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PR 1,2,10,19,20,21,25,26,50,51,52,54,55, et. al.
(71FR12781)

May 30, 2006

(12)

Annette L. Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemaking and Adjudications Staff

Serial No. GL06-014

COMMENTS ON PROPOSED PART 52 RULE (71 FED. REG. 12,782)

Dear Ms. Vietti-Cook:

Dominion Nuclear North Anna, LLC (Dominion) submits comments on the NRC's proposed rule to amend provisions on the licensing, certifications and approvals for nuclear power plants published in the Federal Register on March 13, 2006 (71 Fed. Reg. 12,782).

Dominion appreciates the effort of the Commission and NRC Staff to improve the effectiveness and efficiency of the licensing and approval processes for future license applicants. This is an important and necessary goal if new nuclear generating capacity is to be developed to meet the nation's energy needs.

Dominion has a substantial interest in the proposed rule. Dominion is currently an applicant for an Early Site Permit (ESP) for a site at the North Anna Power Station. In addition, Dominion has entered into a Cooperative Agreement with the U.S. Department of Energy to further the development and deployment of new nuclear plants. Pursuant to this Cooperative Agreement, Dominion is preparing an application for a Combined Construction Permit and Operating License (COL) for an ESBWR at the North Anna ESP site, and General Electric is obtaining certification of the ESBWR design. Consequently, Dominion urges the NRC to complete this rulemaking expeditiously because prospective applicants in the process of preparing COL applications need to know with certainty the standards and procedures that will apply.

Dominion has also been supporting the activities of the Nuclear Energy Institute's (NEI) COL Task Force and endorses the comments submitted by NEI on the proposed rule. Dominion hereby adopts and incorporates by reference NEI's May 16, 2006 and May 30, 2006 comments.[1]

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[1] Letter from A. Heymer to A. Vietti-Cook, "Industry Response to NRC Proposed Rule, "Licenses, Certifications and Approvals for Nuclear Power Plants, 71 Fed. Reg. 12,782 (March 13, 2006)" dated May 30, 2006; Letter from A. Heymer to A. Vietti-Cook, "Federal Register Notice 71 FR 12782. March 13, 2006, Notice of Proposed Rule for Licenses, Certifications and Approvals for Nuclear Power Plants" dated May 16, 2006.

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In addition, Dominion submits the enclosed supplemental comments on the following topics specifically addressing aspects of the proposed rule with which Dominion is most concerned. In particular, Dominion is concerned that certain of these proposed provisions would complicate, rather than improve, new plant licensing.

A. The Proposed Rule Threatens the Finality of Environmental Issues Resolved in ESP Proceedings

B. The NRC Should Eliminate Consideration of Severe Accident Mitigation Design Alternatives

C. The NRC Should Clarify the License Transfer Provisions

D. Preconstruction Activities Should be Authorized by Rule Rather Than by Specific Provisions in an ESP

E. The ESP Review Should Not Be Expanded to Include Control of Construction Activities

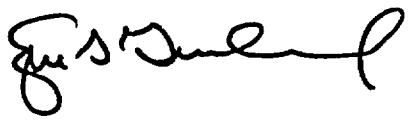
F. Changes That Would Affect Pending Proceedings Should Not Be Retroactive

G. The NRC Should Avoid Duplicative Review in COL Proceedings of Issues Being Resolved in Parallel ESP or Design Certification Proceedings

Dominion appreciates the opportunity to submit these comments on the proposed rule. We urge the Commission to avoid changes that impose new requirements or that eliminate the finality and flexibility afforded under the current regulations, and to move forward with a final rule expeditiously to provide the regulatory certainty needed by prospective applicants.

We would be pleased to discuss these comments further with you if it would assist your deliberations. If you need any further information, please contact Mr. Joseph D. Hegner at 804-273-2770.

Sincerely,



Eugene S. Grecheck
Vice President-Nuclear Support Services

Enclosure: Comments on Proposed Part 52 Rule

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons
Adrian Heymer, NEI
Rick Kingston, GE

Comments on Proposed Part 52 Rule

A. The Proposed Rule Threatens the Finality of Environmental Issues Resolved in ESP Proceedings

Dominion is most concerned with provisions in the proposed rule that would expand the environmental review at the COL stage and negate the finality afforded to environmental issues previously resolved in an ESP proceeding. If these provisions are promulgated as proposed, they are likely to deter future use of the ESP process.

The proposed rule would add a new provision requiring a COL applicant referencing an ESP to include in its Environmental Report an analysis of "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."[2] The proposed rule would also delete all current provisions affording finality to previously resolved environmental issues and would explicitly allow contentions addressing environmental issues resolved in an ESP proceeding to be litigated in a COL proceeding.[3] These provisions could allow opponents to litigate in a COL hearing any previously resolved environmental issue as long as they allege that some information "that . . . differs from, or is in addition to, that discussed in the early site permit environmental impact statement" would change the prior findings.

In addition to increasing the potential for litigation, these changes would considerably expand the review performed by the COL applicant and NRC staff. From the rulemaking notice, it is evident that the Staff envisions preparing 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). In recent meetings discussing the proposed rule, the NRC Staff has suggested that in order to allow this revalidation of prior findings, a COL applicant referencing an ESP would be

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[2] 71 Fed. Reg. at 12,881, proposed section 51.50(c)(1)(iii).

[3] In pertinent part, the proposed rule would delete current section 52.79(a)(1) (see 71 Fed. Reg. at 12,898), add new section 52.39(c)(1)(v) and amend section 52.39(a)(2) so that issues falling within proposed section 52.39(c)(1)(v) would not be afforded finality (71 Fed. Reg. at 12,893), delete current section 52.89 (see 71 Fed. Reg. at 12,902), and add new section 51.107(b)(3) (71 Fed. Reg. at 12,885)

required to update its previous environmental report to present and analyze final plant design information regardless of whether it falls within the bounds of the prior evaluation, and to present and evaluate the significance of all new information (such as new meteorological data, new studies, etc.)

These proposed changes are at odds with the fundamental objective of the current Part 52 regulations to resolve environmental issues at the ESP stage. See, e.g., 54 Fed. Reg. 15,372, 15,373 (1989), describing one of the aims of the Part 52 rules as the "early resolution of safety and environmental issues in licensing proceedings." Consistent with this objective, section 52.39 of the current rules 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). Thus, the current rules avoid reconsideration of environmental issues in a COL application when those issues have previously been assessed in an ESP proceeding. This important objective of the current regulations must be preserved if the ESP process is to retain its current benefits.

The proposed changes are not only inconsistent with the policy objective of finality, but are unnecessary because they are based on a misunderstanding of NEPA's requirements. The rulemaking notice explains that the proposal reflects "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 environment, both actions require the preparation of an EIS." 71 Fed. Reg. at 12,826 (emphasis added). Dominion respectfully submits that this view is incorrect, because an ESP and a COL are "connected actions," which under NEPA case law and Council on Environmental Quality (CEQ) regulations are to be addressed by the NRC in a single environmental impact statement (EIS).[4] 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

[4] Although not explained in the proposed rule, Dominion understands that the Staff is hesitant to consider an ESP and a COL as connected actions because of the definition of connected actions in the CEQ regulations (see 40 C.F.R. § 1508.25(a)). As a threshold matter, the CEQ regulations are not binding on the NRC as an independent agency when the agency has not expressly adopted them. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725, 743 (3d Cir. 1989). See also 49 Fed. Reg. 9,352 (March 12, 1984). In any event, the CEQ regulations explain that connected actions "mean that they 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 and resolves whether a site is suitable for construction and operation of new units, it is obviously closely related to a COL. Further, under the CEQ regulations, 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). If a COL is a partial construction permit, it is obviously an initial step in a larger action and is undertaken only to further decisions and actions on whether new nuclear units should be built.

single EIS. E.g., Village of Grand View v. Skinner, 947 F.2d 651, 656-57 (2d Cir. 1991).

The existing regulations properly recognize that the ESP EIS supports subsequent licensing and does not have to be duplicated. The current 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."[5] 53 Fed. Reg. 32,060, 32,066 (1988). The proposal to treat a COL as a separate action requiring its own EIS is thus a significant and unjustified departure from the existing rules.

While a COL should not be considered an independent action requiring a separate EIS, Dominion recognizes that there may be a need at the COL stage to prepare a supplement to the EIS. A supplement to the EIS would be required if there are significant environmental issues that were 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. The existing rules already require consideration of such issues. 10 C.F.R. § 52.89. A supplement to the EIS 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 significant extent not already considered.'" 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).[6]

There may be instances when the applicant, the NRC Staff, a member of the public, or another agency identifies new information that it believes 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 10 C.F.R. §§ 52.39(a)(2), 52.79(a)(1), and 52.89) should be obtained from the Commission in

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[5] Obviously, an environmental assessment could determine the need for a supplemental EIS, if for example, there are environmental issues that were deferred at the ESP stage.

[6] 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).

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 from what was previously envisioned. See, e.g., S. Trenton Residents, 176 F.3d at 663; New River, 373 F.3d at 1330. By this means, the NRC interests in preserving finality and in supplementing environmental review when appropriate would be carefully balanced.

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. See, e.g., Pennaco Energy, Inc. v. DOI, 377 F.3d 1147, 1151 (10th Cir. 2004) (agency may use supplemental information report).[7] 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.[8] "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." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (emphasis in original).[9]

Requiring a waiver would also be consistent with the approach 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).

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[7] 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 information report based on agency-requested expert analysis).

[8] 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.

[9] 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, 222 F.3d at 560 (citation omitted).

This approach would allow supplementation of the ESP EIS where appropriate, while maintaining the preclusive effect of the Part 52 regulations.[10]

Unfortunately, rather than attempting to preserve finality, the proposed rule would delete all current provisions affording finality to previously resolved environmental issues and would explicitly allow contentions addressing environmental issues resolved in an ESP proceeding to be litigated in a COL proceeding. Proposed sections 52.39(c)(1)(v) and 51.107(b)(3) provide that contentions which may be litigated in a COL proceeding would include:

> Any significant environmental issue not considered which is material to the site or 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 prepared by the Commission in connection with the early site permits.

71 Fed. Reg. at 12,885, 12,893. The proposed amendment to section 52.39(a)(2) indicates that these issues would not be treated as resolved in a COL proceeding. Id. at 12,893. Further, current sections 52.79(a)(1) and 52.89, which define the narrow scope of environmental review for a COL application referencing an ESP, would be deleted.

Under these proposed amendments, as long as the pleading standards were met, any intervenor would be able to litigate a previously evaluated environmental issue simply by alleging that new information alters the prior conclusions. The supplemental information accompanying the proposed rule essentially admits as much, by indicating that environmental issues analyzed at the ESP stage would be only "candidates for issue preclusion at the [COL] stage"

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[10] The license renewal approach is fully applicable. 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. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100-101 (1983). 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. Id. at 97. 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. Id. at 101.

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 early site permit proceeding, based on a site specific environmental impact statement prepared with full public participation, and then applies finality to the issues so resolved in order 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 certainly has the 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.

(71 Fed. Reg. at 12,826) and that environmental issues subject to litigation in a COL proceeding would include "those issues for which there is new and significant information" (id. at 12,827, emphasis added).

Moreover, this risk of expanded hearings and diminished finality would be exacerbated by the proposed standard for when information is considered "new." Under the proposed rule, information "that . . . differs from, or is in addition to, that discussed in the early site permit environmental impact statement" is considered new and must be addressed if significant. See 71 Fed. Reg. at 12,881 (proposed section 51.50(c)(1)(iii)) and 12,826; see also 71 Fed. Reg. at, 12,885, 12,893 (proposed sections 51.107(b)(3) and 52.39(c)(1)(v)). Under this standard, an intervenor would be able to 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 the intervenor met the pleading requirements of basis and reasonable specificity. At the very minimum, no information should be deemed "new" if it was considered in preparing the ER or EIS (as may be evidenced by references in these documents, RAI responses, comment letters, and the like) or it was generally known or publicly available (such as information in published reports, studies and treatises) during preparation of the EIS.

Proposed section 51.50(c)(1)(iii) is in fact very similar to the existing provision in 10 C.F.R § 51.53(b) governing the scope of environmental review in operating license proceedings under the old two-step licensing process. 10 C.F.R. § 51.53 provides that the environmental report for an operating license is only 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." As is well known, the old two-step licensing process routinely allowed reconsideration and litigation of environmental matters that had been addressed at the construction permit stage. In essence, the proposed rule would revert to this ineffective standard.

In contrast, if a waiver were required, previously resolved environmental issues could not be reopened simply based on allegations and artful pleadings in a hearing request. Instead, in accordance with the NRC's Rules of Practice, a waiver request would have to be supported by an affidavit establishing the special circumstances with particularity and making a prima facie showing that the rule should be waived. 10 C.F.R. § 2.335(b), (c). Further, a waiver could only be granted by the Commissioners. Id. at (d). These procedural safeguards are essential if the objective of the current rules – to allow early resolution of environmental issues – is to be preserved.

For all these reasons, the NRC should retain the concept of finality currently embodied in 10 C.F.R. §§ 52.39(a)(2), 52.79(a)(1), and 52.89. The NRC could accomplish this by revising the proposed rule in the manner identified in NEI's

May 16, 2006 letter.[11] The Commission should also explain in the supplemental information accompanying the final rule that persons seeking to reopen previously resolved environmental issues must petition the Commission for a waiver of the finality rules.

In sum, the reopening of environmental issues would be contrary to the Commission's intent and objectives in promulgating Part 52 and unnecessary under NEPA. Therefore, it is permissible and desirable for the Commission to require a waiver request and to grant the waiver only if information arising after the ESP proceeding shows that the grant of the COL would have a seriously different impact on the environment than what was described in the ESP EIS. If impacts evaluated in the ESP EIS are subject to reconsideration without a rule waiver, a fundamental objective and benefit of the current rules will be destroyed.

Dominion also submits that the proposed provision that would require an applicant to have a reasonable process for identifying new and significant information (71 Fed. Reg. at 12,880, proposed section 51.50(c)(1)) is unnecessary. While the license renewal rules require an applicant to inform the NRC of new and significant information of which it is aware (and Dominion does not object to adding such a provision in Part 52), the license renewal rules do not require an applicant to implement any process to analyze or revalidate previously resolved issues.[12] There is no reason to require more here. It may be prudent for a COL applicant to implement an internal process to assure itself that there is no significant new information related to environmental impacts previously evaluated in the ESP EIS prior to submitting the COL application. However, because such a process is beyond the scope of the environmental review required by 10 C.F.R. §§ 52.79(a)(1) and 52.89, such evaluation should not be submitted on the docket. As in license renewal, the Commission should make it absolutely clear that a COL applicant is not required to reanalyze or revalidate any environmental issue previously resolved at the ESP stage.

Similarly, the Commission should provide direction to 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, where environmental impacts were evaluated at the ESP stage, any supplemental EIS at the COL stage should be limited only to those matters requiring supplementation. Further, the Staff should rely upon comments from the public and consulting agencies to identify any areas where supplementation

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[11] Letter from A. Heymer to A. Vietti-Cook, "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).

[12] Compare 10 C.F.R. § 51.53(c)(3)(iv); NUREG-1529 at p. C9-14 (NRC "does not see any reason to require 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.").

may be needed. If such comments identify a potential area for supplementation, only then should the Staff consider whether there is significant new information warranting a request to the Commission for a waiver of the finality provisions. Conversely, if no person identifies a need to supplement the discussion of an impact addressed in the ESP EIS, there should be no need for any discussion of that impact in the EIS supplement at the COL stage.

B. The NRC Should Eliminate Consideration of Severe Accident Mitigation Design Alternatives

Dominion appreciates the NRC's effort to address severe accident mitigation design alternatives (SAMDA) in Design Certification proceedings rather than in COL proceedings. However, Dominion is concerned that the NRC's proposed approach leaves open the possibility that an additional analysis of SAMDA might be required in COL proceedings. Dominion submits that SAMDA need not be considered for certified advanced and evolutionary designs incorporating passive safety features, because severe accident risk for such designs is too remote and speculative. To avoid the possibility of further SAMDA review at the COL stage, Dominion recommends that the NRC should determine in each design certification rule that the severe accident risk from the certified design has been reduced to such a low level as to be considered remote and speculative.

The proposed rule would require an application for a Design Certification to include an Environmental Report analyzing SAMDA, and the NRC Staff to prepare an Environmental Assessment of this information. 71 Fed. Reg. at 12,879, 12,882 (proposed sections 51.31(b), 51.55). A COL applicant would then be permitted to incorporate the NRC's assessment into the applicant's environmental report by reference. 71 Fed. Reg. at 12,881 (proposed section 51.50(c)(2)). However, there is no indication in the proposed rule that the NRC's environmental assessment is entitled to finality in a COL proceeding, and therefore there is a possibility that the adequacy of this assessment, or the need to supplement it to consider additional alternatives, could be raised in COL proceedings. For example, a COL applicant might be required to consider not just design alternatives but also procedural measures to mitigate severe accident risk, even if the remaining risk is insignificant. The possibility of further review of severe accident mitigation measures in a COL proceeding would not only complicate that proceeding but also bring into question the finality of the certified design.

The environmental review under NEPA is governed by a rule of reason. Vt. Yankee Nuclear Power Corp., 435 U.S. 519, 551 (1978). Under this rule of reason, agencies are not required to probe remote or speculative consequences or discuss every conceivable alternative to a proposed action. Id., citing NRDC v. Morton 458 F.2d 827, 837 (D.C. Cir. 1972). Similarly, NEPA does not require that an EIS evaluate "worst-case" scenarios, but simply the reasonably

foreseeable significant adverse effects of the proposed action. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-55 (1989).

For this reason, the Commission took the position for many years that NEPA did not require consideration of severe accidents, and this position was upheld by the Courts. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), aff'd on rehearing en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986); Carolina Envtl. Study Group v. U.S., 510 F.2d 796, 798-800 (D.C. Cir. 1975).

As discussed in Limerick Ecology Action, following the TMI accident, the NRC retreated from the viewpoint that severe accidents are too unlikely to justify their consideration in plant licensing. 869 F.2d at 728. Instead, the NRC sought to exclude consideration of severe accident mitigation alternatives from NEPA review in individual licensing proceedings on the ground that such alternatives were not required by the safety standards under the Atomic Energy Act, and NEPA could require no more. Id. at 739. The Court in Limerick rejected this position, holding that simply meeting the requirements of the Atomic Energy Act does not exempt the NRC from complying with NEPA's procedural requirements. Id. at 741. Subsequent to the Limerick decision, the NRC has included consideration of SAMDA in environmental impact statements on plant licensing (for the few last-generation reactors subsequently licensed) and license renewal.

The Limerick decision does not compel the NRC to consider SAMDA in licensing new plants. The Court in Limerick stated, "It is undisputed that NEPA does not require consideration of remote and speculative risks." Id at 739. The NRC's attempt to exclude consideration of SAMDA in the Limerick case was overturned only because the NRC had not based its decision on the remoteness of the risk. See id.

The evolutionary designs currently being certified are readily distinguishable from those considered in the Limerick era. The risk from the new generations of reactors, which employ passive safety features, is considerably lower than the risk from previously licensed plants. For example, the mean estimate of the core damage frequency for the AP1000 is 5 E-07/yr, while the large release frequency is 6 E-08/yr. Similarly, the core damage frequency for the ESBWR is reported to be approximately 3 E-08/yr, while the large release frequency is reported to be approximately 1 E-09/yr. These risks are well within the range previously considered by the NRC as remote and speculative.

Dominion does not object to the NRC's consideration of risk insights from probabilistic risk analysis during certification of a standardized design. However, once a design has been certified, further consideration of potential design changes is undesirable, because it would undermine the finality of the design certification and eliminate the benefits of standardized designs. Accordingly, Dominion proposes that in each design certification, after whatever consideration

of risk insights is deemed appropriate, the Commission should make a determination that the risk of severe accidents (i.e., beyond design basis accidents) has been reduced to a level deemed too remote and speculative for further consideration under NEPA. This finding should be part of each certification rule, so that it has preclusive effect.[13] With such a finding in each certification rule, there would be no need to incorporate a SAMDA analysis into an environmental report in a COL proceeding.[14] Further, any question concerning the need to supplement such an analysis would be eliminated.

C. The NRC Should Clarify the License Transfer Provisions

The NRC proposes to add a new section 52.28 providing that transfer of an ESP will be processed under 10 C.F.R. § 50.80. Dominion does not object to this provision but recommends that the Commission should clarify when transfer of an ESP is necessary.

In particular, the Commission should clarify that a COL applicant will remain able to reference an ESP held by another entity without any need for a transfer of the ESP. Under the current regulations, a COL may reference an ESP without regard to whether the COL applicant and the ESP holder are identical. See, e.g., 10 C.F.R. § 52.73 (permitting a COL to reference an ESP and containing no requirement that the COL applicant and ESP holder be the same). Moreover, the ability of a COL applicant to reference an ESP held by another entity is clearly intended by the current rules. For example, 10 C.F.R. § 52.25(a) provides that if an Early Site Permit contains a Site Redress Plan, "the holder of the permit, or the applicant for a construction permit or combined license who references the permit" may perform certain preconstruction activities. (Emphasis added). If an ESP could only be referenced by its holder, the words emphasized above would be meaningless, and it is axiomatic that laws must always be interpreted so as to give meaning to all words.[15] Moreover, it makes sense that a COL holder should be able to reference an ESP held by another entity, because an ESP is essentially only a site suitability determination.

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[13] In Limerick, the Court questioned whether severe accident risk could be addressed generically because accident consequences may be affected by site specific features. 869 F.2d at 738-39. However, an application for a certified design must include certain site parameters postulated for the design (see 10 C.F.R. § 52.47), and any site utilizing the certified design must be enveloped by these characteristics. Thus, any analysis in the design certification proceeding should be bounding.

[14] Alternatively, the certification rule for each standardized design could provide a generic, bounding assessment of severe accident risk and mitigation alternatives, and establish by rule that no further consideration is required in any COL proceeding referencing the certified design.

[15] See, e.g., Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation), CLI-02-29, 56 N.R.C. 390, 397-98 & n.27 (2002). See also United States v. Alaska, 521 U.S. 1, 59 (1997); Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001).

Allowing this flexibility is very important to efficient proceedings, because it is possible that State approvals shortly before or after a COL filing could result in some entity other than the ESP holder being chosen to become the COL applicant. For example, an ESP might be held by a regulated utility, but subsequent deregulation might require divestiture of generating capacity and result in some other entity submitting the COL application. State approvals for a certificate of need might result in a change in the entity to construct and operate a plant, and construction financing requirements could also dictate the choice. If an ESP had to be transferred to accommodate such changes, the filing of a COL application might be unnecessarily delayed, or if already filed, the review of the COL might be disrupted.

The Commission previously stated:

> The Commission would not permit a license applicant to reference an early site permit which it does not hold (or has rights to the permit contingent upon a NRC decision to issue a license whose application references the early site permit). To otherwise permit referencing of an early site permit by a non-holder would destroy the commercial value of the permit, and would prevent any entity from seeking an early site permit. This would frustrate the Commission's regulatory objective of providing early regulatory approval of siting, emergency preparedness, and environmental matters.

68 Fed. Reg. 40,026, 40,037 n.2 (July 3, 2003). While the first sentence quoted above is not clearly worded, Dominion understands it to mean that a COL applicant may reference an ESP held by another entity if the ESP holder has given it the right to do so. Obviously, where a COL applicant and the ESP holder are affiliates, and the ESP holder has permitted the COL applicant to reference the ESP, the commercial value of the ESP would not be destroyed. Consequently, a transfer of the ESP is unnecessary. All that should be required is a showing in the COL application that the ESP holder has consented to the reference of its permit.

Accordingly, Dominion recommends that in the supplemental information accompanying any final rule, the Commission should explain that the section governing transfers of ESP does not signify that only an ESP holder may reference an ESP. Rather, transfer of an ESP is only necessary when responsibility for amending or renewing the permit changes. See, e.g., 10 C.F.R. § 52.29(a) (". . . the permit holder may apply for a renewal of the permit.").

D. Preconstruction Activities Should be Authorized by Rule Rather Than by Specific Provisions in an ESP

Dominion is concerned that certain provisions of the proposed rule would make preconstruction work a licensed activity. Dominion respectfully submits that these changes are unnecessary, would institute new standards and requirements for early site permitting, and would be bureaucratic and burdensome.

Under the current rules, an ESP holder may perform certain preconstruction activities if it has provided a site redress plan and if the NRC's EIS prepared for the permit has concluded that the activities will not result in any significant environmental impact which cannot be redressed. 10 C.F.R. § 52.25(a). Thus, no specific authorization is currently required. The proposed rule would delete this provision, and would allow preconstruction activities only if and to the extent specifically authorized in an ESP. See 71 Fed. Reg. at 12,892 (proposed section 52.24(c)).

These changes are inappropriate for a number of reasons. First, they elevate preconstruction work to a licensed activity. This is inconsistent with the original intent of the NRC rules, which was to designate those activities that did not require a construction permit.

Promulgated in 1960, 10 C.F.R. § 50.10(b) excluded site excavation, preparation of the site for construction, construction of roadways, railroad spurs, and transmission lines, and construction of non-nuclear facilities and temporary buildings from the definition of construction. See 25 Fed. Reg. 8,172 (1960).[16] After the promulgation of NEPA, the NRC added 10 C.F.R. § 50.10(c) to provide for environmental review prior to "commencement of construction," which it redefined. 37 Fed. Reg. 5,745 (1972). The Commission later amended its rules again to allow the NRC Staff to authorize limited work, including authorization to perform the activities in 10 C.F.R. § 50.10(e)(1), after completion of the hearings on NEPA and site suitability issues. As the Commission explained,

> The Atomic Energy Act . . . does not by its terms prohibit commencement of construction of a nuclear facility prior to receipt of a construction permit, although the Act does provide that a permit authorizing construction must be obtained. The Commission is thus authorized to apply its technical expertise and develop a practical administrative interpretation of the Act as a whole in determining at what point in time a construction permit must be obtained. Prior to the enactment of the National Environmental Policy Act of 1969 . . . site excavation for safety-related structures

[16] In 1968, driving of piles was added to the list of activities that could be performed without a construction permit. 33 Fed. Reg. 2,381 (1968).

> was generally permitted to be undertaken by the applicants without any prior Commission review. The essential distinction between the past situation and the present one is that NEPA now applies to certain Commission actions. However, this essential difference is accommodated in the amendments by the requirement that there be a full NEPA review and hearing on NEPA issues covered by the Commission's NEPA regulations prior to authorizing any on-site work otherwise generally prohibited by § 50.10(c).

39 Fed. Reg. 14,506, 14,507 (1974). Consequently, the activities specified in 10 C.F.R. § 50.10(e)(1), which are the activities that an ESP holder is permitted to perform by rule under 10 C.F.R. § 52.25(a), are not activities that must be licensed under the Atomic Energy Act. As evidenced by 10 C.F.R. § 50.10(b), they do not have to be authorized by a construction permit (and therefore also do not have to be authorized by an ESP). What the NRC rules are intended to do is ensure that such activities are not performed prior to completion of the NEPA review. Where an ESP has been issued, that is obviously the case.

Nor is it necessary to specify such activities in order to define the work that an ESP holder may perform. Under the current rules, an ESP holder may only perform preconstruction activities that have been evaluated in the environmental impact statement and determined to involve no significant environmental impact which cannot be redressed. 10 C.F.R. § 52.25(a). Thus, the final EIS defines the scope of activities that may be performed under the rules.[17]

Elevating the preconstruction activities to ones that can only be performed if authorized by a license creates a scheme that is more bureaucratic and limiting than the procedures not only under the current Part 52 rules but also under the old Part 50 provisions. This creates numerous undesirable consequences. For example, under the existing rules, preconstruction activities may be performed either by an ESP holder, or by an applicant for a COL referencing an ESP (i.e. the ESP holder and COL applicant do not have to be the same entity.) See 10 C.F.R. § 52.25(a). By requiring a specific authorization in the ESP and by deleting 10 C.F.R. § 52.25(a), the proposed rule would eliminate this flexibility.

In addition, the proposal to require specific authorizations in the rule changes the fundamental nature of the ESP from a site suitability determination to one that authorizes activities, and thus implicates certification requirements under Clean Water Act and Coastal Zone Management Act (CZMA). Section 401 of the Clean Water Act prohibits the NRC from issuing a license to conduct an activity that may result in a discharge into navigable waters unless the State certifies that the

[17] If an ESP applicant does not want authority under 10 C.F.R. § 52.25(a) to perform certain activities within the scope of 10 C.F.R. § 50.10(e)(1), it can exclude such activities from the scope evaluated in its application, and the NRC Staff would then not evaluate the impacts of such activities in its EIS.

discharge complies with certain requirements under the Act or waives certification. 33 U.S.C. § 1341(a). Section 307 of the CZMA requires, for any federal license to conduct an activity affecting a coastal zone, a certification that the activity complies with the enforceable policies of the State's Coastal Zone Management Program. 16 U.S.C. § 1456(c)(3). Under the current regulations, preconstruction activities are activities that do not have to be licensed, and therefore these certification requirements should be inapplicable.[18] Under the proposed rule, either certifications or waivers would have to be obtained from the State, which can be very difficult when the schedule for preconstruction activities is unknown (as is the case for an ESP which remains in effect for 20 years).

By turning preconstruction work into a licensed activity under the Atomic Energy Act, the proposed rule also adds new technical qualification requirements. In particular, the proposed rule would amend the findings that the Commission must make for issuance of an ESP to include a finding that "the applicant is technically qualified to engage in any activities authorized." 71 Fed. Reg. at 12,892 (proposed section 52.24(a)(4)). Such a requirement does not exist under the current rules, and indeed, preconstruction activities have never required such a finding. Nor are there any applicable standards or guidance. Indeed, it is anomalous to require technical qualifications for the activities currently permitted by 10 C.F.R § 52.25(a), because no construction of safety-related structures is permitted.

In addition, the proposed rule would require the proposed preconstruction activities to be identified and described in the site safety analysis report (SSAR). 71 Fed. Reg. at 12,891 (proposed section 52.17(c)). The rulemaking notice explains that this new section of the SSAR "would enable the NRC staff to perform its review of the request, consistent with past practice, to determine if the requested activities are acceptable under 10 CFR 50.10(e)(1)." 71 Fed. Reg. at 12,791. However, 10 C.F.R. § 50.10(e)(1) allows these activities to be authorized if the Staff has completed its EIS and if the licensing Board has made its NEPA and site suitability findings. There is no requirement for an NRC safety review in section 50.10(e)(1), and therefore there is no basis for the current proposal to require preconstruction activities to be discussed in the safety analysis report. To the extent that the proposed rule may be intimating that some additional safety review should be performed,[19] without any specified standards or guidance, it would make the new licensing process more burdensome.

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[18] This does not mean that State review is avoided. Construction run off is a point source discharge requiring an NPDES permit from the State. However, this permitting would occur when the company proposing to build a new plant is ready to commence preconstruction activities, rather than at the ESP stage when such review may be premature.

[19] It is possible that the NRC staff may be contemplating a review of preconstruction activities to evaluate potential impacts on existing units at multi-unit sites. As discussed in the next section, the licensees of

Footnote continues on next page

In sum, rather than making the new licensing process more efficient and effective, these provisions would institute new standards, reviews and approvals on to the process. If the NRC does proceed with the promulgation of these changes, it should apply such changes only to ESPs applied for after the effective date of the new rule. The current 10 C.F.R. § 52.25 should remain in effect and applicable to the ESPs already applied for.

E. The ESP Review Should Not Be Expanded to Include Control of Construction Activities

Dominion is concerned that the proposed rule would unnecessarily expand the safety review in an ESP proceeding. Proposed section 52.17(a)(1)(x) would expand the safety review in an ESP proceeding to include an evaluation of the potential hazards to operating units from construction activities, as well as a description of the managerial and administrative controls to be used to assure that the limiting conditions of operation for existing units will not be exceeded. This proposal would make the ESP process more burdensome without any commensurate safety benefit.

Under the current regulations, the requirement to evaluate the potential hazards to operating units from construction activities applies only at the COL stage. The current requirement, which is contained in 10 C.F.R. 50.34(a)(11), is not one of the requirements incorporated into 10 C.F.R. § 52.17(a)(1) and therefore does not apply to an ESP application. In a letter dated August 11, 2003 to NEI, the NRC stated, "The NRC staff agrees that the requirements of 10 CFR § 50.34(a)(1) are not applicable to an ESP application."

The NRC now proposes to make this evaluation a new requirement for ESP applicants "so that all applicable issues are included in the NRC's review of site suitability. . . ." 71 Fed. Reg. at 12,790. The proposed evaluation and requirement to establish managerial and administrative controls goes far beyond any review that is needed to determine the suitability of the site. At most, any consideration of this issue should be limited to whether the presence of the existing units would preclude the construction of additional units. Because construction has been performed without problem at many operating units, the only question should be whether there are any unique characteristics of site or existing units that would pose any insurmountable impediment to constructing new units.

As a practical matter, information may not exist at the ESP stage to perform a specific evaluation of the potential hazards from construction, because the

existing units have authority, programs and procedures necessary to maintain safety and security at these sites, and the NRC staff has acknowledged that the preconstruction activities would not pose safety and security issues.

design and footprint of the new units may not be known. Further, the evaluation may be premature, because construction may not occur for many years. Indeed, an ESP remains valid for 20 years and may be renewed.

Further, a safety review is not needed for those preconstruction activities that an ESP holder may perform pursuant to 10 C.F.R. § 52.25(a). Such a review is not required in order to authorize these preconstruction activities under 10 C.F.R. § 50.10(e), and therefore should not be required for an ESP. As the NRC Staff has acknowledged, an "ESP does not authorize construction activities that could pose safety/security issue[s] to existing operating units onsite." See Attachment to Memorandum from EDO to Commissioners, "Response to Staff Requirements Memorandum" (Dec. 27, 2005). Moreover, administrative controls already exist at any site on which reactors are already operating. A licensee for an operating unit has the authority to determine all activities in the exclusion area. See 10 C.F.R. § 100.3. Further, the licensee is required by 10 C.F.R. § 50.59 to evaluate changes to its facility. Proposed construction activities would also be evaluated by the licensee for operating units under its site access and security programs. There is, therefore, simply no need for these proposed new requirements.

F. Changes That Would Affect Pending Proceedings Should Not Be Retroactive

As a general matter, Dominion submits that no change should be made retroactive if it would affect or delay a current proceeding. The proposed changes include provisions that might affect the form or contents of ESP applications, as well as the Staff's safety analysis report and environmental impact statement. For example, as previously discussed, proposed section 52.17(a)(1)(x) would add a new requirement to evaluate the potential hazards of construction activities on existing units – a requirement that is currently inapplicable to an ESP application. Other new requirements would be imposed by proposed sections 52.17(a)(1)(xii) - (xiii), 52.17(c), and 52.24(a)(4). If it were necessary to revise pending applications and NRC staff review documents as a result of such changes, the current proceedings could be delayed considerably. This would penalize the companies that have undertaken to demonstrate the new licensing process. Accordingly, any change to the current requirements or practices should only be applied prospectively to future applications.

G. The NRC Should Avoid Duplicative Review In COL Proceedings of Issues Being Resolved in Parallel ESP or Design Certification Proceedings

To promote efficiency and standardization, the NRC should include in any final rule a provision providing that if a COL application references a pending

application for an ESP or design certification, the COL proceeding will not include duplicative review or litigation of issues being resolved in the other, referenced proceedings. Alternatively, if the NRC does not address this issue by rule, it should issue a policy statement providing appropriate guidance to the NRC Staff and Atomic Safety and Licensing Board to avoid duplicative reviews in such cases.

Dominion and other companies are currently preparing COL applications under DOE's 2010 program, which is intended to lead to the deployment of new units, particularly Gen III+ units, in a timeframe that is likely to lead to parallel COL, design certification, and ESP proceedings. In addition, the Energy Policy Act of 2005 provides incentives for the development of new units, which may affect the applicant's choice of schedule. For example, in order to qualify for the production tax credit, a company must submit its COL application by the end of 2008. See IRS Bulletin No. 2006-18 (May 1, 2006), Notice 2006-40, "Credit for Production from Advanced Nuclear Facilities." Thus, COL applicants may not be able to wait until design certification proceedings for their selected technology or ESP proceedings for their selected sites are complete. While the NRC's procedures should not be dictated by these programs and incentives, it is reasonable for the NRC to take steps to ensure that its process is not an impediment to prompt deployment of the most current, passively safe designs. If a design for which a design certification application has been submitted would be subject to duplicative review and litigation in a COL proceeding, attractive new designs like the ESBWR might be at a disadvantage. Similarly, the NRC should take steps to ensure that prompt consideration of site suitability issues is not deterred.

Further, duplicative review of issues already being addressed in another referenced proceeding would be a costly and inefficient use of the NRC's resources, which are already likely to be challenged by the number of expected applications, and would constitute an undue burden to the applicant. Duplicative reviews could also lead to inconsistent results and loss of standardization. Indeed, Part 52 is intended to encourage standardized designs. This objective would be frustrated for near-term COL applicants who are demonstrating the process and who would be required to obtain plant-specific design reviews in their COL proceedings.

Avoiding duplicative reviews is consistent with past NRC practice and case law. In the Private Fuel Storage case, the NRC staff did not duplicate the review of the cask design issues that were being reviewed for a certificate of compliance. In addition, case law has long held that Licensing Boards should not accept contentions which are or are about to become the subject of rulemaking. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 N.R.C. 328, 345 (1999). In UCS v. AEC, 499 F.2d. 1069 (D.C. Cir. 1974), the D.C. Circuit upheld the Commission's discretion to exclude issues from consideration in a licensing proceeding when those issues are being considered in a

rulemaking proceeding. As a general matter, the NRC clearly has the discretion to define the scope of its proceedings. Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983).

For all these reasons, the NRC should amend 10 C.F.R. §§ 52.27(c) and 55.55(c) to exclude from the scope of review and hearing in a COL proceeding those issues that are being resolved in a pending ESP or design certification proceeding referenced in the COL application.

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