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March 3, 1981

Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR-50 (23)
Changes in Facilities
(45 FR 81602)

re: 10 CFR Part 50
Advance Notice of Proposed Rulemaking 45 Fed. Reg. 81602

Dear Secretary:

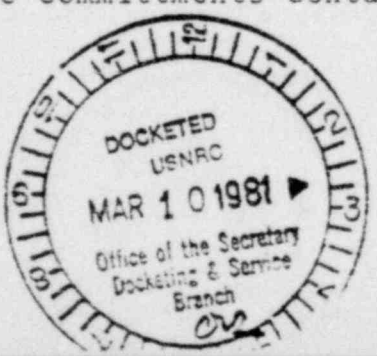
This Comment is filed in response to the request for comments on the Advance Notice of Proposed Rulemaking Concerning Changes in Nuclear Power Plant Facilities After Issuance of Construction Permits. 45 Fed. Reg. 81602 ("Advance Notice"). Although it is filed after the February 9, 1981 deadline, Mr. Warren Minners of the Office of Nuclear Reactor Regulation stated in a phone conversation with the author of this Comment on February 25, 1981 that additional written comments would still be considered by the staff, although such comments should be submitted as soon as possible. This Comment is being written on my own behalf.

Comments are requested in the Advance Notice on: 1. those committments to which an applicant should be legally bound when the NRC grants it a construction permit ("CP"); 2. the advantages or disadvantages of a proposed change; and 3. the extent to which a new rule should be applied to existing construction permit holders. I address each of these points in turn.

I. COMMITTMENTS TO WHICH A CP HOLDER SHOULD BE BOUND

In developing regulations to cover post-CP changes, primary consideration must be given to the intent of Congress, as expressed in the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201 et seq. ("Act" or "AEA") regarding those committments to which a CP holder is to be bound.

Taken as a whole, the language of the Act provides clearly that an applicant is to be bound to each of those committments which an applicant makes in its CP application, PSAR, during the CP proceeding and those committments contained in the CP.



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Thus a variation on Alternative 4 should be the preferred course of action for this rulemaking proceeding. All applicants need not be bound to every detail of the CP application (including the PSAR). Rather, those details which are trivial in nature or left open for later resolution need not be changed by a subsequent CP Amendment. Accordingly, the word "detail" in proposed Alternative 4 should be replaced by a word such as "committment" and the word "committment should be defined in such a way as to exclude things left intentional uncertain for resolution during the Operating License ("OL") stage or de minimus features of the plant.

The AEA makes clear that an applicant is to be bound to each of the committments that it makes. Section 186 of the Act, 42 U.S.C. 2235, provides that nuclear plants are to be constructed "in conformity with the [CP] application as amended...." No small importance was attached by Congress to the committments made in thic CP application. Congress singled out CP's and required that those committments that are made must be made under oath. 42 U.S.C. 2232 (a).

Further, it is grounds for revocation of a CP that the power plant is not built according to the committments set forth in the CP. Section 186 of the AEA, 42 U.S.C. 2236(a) provides that:

> Any license may be revoked...for failure to construct...a facility in accordance with the terms of the construction permit or license or the technical specifications in the application....

Congress, in enacting Section 186 of the Act requiring that a plant must be built in accordance with the terms of the CP, has in effect required that the plant must be built consistently with all the committments made by the applicant during the pendency of the CP proceeding. This broad interpretation of Section 186 has consistently been given to that Section by both the courts and the NRC.

The Fourth Circuit Court of Appeals in Virginia Electric and Power Company v. NRC 571 F. 2d 1289 (1978) in sustaining a Commission interpretation of Section 186, declared that such a broad interpretation was necessary to insure that the public health and safety are protected. In that case the Court noted with approval the Commission's interpretation of the section as not even requiring that deviations from the CP be intentional before they are considered to be violations.

In upholding a large penalty against a utility which unknowingly made false material statements in its CP application the Court stated:

> For reasons fully stated by the Commission we conclude that its stringent interpretation of Section 186 is consistent with the legislative mandate to assure that the utilization of nuclear material would provide adequate protection to"the health and safety of the public." 42 U.S.C. 2232 (a).

571 F. 2d at 1291.

Further, in order to receive an OL the applicant must demonstrate to the NRC that the plant has been built in conformity with the entire CP application. Section 185 fo the Act, 42 U.S.C. 2235 requries as a prerequisite to receiving an OL that a finding be made by the Commission that "the facility authorized has been constructed...in conformity with the application as amended...."*

Section 189 of the AEA, 42 U.S.C. 2239 which sets forth the procedures for seeking CP amendments sheds little light on when a CP is necessary. However, it does contain one significant provision which indicates clearly that CP amendments are to be issued for even minor deviations from the committments made during the CP. Section 189 provides that proposed CP amendments which involve no significant hazards consideration need not be preceded by thirty days advanced notice in the "Federal Register".

The legislative history of this portion of Section 189 makes clear that many CP amendments would not involve significant hazards considerations and that where a significant hazards consideration is involved the amendment may not even involve an important safety issue.

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*The Commission's corresponding regulation, 10 C.F.R. 50.57. requires that before an OL may be issued, the Commission must make the finding that: "construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended...."

The Joint Commission on Atomic Energy, in its Report to the Senate recommending a relaxation of Section 189* explained the amendment to that section as follows:

* * *

> It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.
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> * * *
>
> In these succeeding stages, [after the issuance of the CP] if a hearing is not held [on a CP amendment], the decision would still be on the public record and if an important safety question was involved, could be made by the Board.

Further, the courts and the Commission have interpreted the scope of Section 189 to be of sufficient breadth that CP amendments exist which do not involve significant hazards considerations. In fact, last year the Court of Appeals for the District of Columbia rejected the contention that in a CP amendment not involving signficant hazards considerations the NRC may always dispense with a hearing. In Sholly v NRC Nos. 80-1691, 80-1783 (D.C. Cir., decided Nov. 19, 1980) the Court declared unlawful NRC's refusal to hold a hearing on an OL amendment upon a finding by the NRC that the amendment did not involve a significant hazards consideration:

> We are convinced that such a finding did not permit the NRC to dispense with a hearing that is otherwise required by Section 189 (a). This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In Brooks v. Atomic Energy Commission, 476 F. 2d 924, 926 (D.C. Cir. 1973) (per curiam) this court soundly rejected the contention

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* U.S. Code and Administrative News, 87 Cong., 2nd Sess., V. 1 (1962) Senate Report 1671, pages 2214-2215.

> that the fourth sentance in Section 189(a) 'indicate[d] congressional intent to dispense with a hearing in construction permit amendment proceedings...when the Commission determines that the amendment involves "no significant hazards consideration." '

See also Brooks v. Atomic Energy Commission, 476 F. 2d 924, 926 (D.C. Cir. 1973).

Even the Commission interpretation of Section 189 of the Act contemplates that not all CP amendment proceedings would involve significant hazards considerations. In amending section 50.59 of the Rules, 10 C.F.R.50.59, the Commission in its Statement of Consideration* stated:

> With respect to an application for an amendment of a license which involves a significant hazards consideration, the Commission would act upon the application for amendment after giving notice of its proposed action, as required by Section 189 of the Atomic Energy Act of 1954, as amended in Section 2.105 of 10 C.F.R. Part 2, Notice of issuance of an amendment which did not involve a significant hazards consideration would be published in the Federal Register pursuant to Section 2.106 of 10 C.F.R. Part 2.

See also Statement of Consideration for Proposed NEPA Regulations, 45 Fed. Reg. 13739, 13744-13745 (March 3, 1980).

The language of the Atomic Energy Act, its legislative history, and interpretations of the Act by the courts provide that all deviations from the committments made by an applicant during the CP application process--even ones which do not involve a "signficant hazards consideration" or "important safety questions" require a CP amendment.

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* 39 Fed. Reg. 10554 (March 21, 1974).

Hence, there can be no reconciling the proposed alternative 3 identified in the Advance Notice that CP amendments are necessary for only "principal architectural and engineering criteria" and the need for CP amendments in the absence of even a significant hazards consideration or an important safety question.*

Further, many proposed post-CP changes to a plant might have a significant effect on the environmental impact analysis required to be performed under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321. Further, NEPA imposes upon the Commission an obligation to structure its non-substantive rules in such as way as to insure that even after the CP for a facility has been issued full consideration is to be given to environmental protection. Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1127-1129 (D.C. Cir. 1971).

II. ADVANTAGES AND DISADVANTAGES

The advantages and disadvantages of enacting a rule similar to Alternative 4 as modified have already been weighed by Congress in its decision to require that even such minor deviations as do not involve significant hazards consideration require a CP amendment.

Beyond this Congressional determination, however, the advantages of requiring that all committments be legally binding is that it is most consistent with the interests of protecting the public health and safety and due process. Without such a requirement a CP application would be free to make numerous changes to its design which, although not rising to the level of a "principal architectural or engineering criteria" would reduce the safety of the plant.

Further, allowing an applicant to make changes to its design without a CP amendment circumvents the procedural guarantees provided in the AEA to the Licensing Boards, the staff, and to intervenors, who act in reliance upon representations made by the applicant in deciding to grant the CP or not opposing a particular proposed feature of the plant.#

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* Arguably, all principal architectural and engineering criteria need not involve significant hazards considerations or important safety questions. Such an interpretation, however, blurs the distinction between proposed alternatives 3 and 4 in the Advance Notice.

The need to preserve the due process guarantees contemplated by the AEA is one of the reasons why proposed changes should be approved by the Commission itself or its licensing boards in a CP amendment proceeding and not the NRC staff in the face of a request for a hearing.

Further, an applicant can make numerous committments at the CP hearings which it has no intention of keeping and simply change them freely once the CP has been issued.

The potential disadvantages of requiring applicants to be legally bound to their committments are that such a procedure might create a procedural nightmare and slow the pace of construction. Allowing a hearing to be conducted on each trivial change from the CP would clog the Commission's adjudicatory system and create significant time demands on staff and applicant alike. However, the possibility that these things would occur is remote. While such a rule will result in more construction permit amendments being sought* not every change to a design need require a CP amendment# and not every proposed amendment will result in a request for a hearing. The proposed rule would approximate the system of amendments now required for OL's--a system which has been neither too unwieldy nor excessively time consuming.

Further, delays in construction can be avoided through advanced planning and anticipating such changes. Many changes result due to new technological developments and additional NRC requirements and can often be anticipated months or even years ahead of time. In addition, there is nothing in the AEA or the Commission's rules to suggest that each time a CP amendment is sought construction must be stayed.

One other potential disadvantage of modified alternative 4 which should be discussed is the assertion that the rule does violence to the two-stage licensing system--a system which contemplates an opportunity for an OL hearing at the end of construction.## That two-stage process

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*Indeed, it is hard to imagine some rule which would not increase the number of CP amendments sought--there have never been any to date. Of the 88 extant CPs there has never been a single CP amendment sought. See, Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), CLI-79-11, 10 NRC 733 (1979).

#See Part I of this Comment.

##I will not debate the merits of that two-stage system here except to note that if a change in the design of the plant is not considered until the OL stage, no meaningful hearing can be had, the OL stage comes too late.

provides that the applicant need not prove with the degree of definiteness that will ultimately be required at the OL stage, that the plant may be constructed without endangering the health and safety of the public. Alternative 4 as modified would not require a different finding at the CP stage or greater certainty than is now required. Similarly, requiring CP amendments for changes to committments made during the CP proceeding will not take away from the OL hearing. No overall findings of health and safety are made during CP amendment proceedings and certain things have been left intentionally open at the CP stage for resolution during construction.

III. IMPLEMENTATION

A. Alternative 4, as modified, could be implemented immediately in all pending or future CP proceedings.

B. Alternative 4, as modified, could be implemented immediately for all changes considered in any present or future CP extension proceedings.

C. Alternative 4 could be phased in for all existing CP holders. It could be applied immediately to all changes from the committments made during the CP proceeding which have been proposed but not yet begun. It should not apply to all changes which have been completed.* Finally, those changes currently in process should be reviewed by the staff on a case by case basis.

Immediate implementation of a weak alternative such as alternative 3 and then implementation of alternative 5 on January 1, 1983 is not realistic. What the Commission proposes to do in alternative 5 appears to so dramatically change the nature of CP proceedings that its implementation by that date is highly unlikely.#

Not to require the rule to apply to existing CP holders is to effectively nullify any new rule which might be enacted. No new CP application has been presented to the Commission in the past four or five years, with the exception of Carroll County, and there are few outstanding CP proceedings. Further, there are no proposed new CP applications in the forseeable future.

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*However, the Commission should require all existing CP holders to inform the staff of any committments which have already been changed, which the staff is not already aware of so that these changes might be reviewed.

#This comment is not to be taken as a criticism of an NRC move to restructure the CP licensing process in the manner suggested in alternative 5. It is rather merely a realistic assessment that the Commission does not make such major changes so quickly!

In addition, not applying the new rule to existing CP holders negates all the reasons for enacting such a rule in the first place. Many power plants now under construction can make significant changes in their design without the need to seek a CP amendment. Few additional burdens will be imposed with a phased in implementation of a proposed rule.

IV. CONCLUSION

For all the above reasons, alternative four with some modification to narrow its scope, is consistent with the interests Congress sought to protect under the AEA and is the alternative most suitable to protecting the public health and safety and the due process rights of intervenors, licensing boards and the staff.

Respectfully Submitted,

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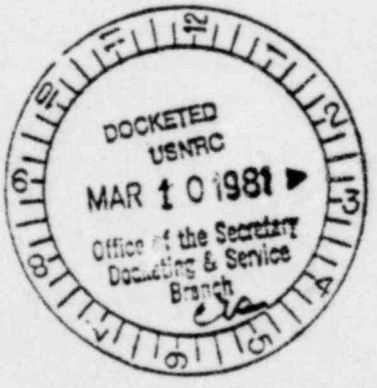
The following are corrections to my Comment of March 3, 1981 on the Advance Notice of Proposed Rulemaking Concerning Changes in Nuclear Power Plant Facilities After Issuance of Construction Permits.

ERRATA

At points too numerous to list in the Comment the word "commitment was spelled "committment". I make a commitment never to misspell that word again.

Page	Par.	Line	Word Used	Correct Word
2	1	9	"intentional"	"intentionally
6	4	5	"application"	"applicant"
8	5	3	"January 1, 1983"	"June i, 1983"

Respectfully Submitted,
Dean Hansell



Acknowledged by card. 3-11-81