory B. Jaczko, Commissioner, NRC
Mr. Luis A. Reyes, Executive Director of Operations, NRC
Ms. Karen D. Cyr, General Counsel, NRC
Mr. James E. Dyer, NRC

Industry Comments on March 13, 2006, Part 52 Notice of Proposed Rulemaking: Proposed Amendments that Would Expand the Scope of the COL Environmental Review and Negate the Finality of Previously Determined ESP Environmental Issues Should Be Modified

Proposed Rule Provisions

Proposed Section 51.50 (environmental report)

Proposed Section 51.50(c)(1)(iii) would add a new provision requiring a COL application referencing an early site permit to include in the Environmental Report, in addition to the environmental information and analyses otherwise required, "any new and significant information on the site or design to the extent that it differs from, or is in addition to, that discussed in the early site permit environmental impact statement." 71 Fed. Reg. 12,782, 12,881.[1]

Proposed Section 52.39 (finality of early site permits)

Proposed Section 52.39(a)(2) specifies that if a COL application references an ESP, "the Commission shall treat as resolved those matters resolved in the proceeding on the application for issuance or renewal of the early site permit, except as provided for in paragraphs (b),(c) and (d) of this section." 71 Fed. Reg. at 12,893. Thus, the subject matter covered in proposed Section 52.39(b), (c), and (d) will not be treated as resolved, and may be the subject of litigation in the COL application hearing.

Of particular interest to this discussion is proposed Section 52.39(c)(1), paragraph (v), which provides that in any proceeding for issuance of a COL referencing an ESP, contentions may be litigated on whether:

> "(v) Any significant environmental issue not covered which is material to the site or the design to the extent that it differs from those discussed or it reflects significant new information in addition to that discussed in the final environmental impact statement."

71 Fed. Reg. at 12,893.[2] A similar provision is included in proposed Section 51.107(b)(3). See 71 Fed. Reg. at 12,885. Thus, in a COL proceeding where

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[1] NEI will separately comment on other provisions added to proposed 10 CFR 51.50(c)(1) requiring COL applicants to "have a reasonable process for identifying new and significant information" regarding the NRC's conclusions in the ESP EIS.

[2] NEI will separately comment on Section 52.39(c)(1)(iv) regarding lack of consistency with Section 52.39(a)(2) regarding emergency planning information updated for COL in accordance with Section 50.54(q).

an ESP is referenced, these issues would not be treated as previously resolved.

Additionally, the proposed rule would delete current provisions in 10 C.F.R. §§ 52.79(a)(1), and 52.89 that afford finality to previously resolved environmental issues.[3]

Comments on Proposed Rule Provisions

Overview

The NRC should not eliminate the concept of finality embodied in Sections 52.39(a)(2), 52.79(a)(1), and 52.89 with respect to previously resolved environmental issues.[4] Additionally, NRC should not promulgate proposed Sections 52.39(c)(1)(v) and 51.107(b)(3) as written, which would allow litigation in COL proceedings of environmental issues previously resolved in an ESP proceeding. Rather, NRC should modify these proposed Sections to require that persons seeking to reopen previously resolved environmental issues must petition the Commission for a waiver of the finality rules. The Commission should grant such waivers only if information arising after the ESP proceeding shows that granting the COL would have a significantly greater impact on the environment than what was described in the ESP EIS.

The Commission should also direct the NRC Staff that it is not necessary for the Staff to examine or revalidate previously resolved environmental issues, or perform an independent search for new information. Rather, the EIS at the COL stage should incorporate by reference the ESP EIS.

In this regard, NRC should clarify that Section 51.20(b) allows preparation of either an EIS or an EIS supplement for both an ESP application and a COL application. The proposed amendments to Sections 51.20(b)(1)-(2) do not change this flexibility (see 71 Fed. Reg. at 12,878), and proposed amended Section 51.75(c)(1) clearly supports use of an EIS supplement for the COL application. Industry's position is also supported by the fact that an early site permit and a combined operating license should be considered "connected actions" under National Environmental Policy Act (NEPA) case law and Council on Environmental Quality (CEQ) regulations.

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[3] *See* 71 Fed. Reg. at 12,898 (deleting current § 52.79(a)(1)); *id.* at 12,902 (deleting current § 52.89); *id.* at 12,893 (amending §§52.39(a)(2) and 52.39(c)).

[4] Sections 52.39(a)(2), 52.79(a)(1), and 52.89 have been restructured or eliminated in the proposed rule. At the end of this paper, recommended rule language is provided for the restructured provisions that preserves the concept of finality embodied by the existing regulations.

The NRC should revise proposed Section 51.50(c)(1)(iii) to emphasize that COL applicants must include in their Environmental Reports (ERs) only that information which is both new and significant – not merely new. NRC should revise proposed Section 52.39(c)(1)(v) in several respects, to provide that in COL proceedings, contentions may only be litigated on *significant* environmental issues material to the site or the design that were not previously considered in the ESP proceeding. Further, NRC should define the scope of information to be considered "new" at the COL stage (when an ESP is referenced) more narrowly than is suggested by the language in proposed Sections 51.50(c)(1) and 52.39(c). NRC should also clarify the meaning of "new and significant" information consistent with license renewal precedent and the Supplementary Information for this proposed rule.

Recommended rule language for addressing these concerns is provided at the end of this paper.

The Proposed Amendments Undercut the Rulemaking Goal of Achieving Finality for Previously Resolved ESP Issues

The NRC asserts that 10 CFR Part 52 "does provide finality for previously resolved issues." 71 Fed. Reg. at 12,826. However, the finality afforded by the ESP process would be significantly eroded by the proposed new requirements in Sections 51.50 and 52.39.

We are concerned that proposed Section 52.39(c)(1)(v), if adopted, could be interpreted to mean that any information that allegedly "differs from" or is "in addition to" that discussed in the final ESP EIS is new and significant information that is subject to review and hearing in the COL proceeding.[5] The effect of such an interpretation would be to unnecessarily expand the environmental review at the COL stage and negate the finality afforded to environmental issues that were previously resolved – eliminating one of the primary benefits of an ESP. Only information that is new and significant with respect to the environmental impacts considered in the ESP EIS – and not information that merely differs from or is in addition to that discussed in the ESP EIS – is appropriate to include in the COL application (COLA) ER. The effect of the staff proposals would be to eliminate the concept of finality embodied in Sections 52.39(a)(2), 52.79(a)(1), and 52.89 with respect to previously resolved environmental issues.

[5] The Supplementary Information appears to support this concern, stating that environmental issues analyzed at the ESP stage would be only "candidates" for issue preclusion at the COL stage (71 Fed. Reg. at 12,826).

In the industry's view, these proposed changes and deletions should not be reflected in the final rule. They will not achieve the Commission's stated goal in this rulemaking of enhancing the agency's effectiveness and efficiency in licensing new plants. Rather, they would undermine the fundamental objective and benefit of an ESP. They are not required by NEPA. Further, they are not consistent with the stated goals of the existing Part 52 rule, which include fostering "early resolution of safety and environmental issues in licensing proceedings." *See, e.g.,* 54 Fed. Reg. 15,372, 15,373 (1989). Consistent with this NRC objective, existing 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 C.F.R. § 52.39(a)(2).[6] Thus, the current rules avoid reconsideration of environmental issues in a COL application when those issues have previously been assessed and resolved in an ESP proceeding. This important regulatory objective must be preserved.

If these proposed amendments are promulgated as proposed, they may well deter submittal of any future ESP applications. Rather than proceeding with these changes, the Commission should modify the final rule to reflect that persons seeking to reopen previously resolved environmental issues in a COL proceeding must petition the Commission for a waiver of the finality rules (currently, 10 CFR §§ 52.39(a)(2), 52.79(a)(1), and 52.89). This is consistent with license renewal. As discussed below, the Commission should also clarify other proposed new provisions which, as drafted, are either confusing as written or appear to conflict with recent statements made by NRC Staff representatives at NRC public meetings and workshops related to proposed Part 52.

NRC May Prepare an EIS Supplement at the COL Stage Because ESPs and COLs May Be Viewed as "Connected Actions" under NEPA

The changes proposed by the NRC Staff are not required by NEPA. In discussing the proposed changes to Section 51.50, the NRC cites "the NRC staff's belief that, inasmuch as an early site permit and a combined license are major Federal actions significantly affecting the quality of the human

[6] Under existing 52.39(a)(2), the Commission "shall treat as resolved those matters resolved" in the ESP proceeding, unless a contention is admitted that a reactor does not fit within an ESP site parameter or a petition is filed alleging either that the site is not in compliance with the ESP terms or that the terms and conditions of the ESP should be modified.

environment, both actions require the preparation of an EIS."[7] It references NRC regulations and unspecified NEPA case law as supporting this position. 71 Fed. Reg. at 12,826. We submit that because an ESP and a COL are "connected actions," under NEPA case law[8] and Council on Environmental Quality (CEQ) regulations, they may appropriately be addressed by the NRC in a single environmental impact statement. In addition, this language in the Supplemental Information is inconsistent with the language in Sections 51.71(d) and 51.75(c)(1) of the proposed rule itself, which properly states that only a supplemental EIS is needed at the COL stage when an ESP is referenced.

CEQ regulations define "connected actions" as actions that "are closely related and therefore should be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(1). Since an ESP is a partial construction permit (CP) and resolves whether a site is suitable for construction and operation of new units, it is "closely related" to a COL.

Further, CEQ regulations provide that actions are "connected" if they are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). This is the case here. If a COL is a partial CP, it is an initial step in a larger action and is undertaken only to further decisions and actions on whether new nuclear units should be built and operated. The ESP, by itself, cannot have a significant impact on the environment unless it is used in connection with another activity, such as a COL.

Under applicable case law, there is no requirement to prepare a new EIS for the latter of two connected actions that were previously evaluated together in a single EIS. Thus, the EIS prepared at ESP stage serves as the EIS for issuance of both the ESP and COL. The ESP EIS includes an evaluation of

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[7] The rulemaking notice can be read to suggest that NRC intends to prepare a COL EIS that will review every environmental issue to determine whether prior findings should be changed as a result of new and significant information or may be incorporated by reference. *See* 71 Fed. Reg. at 12,626 ('the combined license environmental review *is informed* by the EIS prepared at the early site permit stage, and the NRC staff intends to use tiering and incorporation-by-reference *where it is appropriate to do so.*"). *See also id.* ("the NRC is ultimately responsible for completing any required NEPA review, for example, *to ensure that the conclusions for a resolved early site permit environmental issue remain valid for a combined license action.*") (emphasis added).

[8] *E.g., Village of Grand View v. Skinner*, 947 F.2d 651, 656-57 (2d Cir. 1991).

the environmental impacts related to issuance of a COL inasmuch as it considers the environmental impact of plant construction and operation, the activities permitted by the COL. Existing Part 52 regulations properly recognize that a COL application "need not contain information or analyses submitted to the Commission in connection with the ESP." See 10 CFR 52.79(a)(1). It follows that the EIS prepared for ESP – which assesses the environmental impacts of plant construction and operation – does not have to be duplicated. The proposal in the Supplemental Information to treat a COL as a separate action requiring its own independent EIS is thus a significant and unjustified departure from NEPA requirements and case law and is inconsistent with existing NRC rules and the language in the proposed rule itself.

Use of EIS Supplements

While a COL should not be considered an independent action requiring a separate EIS, there may be a need at the COL stage to prepare a supplement to the EIS. In correspondence with NEI, the NRC stated that, "inasmuch as an ESP and a COL are major federal actions," an environmental assessment is not a sufficient environmental inquiry on which to base an action on an ESP or a COL application, and, accordingly, "pursuant to 10 CFR 51.20, both actions require the preparation of an environmental impact statement (EIS)."[9] On this point, we read existing 10 CFR 51.20 as allowing the preparation of either an EIS or an EIS supplement. We ask the NRC to confirm in the final rule this reading of Section 51.20. In particular, we request that the NRC retain the language in Sections 51.71(d) and 51.75(c)(1) of the proposed rule, which states that no more than a supplemental EIS is needed at the COL stage when an ESP is referenced.

A supplement to the EIS would be required if there are significant environmental issues not considered in the ESP proceeding (such as deferred issues like need for power and alternative energy sources), and may be required if the design of the facility exceeds the bounds analyzed in the ESP EIS. Existing NRC rules already require consideration of such issues. 10 C.F.R. § 52.89. An EIS supplement would also be required under NEPA 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

[9] *See* July 6, 2005, letter from W. Beckner, NRR, to A. Heymer, NEI, p.1. As previously discussed, the EIS prepared at the ESP stage serves as the EIS for issuance of both the ESP and COL, and thus satisfies Section 51.20 at both stages. Consequently, at the COL stage, an environmental assessment could be used to determine whether there is any need for supplementation.

significant extent not already considered.'"[10] In this regard, we support the proposed new Section 51.75(c)(1), to the extent it provides that for COL applications that reference ESPs, the draft supplemental COL EIS "shall incorporate by reference" the ESP final EIS. 71 Fed. Reg. at 12,884.

Waiver of Finality Provisions as Prerequisite to Reconsideration of Previously Analyzed Impacts

There may be instances when the applicant, the NRC Staff, or a member of the public identifies new information that they believe alters the evaluation of an environmental issue addressed in the ESP EIS. If this new information does not relate to a design feature exceeding the parameters specified in the ESP, then a waiver of the finality rules (currently, Sections 52.39(a)(2), 52.79(a)(1), and 52.89) should be obtained from the Commission in order to allow reconsideration of the previously analyzed impact. Consistent with federal case law on when an agency must prepare a supplement to an EIS, the Commission should grant the waiver only if the new information presents a "seriously different picture of the environmental impact" of granting a COL than what was previously envisioned.[11] By this means, the NRC's interests in preserving finality and in supplementing environmental review when appropriate would be carefully balanced.

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[10] *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting *Marsh v. Or.Natural Res. Council*, 490 U.S. 360, 374 (1989)); *see* 10 C.F.R. § 51.92(a). The Courts of Appeals have held that "a supplemental EIS is only required where new information provides a seriously different picture of the environmental landscape." *New River*, 373 F.3d at 1330. (emphasis in original, internal quotations omitted) (quoting *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)). *See also Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); *S. 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). "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 (footnote omitted).

[11] *See, e.g., S. Trenton Residents*, 176 F.3d at 663; *New River*, 373 F.3d at 1330.

The Commission's consideration of the new information in the course of evaluating a waiver request would be consistent with federal case law that allows agencies to employ non-NEPA documentation (i.e., documentation aside from an EA or supplemental EIS and not subject to NEPA public participation requirements) to determine whether alleged new impacts are significant enough to require the preparation of supplemental NEPA documentation and explain why not.[12] If the Commission were to deny the waiver request, it would be appropriate for the Commission to explain why the new information did not require a supplement to the ESP EIS, but public participation would not be required.[13] "Although NEPA requires agencies to allow the public to participate in the preparation of an SEIS, there is no such requirement for the decision whether to prepare an SEIS."[14]

Significantly, requiring a waiver would also be consistent with the approach that the NRC has 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)

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[12] *See, e.g., Pennaco Energy, Inc. v. DOI*, 377 F.3d 1147, 1151 (10th Cir. 2004) (agency may use supplemental information report). *See also Highway J Citizens Group v. Mineta*, 349 F.3d 938, 959-60 (7th Cir. 2003), *cert. denied*, 541 U.S. 974 (2004) (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*, 222 F.3d 562, 566 (9th Cir. 2000) (agency supplemental information report); *Price Rd. Neighborhood Ass'n 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 report based on agency-requested expert analysis).

[13] Of course, if the NRC were to determine that an SEIS was required to re-evaluate environmental issues previously considered in the ESP EIS, NEPA's public participation requirements would apply to the preparation of the SEIS. *See Idaho Sporting Congress*, 222 F.3d at 566-68.

[14] *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (emphasis in original). 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." *Id.*, 222 F.3d at 560 (citation omitted).

can be reconsidered, based on significant and new information. See SECY-93-032 at 3-4; 61 Fed. Reg. 28,467, 28,470 (1996). This approach would allow supplementation of the ESP EIS where appropriate, while maintaining the preclusive effect of the Part 52 regulations. In the Supplementary Information in the rulemaking notice, the NRC recognizes the applicability of the license renewal environmental review process to the review of COL applications referencing ESPs (71 Fed. Reg. at 12,826), and we agree that the NRC's license renewal approach is fully applicable here.

While the environmental issues in a license renewal proceeding are resolved generically by rule, the permissibility of such an approach is predicated on the fact that NEPA does not require an agency to adopt any particular internal decision-making structure.[15] NEPA does not require agencies to elevate environmental concerns over other appropriate considerations, but rather only requires that the agency take a "hard look" at the environmental consequences before taking a major action.[16] Thus, the NRC can determine an appropriate method of conducting the hard look required by NEPA, and can adopt an approach that takes into account administrative efficiency in avoiding needless repetition of litigation.[17]

In Part 52, the NRC has chosen an appropriate method of taking the hard look required by NEPA. It allows environmental impacts to be determined at an early stage in an ESP proceeding, based on a site-specific EIS prepared with full public participation, and then applies finality to the issues so resolved to allow a potential applicant to determine that its proposed site is suitable before expending large sums for plant design and licensing. If an agency has the discretion to treat as resolved impacts determined generically by rule, it also has discretion to treat as resolved impacts determined after a full site specific investigation and proceeding. In both cases, the waiver mechanism is an appropriate procedural safeguard allowing supplementation when demonstrated to be necessary.

Moreover, if a waiver were required, previously resolved environmental issues could not be reopened simply based on allegations and artful pleadings in a hearing request. In accordance with the NRC's Rules of Practice, the Commission would be able to grant a waiver request only if it were supported by an affidavit establishing the special circumstances with particularity and

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[15] *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100-101 (1983).

[16] *Baltimore Gas & Electric Co, id.* at 97.

[17] *Id.* at 101.

making a prima facie showing that the rule should be waived. 10 C.F.R. § 2.335(b),(c). These procedural safeguards are needed and appropriate to preserve the current rule's objective of allowing early resolution of environmental issues.

Need to Clarify the Scope of "New and Significant" Information at the COL Stage when an ESP Is Referenced

In its July 6, 2005, letter to NEI (p. 2), the NRC proposed to categorize as "new" in the context of "new and significant" *any information that was not contained or referenced in the ESP application or the ESP EIS.* NRC noted that: "[t]his new information may include (but is not limited to) specific design information that was not contained in the application, especially where the design interacts with the environment, or information that was in the ESP application, but has changed by the time of the COL application. Such information may or may not be significant." Similarly, the Supplementary Information for the proposed rule provides (71 Fed. Reg. at 12,826) that for COL applications referencing ESPs, "new" information is "any information that was not contained or referenced in the *early site permit application or the early site permit EIS.*" (emphasis added).

In apparent contrast, the text of proposed section 51.50(c)(1)(iii) requires COL applications to include, *inter alia*, "any new and significant information on the site or design to the extent that it differs from, or is in addition to, that discussed in the early site permit environmental impact statement." *See* 71 Fed. Reg. at 12,881. Here, the concept of what is "new" is tied only to what information was in the ESP EIS.[18] The same is true of the language of proposed Sections 51.107(b)(3) and 52.39(c)(1)(v).

The new definition will result in unnecessary and duplicative work for COL applicants and the NRC Staff, and will introduce inefficiencies into the licensing and hearing process. Also, the broader definition increases the potential for unnecessarily expanding any associated hearing. Moreover, adoption of this broader definition of "new" severely undermines the intended

[18] Proposed § 51.50(c)(1)(3) is very similar to the existing 10 C.F.R § 51.53(b), which governs the scope of environmental review in Part 50 OL proceedings. Under § 51.53, the ER for an OL is required to address environmental matters "to the extent that they differ from those discussed or reflect new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the construction permit." The old two-step licensing process allowed reconsideration and litigation of environmental matters that had been addressed at the CP stage. The proposed rule should not revert to this ineffective standard.

value and benefit of an ESP. Arguably, a party to a COL proceeding could litigate whether the conclusions in the EIS would be changed by any information – any study, any report, any opinion, or any alleged facts – not explicitly discussed in the EIS, as long as that party met the pleading requirements of basis and reasonable specificity, and even if the information was addressed for ESP (but not documented in the EIS). We believe this standard is unduly broad, and that NRC has not justified the change.

At a minimum, no information should be deemed "new" if it was considered in preparing the Environmental Report or EIS (as may be evidenced by references in these documents, RAI responses, comment letters, and the like), or if it was generally known or publicly available (such as information in reports, studies and treatises) during preparation of the EIS. Consistent with these concerns, the Part 52 final rule (including proposed Sections 51.50(c)(1), as well as 51.107(b)(3) and 52.39(c)(1)(v) if the reference to new and significant information is retained in those sections) and Supplementary Information should be amended to reflect a more appropriate definition of "new" information.

When considering the meaning of "new" and "new and significant" with respect to matters previously considered for ESP, it is important to remember that proposed Section 51.50(c)(1)(ii) requires that COL applications contain information to resolve any other significant environmental issue not considered in the ESP proceeding.

The NRC should also clarify that proposed section 51.50(c)(1)(iii), as well as any other sections that refer to new and significant information, is intended to capture environmental information that is both new <u>and</u> significant – not merely new. We understand that the ER submitted with a COL application that references an ESP must identify any new and significant information regarding the environmental impacts discussed in the ESP EIS. This understanding is based on the Supplementary Information discussion (including the analogy to the NRC's license renewal process (*see* 71 Fed. Reg. at 12,826-27) and the NRC's July 6, 2005, letter to NEI.

However, and as discussed earlier, we believe the current wording of proposed §§ 51.50(c)(1)(iii) (as well as 51.107(b)(3) and 52.39(c)(1)(v)) is confusing in this regard, because it could be interpreted to mean that information that "differs from" or is "in addition to" that discussed in the final ESP EIS is new and significant information subject to review and hearing in the COL proceeding. These sections should be clarified in the final rule.

The importance of this clarification has been heightened by the NRC Staff's recent suggestion[19] that COL applicants, unlike license renewal applicants, are expected to identify all new environmental information that was not provided with the ESP application, regardless of significance. This would include, for example, new environmental data and or studies (e.g., meteorological, hydrological, aquatic, etc.) on issues that were addressed in the ESP EIS. Moreover, the Staff stated that specific design information concerning systems that interface with the environment must be provided in the COL application for NRC review, even though the environmental impacts of these systems were assessed in the ESP EIS based on design information intended to bound the actual future design from an environmental perspective.

Whether in the case of new environmental information or more specific design information, a COL applicant should not be expected to include new information in its ER unless the applicant determines it to be significant with respect to the environmental impacts discussed in the ESP EIS. An auditable record of these evaluations will be maintained by the COL applicant.[20]

We expect that regulatory guidance, such as DG-1145, will indicate that new information should be considered significant and described in the COLA ER if the COL applicant determines that the new information would cause an adverse change in the previously concluded environmental impact from "small" to "moderate" or from "moderate" to "large." This is consistent with NRC's existing practice for license renewal.

In sum, the NRC should clarify that under proposed section 51.50(c)(1)(iii), information on previously considered issues would be included a COL applicant's environmental report only if it is both new and significant. This information would be used by the staff to determine whether to seek from the Commission a waiver of the finality rules. The Commission should make it

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[19] Reference NRC staff statements at an April 21, 2006, public workshop concerning expectations for the content of a COL application

[20] For example, specific design information on environment interfacing systems would not be provided in the COLA ER unless the actual design differs from the bounding design information used for ESP in a way that would adversely affect the environmental impacts discussed in the ESP FEIS. COL application ERs will contain the required demonstration that the actual facility falls within the site characteristics and design parameters specified in the ESP. Specific design information about environment interfacing systems will be maintained available for NRC audit/inspection as it is developed by the COL applicant.

clear that proposed section 51.50(c)(1)(iii) is not intended to require a COL applicant to update the environmental report prepared as the ESP stage.

Conclusion

The Commission should protect the finality of issues resolved at the ESP stage, so that the benefits of an ESP are preserved. For this reason, the proposed sections 51.107(b)(3) and 52.39(c)(1)(v) should be modified to make clear that to avoid preclusion at the COL stage, a contention must (in addition to meeting NRC admissibility standards) involve a significant environmental issue material to the site or the design that was not previously considered in the ESP proceeding. A waiver of ESP finality provisions should be required to raise an issue previously evaluated in the ESP EIS. It is appropriate to require a COL applicant to identify information that is both new and significant, so that the NRC staff can determine whether to seek such a waiver, but a broad update to the previous environmental review is unwarranted.

Recommended Rule Language

§ 52.39 Finality of early site permit determinations.
(a)(2) In making the findings required for issuance of a construction permit, operating license, or combined license, or the findings required by § 52.103, if the application for the construction permit, operating license, or combined license references an early site permit, the Commission shall treat as resolved those matters resolved in the proceeding on the application for issuance or renewal of the early site permit, except as provided for in paragraphs (b), (c) and (d) of this section. . . .

(c) The following issues may be raised in any proceeding for the issuance of a construction permit, operating license, or combined license referencing an early site permit:

.....

(v) Any significant environmental issue material to the site or the design which was not previously considered in the early site permit application or the final environmental impact statement prepared by the Commission in connection with the early site permit. Environmental issues evaluated in the final environmental impact statement prepared by the Commission in connection with an early site permit may only be raised in a proceeding for the issuance of a construction permit, operating license, or combined license referencing the early site permit upon waiver of this rule in accordance with 10 CFR 2.335 based upon a prima facie showing that significant new information materially alters previous conclusions.

. . .

§ 52.80 Contents of applications; additional technical information.
The application must contain:

.....

(c) An environmental report to the extent required by 10 CFR 51.50(c).

Classification of Licensing and Regulatory Action
§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

. . .

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

. . .

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter if there are significant environmental issues not previously evaluated.

Environmental Reports--Production and Utilization Facilities

§ 51.50 Environmental report—construction permit, early site permit, or combined license stage.

. . .

(c) Combined license stage. Each applicant for a combined license shall submit with its application a separate document, entitled "Applicant's Environmental Report–Combined License Stage."

(1) Application not referencing an early site permit. If the combined license application does not reference an early site permit, the environmental report shall contain the information specified in §§ 51.45, 51.51 and 51.52; for other than light-water-cooled nuclear power reactors, the environmental report shall contain the basis for evaluating the contribution of the environmental effects of fuel cycle activities for the nuclear power reactor. Each environmental report shall identify procedures for reporting and keeping records of environmental data, and any conditions and monitoring requirements for protecting the non-aquatic environment, proposed for possible inclusion in the license as environmental conditions in accordance with § 50.36b of this chapter. The combined license environmental report may reference information contained in a final environmental document previously prepared by the NRC staff.

(2) Application referencing an early site permit. If the combined license application references an early site permit, then the "Applicant's Environmental Report–Combined License Stage" need not contain information or analyses submitted to the Commission in "Applicant's Environmental Report–Early Site Permit Stage," but must contain:

.....

(i) ...
(ii) ...
(iii) Any new and significant information regarding the environmental impacts discussed in the ESP application or EIS of which the applicant is aware.

§ 51.71 Draft environmental impact statement--contents.

. . .

(d) *Analysis.* Unless excepted in this paragraph, the draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects and consideration of the economic, technical, and other benefits and costs of the proposed action and alternatives and indicate what other interests and considerations of Federal policy, including factors not related to environmental quality if applicable,

are relevant to the consideration of environmental effects of the proposed action identified under paragraph (a) of this section. The draft environmental impact statement prepared at the early site permit stage must focus on the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters, and will not include an assessment of the benefits (for example, need for power) of the proposed action or an evaluation of other alternative energy sources unless considered by the applicant, but must include an evaluation of alternative sites to determine whether there is any alternative to the site proposed. Absent a waiver granted pursuant to 10 CFR 2.335 based on significant new information, any draft supplemental environmental impact statement prepared at the combined license stage when an early site permit is referenced need not discuss issues that were resolved in the final environmental impact statement prepared by the Commission in connection with the early site permit, provided that the design of the facility falls within the design parameters specified in the early site permit and the site falls within the site characteristics specified within the early site permit. . . .

Draft Environmental Impact Statements--Production and Utilization Facilities
§ 51.75 Draft environmental impact statement–construction permit, early site permit, or combined license.

. . .

(c) (1) Combined license application referencing an early site permit. If the combined license application references an early site permit and the site and design of the facility falls within the site characteristics and design parameters specified in the early site permit, then any draft supplemental combined license environmental impact statement shall incorporate by reference the early site permit final environmental impact statement, need not discuss previously resolved issues.

. . .

§ 51.107 Public hearings in proceedings for issuance of combined licenses.

. . .

(b) If the combined license application references an early site permit, then the presiding officer in a combined license hearing shall not admit contentions proffered by any party on environmental issues which have been accorded finality under § 52.39 of this chapter, unless this contention- -

(1) Demonstrates that the design of the facility falls outside the design parameters specified in the early site permit;

(2) Demonstrates that the site no longer falls within the site characteristics specified in the early site permit;

(3) Raises a significant environmental issue material to the site or the design which was not previously considered or referenced in the early site permit application or final environmental impact statement prepared by the Commission in connection with the early site permit; or

(4) Raises any other material environmental issue the finality of which has been waived by the Commission in accordance with 10 CFR 2.335 based on significant new information.