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SECY-81-12

POLICY ISSUE
(Notation Vote)

For: The Commission

From: Leonard Bickwit, General Counsel
Howard K. Shapar, Executive Legal Director

Subject: The Sholly Decision -- Legislative Options

Discussion: In SECY A-80-183A we provided the Commission a memorandum on the impact of the Sholly decision and possible ways of dealing with it, including NRC "self-help" actions, Supreme Court review and corrective legislation. The self-help actions are underway 1/ and the Commission has approved seeking Supreme Court review. This memorandum, at the request of Commissioner Bradford's office, will identify various legislative options.

One set of legislative options consists of the ones set out in SECY A-80-183A. That proposal suggested three changes in Section 189 of the Atomic Energy Act. One, to overturn the Sholly holding that a request for a hearing stays the effectiveness of a license amendment which involves no significant hazards consideration. A second, to confirm that the Commission is entitled to issue an immediately effective license amendment or order when the public health and safety or common defense and security so requires. A third, to overturn the Sholly holding that approval to undertake previously

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1/ One additional self-help action that might be considered is to revise the definition of unreviewed safety question in 10 CFR §50.59 so that the licensee has greater scope for independent action without prior NRC approval. As the Sholly court reads Congress' intent it is the grant of "significant" new authority that requires a license amendment. See slip op. p. 23.

CONTACT:
Stephen F. Eilperin, OGC
4-1465

8101280280 XA
7pp.

SECY NOTE: Prior papers on the Sholly Decision were issued as SECY-A-80-183/A/B

conditioned or restricted authority is itself a license amendment, at least where the original license or pertinent license authority has been revoked.

Three variants on these options are straightforward, namely dropping one, two, or all of the suggested changes. The variant of dropping all of the suggested changes and of not pursuing any corrective legislation is not one that we favor. We think the Sholly decision was erroneous and threatens to seriously burden the Commission's regulation of nuclear power by inviting hearing requests on minor matters and delaying the effectiveness of license amendments necessary for power plant operation at full rated capacity. The Commission's motion for a stay of mandate filed with the D.C. Circuit noted that the Sholly decision had placed at risk over the next few months some twenty power plants which would either have to shut down or operate at reduced power if not accorded the authority sought under license amendment requests which the staff expected to approve based on a no significant hazards consideration finding. This is likely to be a recurring situation since most licenses require amendment to reflect the physical behavior of the fresh fuel placed in the reactor core when the power plant refuels.

A legislative proposal to overturn the Sholly holding that a request for a hearing stays the effectiveness of a license amendment which involves no significant hazards consideration is, we think, justified. The fact that the Commission intends to pursue seeking Supreme Court review of the decision does not detract from the case for legislation, since the prospect for Supreme Court review is unclear, a Supreme Court decision even if favorable is at least a year away, and the legislative route offers the prospect of more timely action.

The second change suggested in SECY A-80-183A, is to confirm the Commission's power to take immediately effective action either by order or by license amendment. It also arguably expands the Commission's powers to take immediately effective action beyond the purely emergency situations sanctioned by the Administrative

Procedure Act. 5 U.S.C. 558(c). We think the better view is that the Sholly decision does not implicate those two purposes. However, there is language in the Sholly decision which could be interpreted as requiring a hearing, on request, prior to the Commission's exercise of its power to take immediately effective actions. 2/ While we think there is only a very small risk that the Sholly opinion would be stretched that far, the suggested change would assure that the Commission's emergency powers are not impaired by the decision.

The third change suggested in SECY-A-80-183A, namely to make clear that approval to undertake previously conditioned or restricted authority is not a license amendment, is a response to the Sholly ruling that the Commission's approval of purging the TMI-2 containment was itself a license amendment even though not characterized by the Commission as such. Like the first two suggested changes it would be appropriate for inclusion in a legislative proposal tailored solely to the Sholly decision. However, this ruling of the Sholly case should not prove as onerous to the Commission as the no significant hazards ruling, and hence the case for legislative correction is somewhat weaker. It should not prove onerous for two reasons. First, viewed narrowly, the court's ruling is applicable only to a situation where the relevant authority under a license has been revoked, as the D.C. Circuit mistakenly thought was the case with regard to the TMI-2 license. On this reading of the decision there would be exceedingly few occasions where the court's ruling would be applicable and none where it would have any impact, since even prior to Sholly the granting of significant authority where none existed

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2/ The court stated that any significant change in license authority whether it involves the grant, suspension, revocation, or amendment of a license, is a license amendment for which a prior hearing on request must be held. Slip op. p. 23. Since the court included license suspension and revocation in its catalog of actions requiring prior hearing, the argument that emergency action must await a prior hearing, though marginal, is not wholly without support in the court's decision. As noted in text we think the better view of the court's decision is that the Commission's emergency powers are not affected by it.

previously would have required a license amendment. Second, in the Commission's motion to stay mandate we advised the court that we do not intend to follow its ruling on this aspect of the case unless we are advised by the court that we must. We took this position because we viewed the court's ruling as based on a misapprehension of the Commission's intent to revoke only those aspects of the original TMI-2 license governing power operation, not the authority for effluent discharges. Since the question turned on the Commission's intent, not Congress' intent, we took the position that we were free to depart from the court's ruling once the Commission again made its intent in this regard clear. Thus, unless the court rejects our position, the court's ruling on this aspect of the case should have no adverse impact on the TMI-2 cleanup.

The basis for legislative correction hinges on the possibility that the court's ruling is given a broad reading rather than narrow reading; it is susceptible to either. A broad reading would take the court's decision to mean that whenever the Commission found that a license condition has been satisfied, that finding triggered new authority and, if significant, was a license amendment. Given that reading, the Commission would be severely hampered in imposing flexible license conditions or orders, such as requiring the licensee as a condition of operation to effect certain changes to the satisfaction of the Director, NRR, or to the satisfaction of the Commission by a particular date. Under the broad reading of the court's decision the finding of "satisfaction" would be considered a license amendment subject to an adjudicatory hearing before it could be effected. 3/ There is a plausible prospect then, that under this aspect of the court's ruling, an adjudicatory hearing would be a prerequisite to keeping a power plant in operation or bringing up a licensee from a shutdown condition where the condition for operation, or the shutdown order, was occasioned by an immediately effective order requiring the licensee to take corrective action to the Commission's satisfaction.

3/ While the Sholly decision explicitly left open the precise nature of the hearing required by Sec. 189(a), for purposes of this memorandum we assume that an adjudicatory hearing will be required.

There are, of course, legislative options responsive to the Sholly decision which go beyond those suggested in SECY A-80-183A. One set centers on the question of the timing and type of hearing, if any, that should be offered on a no significant hazards consideration license amendment finding. The proposal set forth in SECY A-80-183A, while not explicit on this, was intended to re-institute the pre-Sholly policy of holding an after-the-fact adjudicatory hearing on such amendments. Alternatively, legislative-type hearings could be proposed, and these could be either before or after-the-fact. To the extent the Commission's problem with the Sholly decision centers on the delay the decision will cause in effectuating minor license amendments, and the consequences of that delay, then a prior legislative hearing is also a problem although less severe. Even a legislative hearing is likely to take a few months from the time the amendment is noticed to the time of decision, a passage of time which in many instances probably could not be accommodated in the licensing review process without being on the critical path.

As to after-the-fact options, the choice among them seems unimportant if for no other reason than that after-the-fact hearings of whatever kind are not ordinarily requested. Moreover, by hypothesis an after-the-fact hearing, of whatever kind, will not interfere with the license amendment process. The Commission might consider the option of no hearing whatsoever on a no significant hazards consideration amendment. This would give legislative recognition to the fact that after-the-fact hearings are rarely if ever invoked, and that the approvals at issue are too minor to warrant a hearing. Under the "no hearing" scenario, challenges to the amendment would take the form of a 10 C.F.R. 2.206 request. It is at least arguable that a person contesting a minor amendment should have no stronger claim to an adjudicatory hearing than a person whose claim for 10 C.F.R. 2.206 action is considered not sufficiently important t warrant convening an adjudicatory board.

Another set of possible legislative variants concerns the no significant hazards consideration finding itself. Any legislative proposal touchin this issue would go beyond the Sholly decision

since the court's opinion does not speak to the question of how trifling an amendment must be in order to fall within that category. The issue can be important even if the Sholly ruling is otherwise legislatively corrected, because the opportunity for a prior adjudicatory hearing would then once again hinge upon whether the no significant hazards consideration finding can be made. Since it is now widely appreciated that the Commission makes such a finding at the rate of some 400 per year, it is not unlikely that a lawsuit will be brought to challenge the Commission's frequent use of that finding. An adverse court ruling on the scope of such a finding would again put the Commission in virtually the same place as the Sholly decision--that an adjudicatory hearing if requested by an interested person must precede the effectiveness of the license amendment.

The possible legislative variants run from making the Commission's decision on a no significant hazards consideration finding judicially unreviewable, to some sort of legislative recognition that countenances such frequent use of the no significant hazards consideration finding. However, as noted earlier, any legislative proposal touching this issue would go beyond the Sholly decision. Once the principle of limiting the Commission's legislative proposal to the impact of the Sholly decision is breached, then the field for proposed legislative changes is open-ended.

Recommendation: That the Commission adopt the legislative proposal set forth in SECY A-80-183A, or at minimum choose a legislative proposal which overrules that aspect of the Sholly decision which requires a prior hearing, on request, before a no significant hazards consideration amendment can be made effective.

Leonard Bickwit, Jr.
General Counsel

Howard Shapar by OFE
Howard Shapar
Executive Legal Director

The Commission

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. January 21, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT January 14, 1981, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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