



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

February 8, 1983

MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Ahearne  
Commissioner Roberts  
Commissioner Asselstine

FROM: Martin G. Malsch *RAM*  
Acting General Counsel

SUBJECT: NEW AUTHORITY GRANTED BY LICENSING  
REFORM BILL

Attached is a revised version of my earlier analysis of new authority granted NRC by its licensing reform bill. The revised analysis takes into account all of the language in the latest draft of the bill itself. The changes from the previous analysis are indicated by a line drawn in the margin of the paper.

In addition, by memorandum to me of February 8, 1983, Commissioner Ahearne asked several questions about the previous analysis. The revised version clarifies that the bill's provisions regarding fees and burden of proof for site permit and design approvals do constitute new statutory authority. I have also revised the analysis to add that the bill's provisions on duration of site permits and design approvals, and allowed number and duration of site permit and design approval renewals take away some authority that NRC currently has.

In sum, I would add to Commissioner Ahearne's list of five items granting new authority to NRC both the provisions on fees and burden of proof in renewals and the following three other items:

- (6) authority to issue site permits to anyone;
- (7) authority to issue site permits unconnected to CP completion dates;
- (8) authority to hold hybrid hearings (assuming that the statute currently requires formal hearings in facility licensing cases.)

Attachment: As stated

cc: OPE  
PA  
OCA  
NRR  
ELD  
SECY

Document: Licensing Reform Bill  
Diskette: MGM4

ADDITIONAL LEGAL AUTHORITY GRANTED BY DRAFT  
"NUCLEAR POWERPLANT LICENSING REFORM ACT OF 1983"

The purpose of this analysis is to compare the subject draft bill with authority and requirements of existing law and to summarize those aspects of the draft bill which provide new authority to NRC. It will also be noted where the draft bill clarifies or adds new requirements to existing law.

Section 1 (Title only)

Section 2

This section states various findings and purposes for the other operative sections of the bill. No new authority would be granted. However, several provisions serve to resolve any legal ambiguities (or policy questions) that may exist regarding the role of adjudicatory hearings and economic costs in the licensing process. Current law does not specify the purpose of adjudicatory licensing hearings. The bill would state in section 2(a)(11) that the sole purpose of adjudicatory licensing hearings is the resolution of factual disputes among the parties. This would eliminate such things as public education and providing another layer of technical review as reasons for holding adjudicatory hearings. Current law does not specifically address the role of economic costs in regulatory

decisions. Section 2(a)(10) would confirm that NRC may give appropriate consideration to economic factors in its decisions.

### Section 101

Section 101 of the bill would amend section 185 of the Atomic Energy Act in several important respects. First, current law requires NRC to specify earliest and latest completion dates in all construction permits and to hold adjudicatory hearings prior to issuance of construction permits for all facilities under sections 103 and 104b. and testing facilities under section 104c., even where no interested person wants any hearing. Section 101 would (along with companion changes to section 189) eliminate both requirements and thereby authorize issuance of construction permits without earliest and latest completion dates and without holding any hearing if no interested person requests one. These changes are reflected in a revised section 185a.

Revised section 185b. would authorize issuance of combined construction permits and operating licenses for thermal neutron power generation facilities. Since NRC review and approval would still be required prior to actual operation, the combined permit and license would really constitute an NRC review and approval of an essentially complete design rather than an authorization to commence operation. Current practice calls for permits to be issued based upon a preliminary and therefore

incomplete design and for a thorough re-review of design issues based on the final complete design prior to issuance of an operating license. While current law is somewhat unclear, it would probably authorize a change in practice whereby the permit would be issued based on review and approval of an essentially complete design and the operating license would be issued based on a more limited review which focused on conformity of the as-built facility with the permit and NRC requirements and significant new information developed since the permit review. However, current law calls for a two stage construction permit and operating license review and would not authorize issuance of anything denominated as a combined construction permit and operating license. Thus the bill would accomplish two changes. First, it would resolve any existing legal ambiguity regarding NRC authority to review and approve an essentially complete design at the pre-construction review stage. Second, it would provide new authority to issue a licensing document denominated as a combined construction permit and operating license.

Revised section 185c. marks a clear change from existing law. Under current law consideration of need for the facility and alternative generating sources is an essential part of power reactor construction permit environmental impact statements under NEPA. See, e.g., Mid-American Coalition for Energy Alternatives, Inc. v. NRC, 590 F.2d 356 (D.C. Cir. 1979); New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir.

1971). Other agencies' reviews and determinations on these matters may be given weight but ultimately NRC duty under NEPA in this regard is non-delegable to other Federal, State or regional agencies. Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972). Revised 185c. would authorize NRC to delegate this NEPA function to qualified Federal, State, or regional agencies under defined circumstances. The bill thus provides new authority to delegate certain NEPA review functions.

Revised section 185d. adds a restriction not contained in existing law. Sections 186 and 187 currently authorize NRC to modify any license or permit based, among other things, on changes in the Atomic Energy Act or NRC regulations and on new information which, had it been known before the license or permit was issued, would have been ground for denial of the application. These sections contain no requirement that any particular evidentiary showing be made as a prerequisite to the modification. Revised section 185d. would impose a new statutory requirement for an evidentiary showing, as defined in new section 11bb., prior to modification of certain NRC final determinations. Current law is unclear but would probably authorize NRC to adopt such a restriction. Current law would not require it.

Revised section 185e. is intended to state existing law.

Section 102

This section makes substantial changes to existing section 189a. First, it adds a requirement for the holding of a hearing prior to approval of a facility design. Under current law NRC could approve a design by generic rule-making under section 4 of the Administrative Procedure Act which does not require the holding of any hearing. The requirement in revised 189a.(1) that hearings be held on other regulatory actions essentially restates existing law except that, as explained above, the requirement that hearings be held prior to issuance of certain construction permits even if no interested person requests one would be eliminated.

Revised section 189a(1)(A)-(C) imposes new notice requirements. Current law requires only 30 days' Federal Register notice for construction permits and operating licenses for facilities under sections 103 and 194b. and testing facilities under section 104c. Revised section 189a.(2) conforms to existing law (the so-called Sholly amendment in the 1982-1983 NRC Authorization Act) except that the provision would be extended to amendments to construction permits, combined construction permits and operating licenses, design appeals, and site permits.

Revised section 189a.(1)(D) would add a new provision on relitigation of issues. Hearing relitigation of issues which were considered and decided or which could have been considered and decided in a prior proceeding before the Commission for the

same facility or facility site or design approval under new section 194 could not occur unless a defined evidentiary showing were made. The effect on existing law would vary with the type of proceeding. If NRC approved a facility design by rule, then under current law the approval embodied in that rule could not be relitigated in any licensing proceeding absent a showing of special circumstances (10 CFR §2.758). The substantial showing required by the revised section is somewhat more broad (substantial evidentiary showing of non-compliance) than the showing required by current law (special circumstances). In this respect the bill relaxes current requirements, although NRC would be authorized under current law to relax 10 CFR §2.758 to conform to the bill.

Relitigation of issues previously decided in a licensing proceeding is currently governed by traditional principles of res judicata and collateral estoppel. Thus a party (and those in privity with the party) is barred from relitigating issues previously raised by or within the scope of a proceeding brought by the same party. Different parties are not affected. Revised section 189a(1)(D) would extend the bar to parties which had not participated in the prior licensing proceeding. While this is a change in current practice, it is not clear whether a change in the Atomic Energy Act is required. It is likely that NRC could render final and binding decisions on sites and designs as part of construction permit proceedings that would not be subject to



re-review or relitigation at the operating license stage without some evidentiary showing.

Revised sections 189b., c. and d. authorize NRC to hold so-called "hybrid hearings" in satisfaction of hearing requirements of section 189 for certain facility licensing actions. Current law would authorize but not require the holding of some kind of hearing, including a hybrid hearing as described in revised section 189c. and d., in connection with approval of designs by rulemaking. No judicial case has held specifically that formal "on the record" hearings are required in connection with facility licensing actions, although the issue has never been raised on judicial review because NRC and its predecessor AEC have in the past always granted an "on the record" hearing if requested. If one assumes for purposes of discussion that "on the record" hearings are currently required for facility licensing actions (issuing, denying, amending, suspending, and revoking facility licenses or permits), then revised sections 185b., c. and d. would modify existing law by granting NRC some additional flexibility to resolve insubstantial factual disputes by less than formal "on the record" adjudicatory procedures. This is similar to, but more flexible than, the summary disposition practice authorized by current law applicable to on the record proceedings (see 10 CFR §2.749).

Revised section 189e. conforms to existing law.

Section 103

Section 103 would add a new section 193 providing for early site permits. Current law would authorize NRC to issue partial initial decisions on site suitability in construction permit proceedings (10 CFR §§2.600-2.606). However, only construction permit applicants could obtain such a decision, the decision would need to be tied to earliest and latest completion dates for the plant itself, a license application and issuance fee would need to be paid in full by the construction permit applicant, and the burden of proof on renewal (in the form of a request to extend the completion date in the construction permit) would need to be on the permittee. The bill would grant new authority to allow anyone to obtain a site permit, to allow NRC to divorce the early site permit proceeding from the construction permit proceeding and thereby divorce the early site permit from the construction permit completion date, and to allow NRC to defer and allocate license and application fees. The bill would also add new authority and a new requirement that the burden of proof on renewal be placed on the proponent of renewal denial. The bill would also add new restrictions on the duration of site permits and on the duration and number of allowed site permit renewals.

New section 193f. restricts modifications of final determinations made in early site permit proceedings. This requirement is similar to the requirement that would currently apply if site suitability issues were sought to be raised in the

design review stage of the construction permit proceeding following issuance of a partial initial decision on site suitability. Existing law would likely allow NRC to adopt a similar restriction on relitigation of site suitability issues at the operating license review stage.

#### Section 104

Section 104 of the bill would add a new section 194 providing for design approvals for standardized designs for thermal neutron power generation facilities. NRC is currently authorized by sections 109, 161i. and 161p. to issue rules that would constitute design approvals with the same attributes as those in new section 194, with the three exceptions noted below. However, NRC authority to do this has never been exercised and the bill would obviate whatever doubts there may be regarding the extent of NRC authority.

The provisions regarding fees, duration of approvals, burden of proof, duration and allowed number of renewals change existing law in the same manner as the counterpart provisions of section 193.

Section 201 (Definitions only)

Section 202 (Definitions only)

Section 203

Section 203a. adds a new requirement that the Commission promulgate proposed regulations implementing new sections 185d., 193f., and 194e. within 180 days after enactment. Section 203b. would add a new restriction on modifications of licenses, permits and approvals for thermal neutron power generation facilities. Subsections 203c. and d. clarify how NEPA would apply to site permits and design approvals. NEPA case law is unclear on the points addressed by these subsections.

Sections 301 & 302 (Conforming only)Section 303

This section would amend and conform sections 182b. relating to ACRS review. Current law would require ACRS review on applications for partial initial decisions on site suitability for facilities under 103 and 104b. and testing facilities under 104c. The revised section 182b. would, in effect, add a requirement of ACRS review of site issues for other facilities. Current law does not require ACRS review for design approvals by rule; the revised section 182b. would add such a requirement for design approvals under section 194.

Section 304 (Conforming only)Section 305 (Table of Contents only)

Section 401 (Effective Notice only)