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

AUG 0 2 1985

MEMORANDUM FOR: Commissioner Bernthal

FROM: William J. Dircks
Executive Director for Operations

SUBJECT: SECY-85-209 -- SHOLLY AMENDMENT PROCEDURES

Your July 12, 1985 memorandum to me raised several questions concerning the alternatives for a final rule implementing the Sholly amendments to Section 189 of the Atomic Energy Act which were suggested in SECY-85-209. A discussion of the Sholly legislation, its history, the two interim final regulations promulgated pursuant to the legislation, and the staff's present procedures under these regulations are included in addition to responses to your specific questions.

As explained in SECY-85-209, under present procedures, the three standards under which we must make judgments about no significant hazards considerations cause some difficulty because they are "merits" standards and under the Sholly legislation the merits are not to be prejudged. The standards often force more than a cursory review of an amendment request for a proposed determination. It should be noted that the standards were the original basis for Congressional enactment of the "no significant hazards consideration language" in Section 189. Consequently, it may be difficult to make a meaningful change to the standards although it could be argued that changing the standards would solve the problem of prejudgment. Another approach might be to add additional examples, thereby making it easier to initially fit amendment requests into specified categories.

Question 1. Do we really have an alternative given the Staff's own position that "[t]he final [Sholly] legislation and its history make clear that normally the Staff should issue for public comment a proposed determination on no significant hazards consideration?"

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Response. We do have alternatives under both Options 2 and 3. A determination only is required where the Commission seeks to issue an amendment without 30 days prior notice and opportunity for hearing. If 30 days prior notice and opportunity for hearing is given and no request for hearing is received any amendment can be issued without further notice. Under Option 2, we would "notice receipt of amendment requests, offer an opportunity for a hearing, and then make the 'no significant hazards considerations' analysis only if a hearing request is received." To conform this option to the legislation, we would have to issue for public comment a proposed determination whenever we receive a hearing request, unless there is an emergency situation. The advantages of this option are described in SECY-85-209. A disadvantage is that we would have to wait until the end of the comment period on the proposed determination before we could issue the amendment. On the other hand, it would be possible to make procedural determinations on the hearing request while the comment period was pending. Under Option 3, we would "notice licensees' determinations in most cases and the staff's proposed determinations in unusual, complex or difficult ones." We would adopt a licensee's determination as our own proposed determination where the issues presented are straight-forward and consistent with Commission guidance on the determination. Additional agency review would in essence go to the merits. Thus, when a cursory review showed that we agreed with the licensee, the licensee's determination would be accepted. We would make our own proposed determination when a swift and short review showed that we disagreed in some significant way or that further technical work was required to make a proposed determination.

Question 2. If the Staff believes there are legal impediments to Option 2 (which is less of a departure from current practice than Option 3), would not Option 3 be flatly impermissible as a legal matter?

Response. There would be no legal impediments to implementing Options 2 and 3 as described above.

Question 3. Under Option 3, it appears to me that "significant hazards considerations" (as opposed to significant hazards) would virtually always be present if the determination is truly that difficult and complex to make.

Response. "Unusual", "complex" or "difficult" do not refer to the technical merits but rather to the question concerning the applicability of the examples or standards to a particular factual circumstance. For example, spent fuel expansions were ultimately determined to pose "no significant hazards" although no licensee would have been expected to accurately predict this determination. An opportunity for a prior hearing is available in every instance where a significant hazards consideration is involved in an amendment request. The proposal has been clarified in response to Question 1. As noted, however, sometimes the issue is not technically difficult but does not fit the standards or examples neatly. In such cases the Staff would necessarily have to make its own determination. Thus, the terms "difficult" and "complex" would be appropriately clarified.

Question 4. Not only Staff, but utilities have in the past raised serious and legitimate concerns over the inordinate time required for NRC to process even the simplest license amendment which a utility may find necessary to improve its operations. For example, in a recent visit to one plant, I learned that literally scores of license amendment applications had been pending for many months, apparently because NRC is incapable of timely processing. Such concerns could easily be viewed as eventually contributing to safety degradation. Is the Staff now throwing up its hands and, in effect, saying there is nothing to be done? Or has the problem gone away?

Response. The Sholly legislation clearly requires legal procedures and notice which were not previously part of Commission practice. Thus, whatever option the Commission adopts will involve processing and noticing amendment requests. That time can probably be shortened with the cooperation of our licensees and quicker staff reviews. Amendment requests, however, take time to review, quite apart from Sholly considerations, to make the requisite public health and safety or common defense and security determinations. A review of amendments processed since the interim rule was implemented reveals only a few cases where the Sholly procedures caused any delay. In most instances, amendments took longer times to process because more, clearer or better information from licensees was needed in order to understand and to act expeditiously on their amendment requests. The mean and average time for technical reviews of amendments significantly exceed the notice time required by Sholly which runs concurrently.

No time-consuming procedures are required where the amendment is needed to prevent derating or shutdown since such a situation constitutes an emergency under Sholly legislation.

(Signed) William J. Dircks

William J. Dircks
Executive Director for Operations

Enclosure: As stated
cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Zech
SECY
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OPE

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FC	:OELD	:OELD	:ELD	:EDO	:	:	:
AME	:TDorian	:WJOlmstead	:GHCunningham	:WJDircks	:	:	: :
ATE	:7/ /85	:7/19/85	:7/19/85	:7/ /85	:	:	:

ENCLOSURE

ANALYSIS

Introduction

Public Law 97-415, signed on January 4, 1983, among other things, directed NRC to promulgate regulations which establish (a) standards for determining whether an amendment to an operating license involves no significant hazards consideration, (b) criteria for providing, or, in emergency situations, dispensing with, prior notice and public comment on any such determination, and (c) procedures for consulting with the State in which the facility involved is located on such a determination about an amendment request. See Conf. Rep. No. 97-884, 97th Cong., 2d Sess. (1982). The legislation also authorized NRC to issue and make immediately effective an amendment to a license, upon a determination that the amendment involves no significant hazards consideration (even though NRC has before it a request for a hearing by an interested person) and in advance of the holding and completion of any required hearing.

The two interim final rules published in the FEDERAL REGISTER on April 6, 1983 ((48 FR 14864) and (48 FR 14873)), responded to the statutory directive that NRC expeditiously promulgate regulations on the three items noted above. The first dealt with the standards themselves and the second with the notice and State consultation procedures. These regulations were issued, as final though in interim form.

The following discussion is divided into two parts. The first discusses the background, including a discussion of the proposed rule on the standards

published before passage of the legislation, as well as an overview of the interim final rules published after the legislation was enacted. See 45 FR 20491 (March 28, 1980). The second discusses the present practice.

I. Background

A. Affected Legislation, Regulations and Procedures

When the Atomic Energy Act of 1954 (Act) was adopted in 1954, it contained no provision which required a public hearing on issuance of a construction permit or an operating license for a nuclear power reactor in the absence of a request from an interested person. In 1957, the Act was amended to require that mandatory hearings be held before issuance of both a construction permit and an operating license for power reactors and certain other facilities. See Public Law 85-256 (71 Stat. 576) amending section 189a. of the Act.

The 1957 amendments to the Act were interpreted by the Commission as requiring a "mandatory hearing" before issuance of amendments to construction permits and operating licenses. See, e.g., Hearing Before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong., 2d. Sess. (April 17, 1962), at 6.) Partially in response to the administrative rigidity and cumbersome procedures which this interpretation forced upon the Commission (see, Joint Committee on Atomic Energy Staff Study, "Improving the AEC Regulatory Process", March 1961, pp. 49-50), section 189a. of the Act was amended in 1962 to eliminate the requirement for a mandatory public hearing

except upon the application for a construction permit for a power or testing facility. As stated in the report of the Joint Committee on Atomic Energy which recommended the amendments:

> Accordingly, this section will eliminate the requirements for a mandatory hearing, except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. 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 Regulations 50.59. House Report No. 1966, 87th Cong., 2d. Sess., p. 8.

Thus, according to the 1962 amendments, a mandatory public hearing would no longer be required before issuance of an amendment to a construction permit or operating license and a thirty-day prior public notice would be required only if the proposed amendment involved a "significant hazards consideration." In sum, section 189a. of the Act, now provided that, upon thirty-days' notice published in the FEDERAL REGISTER, the Commission may issue an operating license, or an amendment to an operating license, or an amendment to a construction permit, for a facility licensed under sections 103 or 104b. of the Act, or for a testing facility licensed under section 104c., without a public hearing if no hearing is requested by an interested person. Section 189a. also permitted the Commission to dispense with such thirty-days' notice and FEDERAL REGISTER publication with respect to the issuance of an amendment to a construction permit or an amendment to an

operating license upon a determination by it that the amendment involves no significant hazards consideration. These provisions were incorporated into the Commission's regulations, which were subsequently changed. See §§ 2.105, 2.106, 50.58(a) and (b) and 50.91.

The Commission's regulations before promulgation of the two interim final rules provided for prior notice of an application for an amendment when a determination was made that there is a significant hazards consideration and provided an opportunity for interested members of the public to request a hearing. Hence, if a requested license amendment were found to involve a significant hazards consideration, the amendment would not be issued until after any required hearing were completed or after expiration of the notice period. In addition, § 50.58(b) further explained the Commission's hearing and notice procedures, as follows:

> The Commission will hold a hearing after at least 30 days notice and publication once in the FEDERAL REGISTER on each application for a construction permit for a production or utilization facility which is of a type described in § 50.21(b) or § 50.22 or which is a testing facility. When a construction permit has been issued for such a facility following the holding of a public hearing and an application is made for an operating license or for an amendment to a construction permit or operating license, the Commission may hold a hearing after at least 30 days notice and publication once in the FEDERAL REGISTER or, in the absence of a request therefor by any person whose interest may be affected, may issue an operating license or an amendment to a construction permit or operating license without a hearing, upon 30 days notice and publication once in the FEDERAL REGISTER of its intent to do so. If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, it may dispense with such notice and publication and may issue the amendment.

The Commission noted in its interim final rules that, after it has made its determination about whether a proposed license amendment does or does not present a significant hazards consideration, its hearing and attendant notice requirements come into play. Under its former rules, the Commission made its determination about whether it should provide an opportunity for a hearing before issuing an amendment together with its determination about whether it should issue a prior notice -- and the central factor in both determinations was the issue of "no significant hazards consideration." It had been argued that in practice this meant that the staff often decided the merits of an amendment together with the issue of whether it should give notice before or after it has issued the amendment. See 48 FR 14864, at 14865 (April 6, 1983). The argument arose, in part, because of some concern that the Act and the regulations did not define the term "significant hazards consideration" and did not establish criteria for determining when a proposed amendment involves "significant hazards considerations." Section 50.59 has, of course, all along set forth criteria for determining when a proposed change, test or experiment involves an "unreviewed safety question" but it was and is clear that not every such question involves a "significant hazards consideration."

The Commission's practice with regard to license amendments involving no significant hazards consideration (unless, as a matter of discretion, prior notice was given) was to issue the amendment and then publish in the FEDERAL REGISTER a "notice of issuance." See § 2.106. In such a case, interested members of the public who wished to object to the amendment and request a

hearing could do so, but a request for a hearing did not, by itself, suspend the effectiveness of the amendment. Thus, both the notice and hearing, if one were requested, occurred after the amendment was issued.

It is important to bear in mind as one reads this analysis that there is no intrinsic safety significance to the "no significant hazards consideration" standard. Neither as a notice standard nor as a standard about when a hearing may be held does it have a substantive safety significance. Whether or not an action requires prior notice or a prior hearing, no license and no amendment may be issued unless the Commission concludes that it provides reasonable assurance that the public health and safety will not be endangered and that the action will not be inimical to the common defense and security or to the health and safety of the public. See, e.g., § 50.57(a). In short, the "no significant hazards consideration" standard is a procedural standard which governs whether an opportunity for a prior hearing must be provided before action is taken by the Commission, and, as discussed later, whether prior notice for public comment may be dispensed with in emergency situations or shortened in exigent circumstances.

B. The Sholly Decision and the New Legislation

The Commission's practice of not providing an opportunity for a prior hearing on a license amendment not involving significant hazards considerations was held to be improper in Sholly v. NRC, 651 F.2d 780 (1980), rehearing denied, 651 F.2d 792 (1980), cert. granted 451 U.S. 1016 (1981), vacated 459 U.S.

1154 (1983) (Sholly). In that case the U.S. Court of Appeals for the District of Columbia Circuit ruled that, under section 189a. of the Act, NRC must hold a prior hearing before an amendment to an operating license for a nuclear power plant can become effective, if there has been a request for hearing (or an expression of interest in the subject matter of the proposed amendment which is sufficient to constitute a request for a hearing). A prior hearing, said the Court, is required even when NRC has made a finding that a proposed amendment involves no significant hazards consideration and has determined to dispense with prior notice in the FEDERAL REGISTER.

At the request of the Commission and the Department of Justice, the Supreme Court agreed to review the Court of Appeals' interpretation of section 189a. of the Act. On February 22, 1983, the Supreme Court vacated the Court of Appeal's opinion as moot and directed the Court of Appeals to reconsider the case in light of the new legislation. On April 4, 1983, the Court of Appeals, having considered the legislation, found that the portion of its opinion holding that a hearing requested under section 189a. of the Act must be held before a license amendment becomes effective would be moot as soon as NRC promulgated the regulations to which the legislation referred. The Court also found that NRC, of course, was still under a statutory mandate to hold a hearing after an amendment became effective, if requested to do so by an interested party. Appeal Nos. 80-1691, 80-1783, and 80-1784.

The Court of Appeals' decision did not involve and has no effect upon the Commission's authority to order immediately effective amendments, without prior notice or hearing, when the public health, safety, or interest so requires. See, Administrative Procedure Act, § 9(b), 5 U.S.C. § 558(c), section 161 of the Atomic Energy Act, and 10 C.F.R. §§ 2.202(f) and 2.204. Similarly, the Court did not alter existing law with regard to the Commission's pleading requirements, which are designed to enable the Commission to determine whether a person requesting a hearing is, in fact, an "interested person" within the meaning of section 189a. -- that is, whether the person has demonstrated standing and identified one or more issues to be litigated. See, BPI v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974), where the Court stated that, "Under its procedural regulations it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing."

The Commission believed that legislation was needed to change the result reached by the Court in Sholly because of the implications of the requirement that the Commission grant a requested hearing before it could issue a license amendment involving no significant hazards consideration. It also believed that, since most requested license amendments involving no significant hazards consideration are routine in nature, prior hearings on such amendments could result in unnecessary disruption or delay in the operations of nuclear power plants by imposing regulatory burdens unrelated to significant safety matters. Subsequently, on March 11, 1981, the Commission

submitted proposed legislation to Congress (introduced as S.912) that would expressly authorize it to issue a license amendment before holding a hearing requested by an interested person, when it has made a determination that no significant hazards consideration is involved in the amendment.

After the House and Senate conferees considered two similar bills, H.R.2330 and S.1207, they agreed on a unified version (see Conf. Rep. No. 97-884, 97th Cong., 2d. Sess. (1982)) and passed Public Law 97-415. Specifically, section 12(a) of that law amends section 189a. of the Act by adding the following with respect to license amendments involving no significant hazards considerations:

> (2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.
>
> (B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.
>
> (C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards

> consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

Section 12(b) of that law specifies that:

> (b) The authority of the Nuclear Regulatory Commission, under the provisions of the amendment made by subsection (a), to issue and to make immediately effective any amendment to an operating license shall take effect upon the promulgation by the Commission of the regulations required in such provisions.

Thus, as noted above, the legislation authorizes NRC to issue and make immediately effective an amendment to an operating license upon a determination that the amendment involves no significant hazards considerations, even though NRC has before it a request for a hearing from an interested person. In this regard, the Conference Report states:

> The conference agreement maintains the requirement of the current section 189a. of the Atomic Energy Act that a hearing on the license amendment be held upon the request of any person whose interest may be affected. The agreement simply authorizes the Commission, in those cases where the amendment involved poses no significant hazards consideration, to issue the license amendment and allow it to take effect before this hearing is held or completed. The conferees intend that the Commission will use this authority carefully, applying it only to those license amendments which pose no significant hazards consideration. Conf. Rep. No. 97-884, 2d. Sess., at 37 (1982).

And the Senate has stressed:

> its strong desire to preserve for the public a meaningful right to participate in decisions regarding the commercial use of nuclear power. Thus, the provision does not dispense with the requirement for a hearing, and the NRC, if requested [by an interested person], must conduct a hearing after the license amendment takes effect. See S. Rep. No. 97-113, 97th Cong., 1st Sess., at 14 (1981).

The public notice provision was explained by the Conference Report as follows:

> The conferees note that the purpose of requiring prior notice and an opportunity for public comment before a license amendment may take effect, as provided in subsection (2)(C)(ii) for all but emergency situations, is to allow at least a minimum level of citizen input into the threshold question of whether the proposed license amendment involves significant health or safety issues. While this subsection of the conference agreement preserves for the Commission substantial flexibility to tailor the notice and comment procedures to the exigency of the need for the license amendment, the conferees expect the content, placement and timing of the notice to be reasonably calculated to allow residents of the area surrounding the facility an adequate opportunity to formulate and submit reasoned comments.
>
> The requirement in subsection 2(C)(ii) that the Commission promulgate criteria for providing or dispensing with prior notice and public comment on a proposed determination that a license amendment involves no significant hazards consideration reflects the conferees' intent that, wherever practicable, the Commission should publish prior notice of, and provide for prior public comment on, such a proposed determination.
>
> In the context of subsection (2)(C)(ii), the conferees understand the term "emergency situations" to encompass only those rare cases in which immediate action is necessary to prevent the shutdown or derating of an operating commercial reactor . . . The Commission's regulations should insure that the "Emergency situations" exception under section 12 of the conference agreement will not apply if the licensee has failed to apply for the license amendment in a timely fashion. In other words, the licensee should not be able to take advantage of the emergency itself. To prevent abuses of this provision, the conferees expect the Commission to independently assess the licensee's reasons for failure to file an application sufficiently in advance of the threatened closure or derating of the facility. Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 38 (1982).

C. Basis for Interim Final Rule on Standards for Determining Whether an Amendment to an Operating License Involves No Significant Hazards Considerations and Examples of Amendments that Are Considered Likely or Not Likely to Involve Significant Hazards Considerations

Many of the comments on the interim final rules were the same or were similar to those on the proposed rule. These comments and responses on the proposed rule and the petition for rulemaking are consolidated and repeated here with references to the earlier FEDERAL REGISTER citations.

1. Petition and Proposed Rule

General

The Commission's interim final rule on standards for determining whether an amendment involves no significant hazards consideration resulted from notice of proposed rulemaking issued in response to a petition for rulemaking (PRM 50-17) submitted by letter to the Secretary of the Commission on May 7, 1976, by Mr. Robert Lowenstein. For the reasons discussed below, the petition was denied. See 48 FR 14867. However, the Commission published proposed standards, as intended by the petitioner, though not the standards petitioned for. (PRM-50-17 was published for comment in the FEDERAL REGISTER on June 14, 1976 (41 FR 24006)). The staff's recommendations on this petition are in SECY-79-660 (December 13, 1979). The notice of proposed rulemaking was published in the FEDERAL REGISTER on March 28, 1980 (45 FR 20491). Note that the proposed rule was published before passage of the legislation and that the Congress was aware of this rule during passage of the legislation. The staff's recommendations first on a final rule and later

on the interim final rules are in SECY-81-366, 81-366A, 83-16, 83-16A and 83-16B.

In issuing the proposed rule, the Commission sought to define more precisely the standards for determining when an amendment application involved no significant hazards considerations. These standards would have applied to amendments to operating licenses, as requested by the petition for rule-making, and also to construction permit amendments, to whatever extent considered appropriate. The Commission later decided that these standards should not be applied to amendments to construction permits, since such amendments are very rare and normally would not be expected to involve a significant hazards consideration. It therefore modified the proposed rule accordingly. Additionally, the Commission stated in the interim final rules that it would review the extent to which and the way standards should be applied to research reactors. And it noted that, in the meanwhile, it would handle case-by-case any amendments requested for construction permits or for research reactors with respect to the issue of significant hazards considerations. 48 FR, at 14867.

Before the proposed rule on standards was published, the Commission's staff was guided, in reaching its determinations with respect to no significant hazards considerations, by standards very similar to those described in the proposed rule and in the interim final rules. In addition, a list of examples have been used of amendments likely to involve, and not likely to

involve, significant hazards considerations when the standards are applied. These examples were employed by the Commission in developing both the proposed rule and the interim final rules. The notice of proposed rulemaking contained standards proposed by the Commission to be incorporated into Part 50, and the statement of considerations contained examples of amendments to an operating license that are considered "likely" and "not likely" to involve a significant hazards consideration. The examples were samples of precedents with which the staff was familiar; they were representative of certain kinds of circumstances; however, they did not cover the entire range of possibilities; nor did they cover every facet of a particular situation. Therefore, it was clear that the standards ultimately would have to govern a determination about whether or not a proposed amendment involves significant hazards considerations.

The three standards proposed in the notice of proposed rulemaking were whether operation in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of an accident of a type different from any evaluated previously, or (3) involve a significant reduction in a margin of safety. The interim final rules did not change these standards. They did, however, change the introductory phrase to make the standards easier to understand and to use.

As a result of the legislation, the Commission formulated separate notice and State consultation procedures that provide in all (except emergency) situations prior notice of amendment requests. The notices usually make a "proposed determination" about whether or not significant hazards considerations are involved in connection with an amendment and, therefore, whether or not to offer an opportunity for a hearing before an amendment is issued; if a hearing request is received a final determination is made about whether or not significant hazards considerations are involved. The decision about whether or not to issue an amendment has continued to remain one that, as a separate matter, is based on public health and safety.

2. Comments on Proposed Rule and Responses to these Comments

a. General

Nine persons submitted comments on the petition for rulemaking and nine persons submitted comments on the proposed amendments. One of the commenters stated that all three standards were unclear and useless in that they implied a level of detailed review of amendment applications far beyond what the staff normally performs. When it promulgated the interim final rule, the Commission stated in response to this comment that it was its considered judgment that the standards have been and will continue to be useful in making the necessary reviews. 48 FR 14864, at 14867 (April 6, 1983). It added its belief that the standards when used together with the examples will enable it to make the requisite decisions. Id. In this regard, it noted that Congress was more than aware of the Commission's

standards and proposed their expeditious promulgation. It quoted, for example, the Senate Report which stated:

> ... the Committee notes that the Commission has already issued for public comment rules including standards for determining whether an amendment involves no significant hazards consideration. The Committee believes that the Commission should be able to build upon this past effort, and it expects the Commission to act expeditiously in promulgating the required standards within the time specified in section 301 [i.e., within 90 days after enactment]. S. Rep. No. 97-113, 97th Cong., 1st Sess., at 15 (1981).

Similarly, the House noted:

> The committee amendment provides the Commission with the authority to issue and make immediately effective amendments to licenses prior to the conduct or completion of any hearing required by section 189(a) when it determines that the amendment involves no significant hazards consideration. However,the authority of the Commission to do so is discretionary, and does not negate the requirement imposed by the Sholly decision that such a hearing, upon request, be subsequently held. Moreover, the Committee's action is in light of the fact that the Commission has already issued for public comment rules including standards for determining whether an amendment involves no significant hazards considerations. The Commission also has a long line of case-by-case precedents under which it has established criteria for such determinations.... H. Rep. No. 97-22 (Part 2), 97th Cong., 1st Sess., at 26 (1981) (Emphasis added).

A number of commenters recommended, in regard to the second criterion in the proposed rule, that a threshold level for accident consequences (for example, the limits in 10 C.F.R. Part 100) be established to eliminate insignificant types of accidents from being given prior notice. This comment was not accepted. The Commission stated that setting a threshold level for accident consequences could eliminate a group of amendments with respect to accidents which have not been previously evaluated or which, if previously evaluated,

may turn out after further evaluation to have more severe consequences than previously evaluated. 48 FR, at 14868.

The Commission explained that it is possible, for example, that there may be a class of license amendments sought by a licensee which, while designed to improve or increase safety may, on balance, involve a significant hazards consideration because it results in operation of a reactor with a reduced safety margin due to other factors or problems (i.e., the net effect is a reduction in safety of some significance). Id. Such a class of amendments typically is also proposed by a licensee as an interim or final resolution of some significant safety issue that was not raised or resolved before issuance of the operating license -- and, based on an evaluation of the new safety issue, they may result in a reduction of a safety margin believed to have been present when the license was issued. In this instance, the presence of the new safety issue in the review of the proposed amendment, at least arguably, could prevent a finding of no significant hazards consideration, ever though the issue would ultimately be satisfactorily resolved by the issuance of the amendment. Accordingly, the Commission added to the list of examples considered likely to involve a significant hazards consideration a new example (vii). Id. See Section I(C)(1)(d) below.

In promulgating the interim final rules, the Commission noted that, when the legislation described before was being considered, the Senate Committee on

Environment and Public Works commented upon the Commission's proposed rule before it reported S. 1207. Id. The Committee stated:

> The Committee recognizes that reasonable persons may differ on whether a license amendment involves a significant hazards consideration. Therefore, the Committee expects the Commission to develop and promulgate standards that, to the maximum extent practicable, draw a clear distinction between license amendments that involve a significant hazards consideration and those that involve no significant hazards consideration. The Committtee anticipates, for example, that consistent with prior practice, the Commission's standards would not permit a "no significant hazards consideration" determination for license amendments to permit reracking of spent fuel pools. S. Rep. No. 97-113, 97th Cong., 1st Sess., at 15 (1981).

The Commission agreed with the Committee "that reasonable persons may differ on whether a license amendment involves a significant hazards consideration" and it tried "to develop and promulgate standards that, to the maximum extent practicable, draw a clear distinction between license amendments that involve a significant hazards consideration and those that involve no significant hazards consideration." 48 FR, at 14868. (Reracking is discussed below.) The Commission stated its belief that the standards coupled with the examples used as guidelines help draw as clear a distinction as practicable. It decided not to include the examples in the text of the interim final rules in addition to the original standards, but, rather, to keep them as guidelines under the standards for the use of the Office of Nuclear Reactor Regulation. Id.

In promulgating the interim final rules, the Commission also noted to licensees that, when they consider license amendments outside the examples,

it may need additional time for its determination on no significant hazards considerations, and that they should factor this information into their schedules for developing and implementing such changes to facility design and operation. Id.

The Commission stated its belief that the interim final rules thus went a long way toward meeting the intent of the legislation. Id. In this regard, it quoted the Conference Report, which stated:

> The conferees also expect the Commission, in promulgating the regulations required by the new subsection (2)(C)(i) of section 189a. of the Atomic Energy Act, to establish standards that to the extent practicable draw a clear distinction between license amendments that involve a significant hazards consideration and those amendments that involve no such consideration. These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations. These standards should be capable of being applied with ease and certainty, and should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 37 (1982).

The Commission stated that it had attempted to draft standards that are as useful as possible, and that it had tried to formulate examples that will help in the application of the standards. 48 FR, at 14868. It noted that the standards in the interim final rules were the product of a long deliberative process. (As will be recalled, standards were submitted by a petition for rulemaking in 1976 for the Commission's consideration.) The Commission then explained with respect to the interim final rules that the standards and examples were as clear and certain as the Commission could make them, and it

repeated the Conference Report to the effect that the standards and examples "should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration." Id.

With respect to the Conference Committee's statement, quoted above, that the "standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment," the Commission recalled that it was its general practice to make a decision about whether to issue a notice before or after issuance of an amendment together with a decision about whether to provide a hearing before or after issuance of the amendment; thus, occasionally, the issue of prior versus post notice was seen by some as including a judgment on the merits of issuance of an amendment. Id. For instance, a commenter on the proposed rule suggested that application of the criteria with respect to prior notice in many instances will necessarily require the resolution of substantial factual questions which largely overlap the issues which bear on the merits of the license amendment. Id., at 14868-69. The implication of the comment was that the Commission at the prior notice stage could lock itself into a decision on the merits. Conversely, the commenter stated that the staff, in using the no significant hazards consideration standards, was reluctant to give prior notice of amendments because its determination about the notice might be viewed as constituting a negative connotation on the merits.

The Commission noted in response that, in any event, the legislation had made these comments moot by requiring separation of the criteria used for providing or dispensing with public notice and comment on determinations about no significant hazards considerations from the standards used to make a determination about whether or not to have a prior hearing if one is requested. Id., at 14869. The Commission explained that under the two interim final rules, the Commission's criteria for public notice and comment had been separated from its standards on the determination about no significant hazards considerations. Id. It noted, in fact, that under the interim final rule involving the standards it would normally provide prior notice (for public comment and an opportunity for a hearing) for each operating license amendment request. And it stated its belief that use of these standards and examples would help it reach sound decisions about the issues of significant versus no significant hazards considerations and that their use would not prejudge the safety merits of a decision about whether to issue a license amendment. Id. It explained that it held this belief because the standards and the examples were merely screening devices for a decision about whether to hold a hearing before as opposed to after an amendment is issued and could not be said to prejudge the Commission's final public health and safety decision to issue or deny the amendment request. Id. As explained above, that decision has remained a separate one, based on separate public health and safety findings.

b. Reracking of Spent Fuel Pools

Before issuance of the two interim final rules, the Commission provided prior notice and opportunity for prior hearing on requests for amendments involving reracking of spent fuel pools. When the interim final rule on standards was published, the Commission explained that it was not prepared to say that a reracking of a spent fuel storge pool will necessarily involve a significiant hazards consideration. It stated that, nevertheless, as shown by the legislative history of Public Law 97-415, specifically of section 12(a), the Congress was aware of the Commission's practice and that statements were made by members of both Houses, before passage of that law, that these members thought the practice would be continued. Id. The report on the Senate side has been quoted above; the discussion in the House is found at 127 Cong. Record at H 8156, Nov. 5, 1981.

The Commission decided not to include reracking in the list of examples that are considered likely to involve a significant hazard consideration, because a significant hazards consideration finding is a technical matter which has been assigned to the Commission. However, in view of the expressions of Congressional understanding, the Commission stated that it felt that the matter deserves further study. Accordingly, it instructed the staff to prepare a report on this matter; and it stated that, upon receipt and review of this report, it would revisit this part of the rule. Id. The report is found in SECY-83-337, dated August 15, 1983.

In the interim final rule on standards, the Commission stated that, while it is awaiting its staff's report, it would make findings case-by-case on the question of no significant hazards consideration for each reracking application, giving full consideration to the technical circumstances of the case, using the standards in § 50.92 of the rule. Id. It also stated that it was not its intent to make a no significant hazards consideration finding for reracking based on unproven technology. It added, however, that, where reracking technology has been well developed and demonstrated and where the Commission determines on a technical basis that reracking involves no significant hazards, the Commission should not be precluded from making such a finding. And it noted that, if it determines that a particular reracking involves significant hazards considerations, it would provide an opportunity for a prior hearing. Id.

The Commission also noted that, under section 134 of the Nuclear Waste Policy Act of 1982, an interested party may request a "hybrid" hearing in connection with reracking, and may participate in such a hearing, if one is held. It stated that it would publish in the near future a FEDERAL REGISTER notice describing this type of hearing with respect to expansions of spent fuel storage capacity and other matters concerning spent fuel. Id.

c. Amendments Involving Irreversible Consequences

There was some concern in Congress about amendments involving irreversible consequences. In promulgating the interim final rule on

standards, the Commission mentioned this concern and quoted the Conference Report, which stated:

> The conferees intend that in determining whether a proposed license amendment involves no significant hazards consideration, the Commission should be especially sensitive to the issue posed by license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility or allowing a facility to operate for a period of time without full safety protections). In those cases, issuing the order in advance of a hearing would, as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. Accordingly, the conferees intend the Commission be sensitive to those license amendments which involve such irreversible consequences. (Emphasis added.) Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 37-38 (1982).

The Commission noted, 48 FR, at 14869, that this statement was explained in a colloquy between Senators Simpson and Domenici, as follows:

> Mr. DOMENICI. In the statement of managers, I direct attention to a paragraph in section 12, the so-called Sholly provision, wherein it is stated that in applying the authority which that provision grants the NRC should be especially sensitive to the issue posed by license amendments that have irreversible consequences." Is that paragraph in general, or specifically, the words "irreversible consequences" intended to impose restrictions on the Commission's use of that authority beyond the provisions of the statutory language? Can the Senator clarify that, please?
>
> Mr. SIMPSON. I shall. It is not the intention of the managers that the paragraph in general, nor the words "irreversible consequences," provide any restriction on the Commission's use of that authority beyond the statutory provision in section 189a. Under that provision, the only determination which the Commission must make is that its action does not involve a significant hazard. In that context, "irreversibility" is only one of the many considerations which we would expect the Commission to consider. It is the determination of hazard which is important, not whether the action is irreversible. Clearly, there are many irreversible actions which would not pose a hazard. Thus where the Commission determines that no significant hazard is involved, no further consideration need be given to the irreversibility of that action.

> Mr. DOMENICI. I thank the Senator for the clarification. That is consistent with my readings of the language.... 134 Cong. Rec. (Part II), at S. 13056 (daily ed. Oct. 1, 1982).

The Commission then noted, 48 FR, at 14869, that the statement was further explained in a colloquy between Senators Mitchell and Hart, as follows:

> Mr. MITCHELL. The portion of the statement of managers discussing section 12 of the report, the so-called Sholly provision, stresses that in determining whether a proposed amendment to a facility operating license involves no significant hazards consideration, the Commisison "should be especially sensitive . . . to license amendments that have irreversible consequences." Is my understanding correct that the statement means the Commission should take special care in evaluating, for possible hazardous considerations, amendments that involve irreversible consequences?
>
> Mr. HART. The Senator's understanding is correct. As you know, this provision seeks to overrule the holding of the U.S. Court of Appeals for the District of Columbia in Sholly against Nuclear Regulatory Commission. That case involved the venting of radioactive krypton gas from the damaged Three Mile Island Unit 2 reactor -- an irreversible action.
>
> As in this case, once the Commission has approved a license amendment, and it has gone into effect, it could prove impossible to correct any oversights of fact or errors of judgment. Therefore, the Commission has an obligation, when assessing the health or safety implications of an amendment having irreversible consequences, to insure that only those amendments that clearly raise no significant hazards issues will take effect prior to a public hearing. 134 Cong. Rec. (Part III), at S. 13292.

In light of the Conference Report and colloquies it had quoted, the Commission stated that it would make sure "that only those amendments that clearly raise no significant hazards issues will take effect prior to a public hearing," 48 FR, at 14870, and that it would do this by providing in § 50.92 of the rule that it would review proposed amendments with a view as to whether they involve irreversible consequences. Id.

In this regard, it made clear in example (iii) that an amendment which allows a plant to operate at full power during which one or more safety systems are not operable would be treated in the same way as other examples considered likely to involve a significant hazards consideration, in that it is likely to meet the criteria in § 50.92 of the rule. Id.

The Commission also made it clear that the examples did not cover all possible cases, were not necessarily representative of all possible concerns, and were set out simply as guidelines. Id.

The Commission left the proposed rule intact to the extent that the interim final rules stated standards with respect to the meaning of "no significant hazards consideration." The standards in the interim final rules were identical to those in the proposed rule, though the attendant language in new § 50.92 as well as in § 50.58 was revised to make the determination easier to use and understand. To supplement the standards incorporated into the Commission's regulations, the guidance embodied in the examples was referenced in the procedures of the Office of Nuclear Reactor Regulation, copies of which were placed in the Commission's Public Document Room and sent to licensees. It was the Commission's intention that any request for an amendment meet the standards in the regulations and that the examples simply provide supplementary guidance.

d. Examples of Amendments that Are Considered Likely to Involve Significant Hazards Considerations Are Listed Below

The statement of considerations before the interim final rules listed the following examples of amendments that the Commission considered likely to involve significant hazards considerations. Id. It explained that, unless the specific circumstances of a license amendment request, when measured against the standards in § 50.92, lead to a contrary conclusion, then, pursuant to the procedures in § 50.91, a proposed amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 or for a testing facility will likely be found to involve significant hazards considerations, if operation of the facility in accordance with the proposed amendment involves one or more of the following:

(i) A significant relaxation of the criteria used to establish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety (such as allowing a plant to operate at full power during a period in which one or more safety systems are not operable).

(iv) Renewal of an operating license.

(v) For a nuclear power plant, an increase in authorized maximum core power level.

(vi) A change to technical specifications or other NRC approval involving a significant unreviewed safety question.

(vii) A change in plant operation designed to improve safety but which, due to other factors, in fact allows plant operation with safety margins significantly reduced from those believed to have been present when the license was issued. Id.

e. Examples of Amendments that Are Considered Not Likely to Involve Significant Hazards Considerations Are Listed Below

The statement of considerations before the interim final rules listed the following examples of amendments the Commission considered not likely to involve significant hazards considerations. 48 FR, at 14869. It explained that, unless the specific circumstances of a license amendment request, when measured against the standards in § 50.92, lead to a contrary conclusion then, pursuant to the procedures in § 50.91, a proposed amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 or for a testing facility will likely be found to involve no significant hazards considerations, if operation of the facility in accordance with the proposed amendment involves only one or more of the following:

(i) A purely administrative change to technical specifications: for example, a change to achieve consistency throughout the technical specifications, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications: for example, a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading, if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, that the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and that NRC has previously found such methods acceptable.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated. This assumes that the operating restriction and the criteria to be applied to a request for relief have been established in a prior review and that it is justified in a satisfactory way that the criteria have been met.

(v) Upon satisfactory completion of construction in connection with an operating facility, a relief granted from an operating restriction that was imposed because the construction was not yet completed satisfactorily. This is intended to involve only restrictions where it is justified that construction has been completed satisfactorily.

(vi) A change which either may result in some increase to the probability or consequences of a previously-analyzed accident or may reduce

in some way a safety margin, but where the results of the change are clearly within all acceptable criteria with respect to the system or component specified in the Standard Review Plan: for example, a change resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations.

(viii) A change to a license to reflect a minor adjustment in ownership shares among co-owners already shown in the license. Id.

II. Present Practice

A. Notice for Public Comment and for Opportunity for a Hearing

In the two interim final rules, the Commission decided to adopt the notice procedures and criteria contemplated by the legislation with respect to determinations about no significant hazards consideration. In addition it decided to combine the notices for public comment on no significant hazards considerations with the notices for opportunity for a hearing, thereby, normally providing both prior notice of opportunity for a hearing and prior notice for public comment of requests it receives to amend operating licenses of facilities described in § 50.21(b) or § 50.22 or of testing facilities.

With respect to opportunity for a hearing, the Commission amended § 2.105 to specify that it could normally issue in the FEDERAL REGISTER at least every

30 days, and perhaps more frequently, a list of "notices of proposed actions" on requests for amendments to operating licenses. These periodic notices now provide an opportunity to request a hearing within thirty days. The Commission also retained the option of issuing individual notices, as it sees fit. The Commission's procedures, see § 2.105(d)(2), provide that a person whose interest may be affected by the proceeding may file a petition for leave to intervene and may request a hearing. If the staff does not receive any request for a hearing on an amendment within the notice period, it takes the proposed action when it has completed its review and made the necessary findings. If it receives such a request, it acts under new § 50.91, which describes the procedures and criteria the Commission uses to act on applications for amendments to operating licenses.

To implement the main theme of the legislation, under new § 50.91 the Commission combined a notice of opportunity for a hearing with a notice for public comment on any proposed determination on no significant hazards consideration. Additionally, new § 50.91 permits the Commission to make an amendment immediately effective in advance of the holding and completion of any required hearing where it has determined that no significant hazards consideration is involved. Thus, § 50.91 builds upon amended § 2.105, providing details for the system of FEDERAL REGISTER notices. For instance, exceptions are made for emergency situations, where no prior notices (for opportunity for a hearing and for public comment) might be issued, assuming no significant hazards considerations are involved. In sum, this system added a

"notice for public comment" under § 50.91 to the former system of "notice of proposed action" under § 2.105 and "notice of issuance" under § 2.106.

Under this new system, the Commission requires an applicant requesting an amendment to its operating license (1) to provide its careful appraisal on the issue of significant hazards, using the standards in § 50.92 (and whatever examples are applicable), and (2) if it involves the emergency or exigency provisions, to address the features on which the Commission must make its findings. (Both points will be discussed later.) The staff has frequently stated to applicants that the Commission wants a "reasoned analysis" from an applicant. An insufficient or sloppy appraisal will be returned to the applicant with a request to do a more careful analysis. Where an application has been returned for such reasons, i.e., because of the applicant's negligence, the applicant cannot use the exigency or emergency provisions of the rule for any subsequent application for the same amendment.

When the staff receives the amendment request, as described below, it decides whether there is an emergency situation or exigent circumstances. If there is no emergency, it makes a preliminary decision, called a "proposed determination," about whether the amendment involves no significant hazards considerations -- normally, this is done before completion of the safety analysis (also called safety evaluation). In the proposed determination, it might accept the applicant's appraisal in whole or in part or it might reject the applicant's appraisal but, nonetheless, reach the same conclusion. With respect to the proposed determination, the staff views the term "considerations"

in the dictionary sense, that is, as a sorting of factors as to which it has to make that determination. In this sorting, the three standards are used as benchmarks and, if applicable, the examples may be used as guidelines.

Amendment requests that were received before May 6, 1983 (the effective date of the interim final rules), have been processed in the same way, except that licensees have not been required to provide their appraisals.

At this stage, if the staff decides that no significant hazards consideration is involved, it can issue an individual FEDERAL REGISTER notice or list this amendment in its periodic publication in the FEDERAL REGISTER. This periodic publication lists not only amendment requests received for which the Commission is publishing notice under § 2.105, it also provides a reasonable opportunity for public comment by listing this and all amendment requests received since the last such periodic notice, and, like an individual notice, (a) providing a description of the amendment and of the facility involved, (b) noting the proposed no significant hazards consideration determination, (c) soliciting public comment on the determinations which have not been previously noticed, and (d) providing for a 30-day comment period. The following table, footnotes, and other explanatory material list and explain the Commission's monthly FEDERAL REGISTER notices (FRN) between May 6, 1983 and May 21, 1985 on determinations about no significant hazards considerations (NSHC).

"SHOLLY" STATISTICS

May 6, 1983 - May 21, 1985	Monthly FRN Proposed NSHC	Individual FRN Proposed NSHC	Individual FRN SHC	Total
NUMBER	1822	291	28	2141
Period for public comment:				
30 days	1822	272	28	2122
Less than 30 days:				19
Short FRN	0	19	0	
Press release	9	0	0	9
Public comments received	2 Grand Gulf 1 Oyster Creek 1 LaSalle-2	8 TMI-1 1 Susquehanna 1 WNP-2	0	14[1/]
Requests for hearing	1 Grand Gulf	2 TMI-1; 2 Trojan 1 Salem-1; 6 Turkey Pt. 3/4	1 Pilgrim 2 Zion 1/2	15[2/]

Amendments Issued - Total	1368
(1) with 30 days notice	1293
(2) less than 30 days or no notice	64
(3) Hearing requested but final NSHC determination made (50.91(a)(4))	10[3/]
(4) Proposed NSHC; hearing requested; hearing completed and amendment issued. No final NSHC determination was made because hearing was completed before amendment was needed	1[4/]

Backlog: (Applications received which have not been noticed, either in periodic FRN or individually through May 24, 1985): NUMBER: 269 (Includes items which have been prepared and approved for publication in the next periodic publication, items which are in concurrence chain, and items for which additional information is needed from the licensee.)

FOOTNOTES: See Pages 35 and 36.

FOOTNOTES FOR "SHOLLY" STATISTICS

1/ Comments

Grand Gulf - 2 comments were received, one from the State and one from a member of the public.

TMI-1 - 7 comments were received as result of initial noticing action;
1 additional comment was received as a result of Notice of Additional Opportunity, published on August 25, 1983.

Susquehanna - 1 comment was received from a member of the public.

Oyster Creek - 1 comment was received from the State.

WNP-2 - 1 comment was received from a member of the public.

LaSalle-2 - 1 comment was received from a local government.

2/ Requests for hearing

TMI-1 - Steam generator repair - 2 requests for hearing were received. A prehearing conference was held. By a Memorandum and Order, dated June 1, 1984, the Board dismissed 9 of 11 contentions. The hearing was concluded on July 18, 1984. The Staff's proposed findings were submitted on August 20, 1984. The Board issued its Decision on October 31, 1984.

Salem-1 - Integrated leak rate - 1 request for hearing received from the State of Delaware. On January 20, 1984, the State filed a motion to withdraw, which was granted by the Board on January 25, 1984.

Turkey Pt. 3/4 - (a) Proposed operational limits for current and future reloads - 2 requests for hearing (2 units) were received. A prehearing conference was held on February 28, 1984. Discovery is in process. (b) Spent Fuel Storage Expansion - 2 requests for hearing (2 units) were received. (c) Enriched fuel storage - 2 requests for hearing (2 units) were received. Nuclear Responsibility Inc. and Joette Lorian are the petitioners in all three issues.

Pilgrim - Single loop operation - 1 request for hearing was received. The proceeding was dismissed on January 26, 1984, based on settlement.

Grand Gulf - Amendment No. 10 redefined HPCS operation and resulted in a calculated increase in peak clad temperature. One hearing request was received. A prehearing conference was held on February 29, 1984. The Board issued its Decision on April 23, 1984, admitting two contentions

for discovery. On September 24, 1984, the Board issued a Memorandum and Order terminating the proceeding.

Trojan - Spent fuel pool expansion - 2 requests for hearing, 1 from the State and 1 from Coalition for Safe Power, were received. Both were admitted as parties to the proceeding. A prehearing conference was held. Two contentions were accepted. Coalition has withdrawn from the proceeding. The Board issued its Initial Decision on November 28, 1984.

Zion 1/2 - Containment leak testing - 2 requests for hearing (2 units), from Citizens Against Nuclear Power were received. The licensee subsequently withdrew its application.

3/ Amendments Issued, Item (3)

TMI-1 hot testing, 1 amendment
Salem 1 integrated leak testing, 1 amendment
Turkey Pt. 3/4 operational limits for current/future reloads, 2 amendments
TMI-1 hot functional testing of SG, 1 amendment
Trojan spent fuel pool, 1 amendment
Turkey Pt. 3/4 SFP storage expansion - 4 amendments

4/ Amendments Issued, Item (4)

TMI-1 steam generator tube repairs and return to operation, 1 amendment. Pursuant to the Initial Decision of the Board dated October 31, 1984, the Commission completed action on GPU's May 9, 1983, application by issuing an amendment to the license permitting the return of the steam generators to operation. The hearing having been completed, the matter of a final determination of no significant hazards consideration related to this amendment was considered moot and no such determination was required or made.

Additional Explanations for Table on "Sholly" Statistics

Out of a total of 2113 notices of no significant hazards considerations, the Commission received requests for hearings on 15 notices and comments on 4 notices. Out of a total of 28 notices of significant hazards considerations, the Commission received requests for hearings on 3 notices and no comments.

Between May 6, 1983, and May 21, 1985, the Commission published various types of notices in addition to or to the exclusion of FRNs. Three were press releases only; four were press releases and paid announcements; one was a press release and a FRN; and one was a paid announcement only. The specifics of these notices were as follows:

Press Release (only)

1. Florida Power Corporation, et al. (FPC), Crystal River Unit No. 3, application for amendment dated June 24, 1983 to provide the option of using a roving fire watch patrol instead of a continuous fire watch when required by a non-functional fire barrier penetration. Use of the option requires verification that fire detectors are operational. On June 14 (10 days before the application) FPC discovered that a large number of fire dampers in various building ventilation systems had not been certified by the manufacturer to be able to sustain a fire for a 3-hour period. The devices were only certified for a 1-1/2 hour rating. NRC regulations require such devices to be certified with a 3-hour rating. FPC considered the subject dampers to be non-functional and, as required by the Technical Specifications (TS), was required to maintain a continuous fire watch at each damper.

2. Southern California Edison Company, San Onofre Unit 1, application for amendment dated July 23, 1984, to revise limiting conditions for operation for snubbers in accordance with GL 84-13 in order to delete the tabular listings of snubbers and to specify instead that all snubbers are required to be operable except for those installed on non safety-related systems whose

failure or failure of the system on which they are installed would have no adverse effect on any safety-related system. Snubber modifications were conducted and were completed just before hot functional testing in mid-August 1984. The request to revise the explicit lists therefore could not have been processed earlier.

3. Southern California Edison Company (SCE), San Onofre Nuclear Generating Station Unit 3, application for amendment dated July 14, 1983, to allow startup testing in the hot standby mode (hot, zero power, subcritical) before initial criticality with two operable auxiliary feedwater pumps rather than three. The licensee stated that because the plant has not been critical, the reduced auxiliary feedwater system capacity permitted by the proposed change is compensated for by the absence of decay heat and fission products in the clean core. One of the electric-motor driven auxiliary feedwater pumps had recently been observed to vibrate excessively. SCE determined on July 11 that the excessive vibration was due to a warped shaft in the pump motor. Since the defect could not be repaired in the field, the motor roter was returned to the manufacturer for repair. SCE estimated that the pump would be out of service for 4 to 6 weeks. During that time, the TS would not permit operation of the plant in the hot standby mode. The next stage of the startup test program required about a month of testing in hot standby. Therefore, if the TS were not changed, the hot standby testing could not be conducted until the defective pump was returned to service, delaying the startup test program and ultimately power operation by about four weeks.

Press Release and Paid Public Announcement

1. Mississippi Power and Light Company, et al., Grand Gulf Nuclear Station Unit No. 1, application for amendment dated June 14 and August 1, 1983, to change the TS and grant one-time exceptions to some TS for relief needed to restart the plant. The application would redefine operability ranges for high pressure core spray until the first refueling outage due to water level instrumentation inaccuracies at low pressure; requested approval of a design change to prevent automatic tripping of RHR jockey pumps needed to prevent potential damage from waterhammer. The one time exceptions requested were suspension of the provisions of TS 4.0.4 to allow plant to attain operating conditions necessary for ADS trip system surveillance testing and to allow plant to attain operating conditions necessary for Scram Discharge Volume surveillance testing. The amendment would allow immediate start-up of the plant.

2. Commonwealth Edison Company (CEC), LaSalle County Station, Units 1 and 2, application for amendment dated May 25, 1984, to change the TS in Table 3.3.2-2 to increase the main steam line tunnel inlet air to outlet air temperature difference for the trip setpoint 12°F from greater than or equal to 24°F to greater than or equal to 36°F. The allowable value increased 12°F to 42°F. These changes were proposed to prevent an unintentional full isolation of all main steam lines causing reactor shutdown with no steam present. CEC requested action as soon as possible because of the new steam tunnel temperatures which were being obtained from operational startup of Unit 2. CEC explained that the change was needed as soon as possible to

prevent spurious trips from causing full steam line isolations and reactor shut downs.

3. Commonwealth Edison Company, LaSalle County Station, Unit 2, application for amendment dated July 31, 1984, to vacate Amendment No. 3 and reinstate License Condition 2.C(7) which required installation of instrumentation that would automatically shut down the reactor (in the startup and refueling modes only) in the event of low control rod drive pump discharge pressure. Condition 2.C(7) was to have been satisfied before completion of the startup test program. Amendment No. 3 indicated installation of the instrumentation to comply with License Condition 2.C(7) and provided the necessary TS to assure proper operation of the new scram capability and deletion of the license condition. However, the licensee found that, while testing the modification, spurious scrams occurred, indicating that with the existing trip setpoints the modification could not yet be declared fully operable, pending identification and correction of the cause of the scrams. Thus, the license condition had to be reinstated to provide the time necessary to assure the operability of the instrumentation.

4. Georgia Power Company, et al., Edwin I. Hatch Nuclear Plant, Unit No. 2, application for amendment dated August 27, 1984, supplemented September 20, 1984, requested the revision of the overcurrent trip setpoints for four circuit breakers listed in the TS Table 3.8.2.6-1 "Primary Containment Penetration Conductor Overcurrent Protective Devices." The licensee requested an exigent circumstances amendment because of its late recognition

that the TS change was necessary in order to provide the new overcurrent trip setpoints. The NRC staff issued a proposed determination that, though the plant could be started up and operated without this change, extended operation without it was undesirable because it requires deenergizing the main steam line drain valve motor.

Press Release and Federal Register Notice (short notice)

1. Pennsylvania Power and Light Company, Susquehanna Steam Electric Station, Unit 1, application for amendment dated October 20, 1983, as modified November 7, 1983, to change the TS table to modify the start time sequence of two emergency service water pumps from 53 and 57 seconds to 44 and 48 seconds, respectively, to support two-unit operation and prevent potential concurrent starts of the residual heat removal or core spray pumps with the emergency service water pumps. The exigent circumstances resulted from extending the shutdown of Unit 1 following the tie-in outage for Unit 2 and delaying the fuel load of Unit 2 if the proposed change were not acted upon in a timely manner.

Paid Public Announcement (only)

Toledo Edison Company, et al., Davis-Besse Nuclear Power Station, Unit No. 1, application for amendment dated December 3, 1984, to modify TS section 1.6 which provides the definition of OPERABLE-OPERABILITY, to provide that, from the effective date of the amendment until Mode 1 is entered for Cycle 5 only, operability of the auxiliary feedwater system will be determined without consideration of the status of the startup feedwater system. The licensee

satisfactory explained the circumstances requiring prompt action on the application because the startup feedwater pump would be needed on a one-time basis to perform the zero power physics tests in Mode 2 during plant startup. While the plant could be started up and operated at low power without the change, initial startup from a refueling outage without the change was undesirable because it could extend or prevent performance of required zero-power core physics testing and could result in unnecessary challenges to the plant's safety system.

While it is awaiting public comment, the staff proceeds with the safety analysis. In this context, the Commission explained in the interim final rules that, though the substance of the public comments could be litigated in a hearing, when one is held, neither it nor its Licensing Boards or Presiding Officers would entertain hearing requests on the NRC staff's substantive findings with respect to these comments. It noted that this is in keeping with the legislation which states that public comment cannot delay the effective date of an amendment.

After the public comment period, the staff reviews the comments, if any, considers the safety analysis, and makes its decision on the amendment request. If it decides that no significant hazards consideration is involved, it may publish an individual "notice of issuance" under § 2.106 or, normally, it publishes the notice of issuance in its system of periodic FEDERAL REGISTER notices, and thus closes the public record. As the Commission explained with respect to the interim final rules, it does not normally make and publish a "final determination" on no significant hazards consideration, because such a determination is needed only if a hearing request is received and if it decides to make the amendment immediately effective and to provide a hearing after issuance rather than before. In this regard, the staff need not respond to comments if a hearing has not been requested.

If it receives a hearing request during the comment period and the staff has decided that no significant hazards consideration is involved, it prepares a

"final determination" on that issue which considers the request and the public comments, makes the necessary safety and public health findings, and proceeds to issue the amendment. The hearing request is treated the same way as in previous Commission practice, that is, by providing any requisite hearing after the amendment has been issued. As explained before, the legislation permits the Commission to make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person (even one that meets the provisions for intervention in § 2.714), in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved. Any question about the staff's substantive determinations on the issue of significant versus no significant hazards consideration that may be raised in any hearing on the amendment does not stay the effective date of the amendment.

The procedures just described have been the usual way of handling license amendments under the interim final rules because most of these amendments do not involve (1) emergency situations, or (2) exigent circumstances, or (3) entail a determination that a significant hazards consideration is involved. As discussed below, these three cases and other unusual ones could arise though.

Returning to the initial receipt of an application, if the staff were to receive an amendment request and then determine that a significant hazards consideration is involved, it would handle this request by issuing an

individual notice of proposed action providing an opportunity for a prior hearing under § 2.105, and, as appropriate, notifying the public of the final disposition of the amendment by noting its issuance or denial in an individual FEDERAL REGISTER notice. As explained above, even if the amendment request were to involve an emergency situation and if it were determined that a significant hazards consideration were involved, the Commission would be required to issue a notice providing an opportunity for a prior hearing. If the Commission were to determine, however, that the public health or safety were in imminent danger, it could issue an appropriate order under 10 C.F.R. Part 2, as explained previously and as also discussed below.

Another unusual case may arise: the staff may receive, for instance, an amendment request and find an emergency situation, where failure to act in a timely way would result in derating or shutdown of a nuclear power plant. In this case, also discussed later in connection with State consultation, it may proceed to issue the license amendment, if it determines, among other things, that no significant hazards consideration is involved. In this circumstance, the staff might not necessarily be able to provide for prior notice for opportunity for a hearing or for prior notice for public comment; though it has not done this so far, it could provide notice in an individual notice of issuance under § 2.106 (which provides an opportunity for a hearing after the amendment is issued) or, as has been the case thus far, it could provide periodic notice (the Commission's periodic FEDERAL REGISTER notice system notes its action on the amendment request and, thereby, provides an opportunity for a hearing after issuance). The Commission stated with

respect to the interim final rules, in connection with emergency requests, that it expects its licensees to apply for license amendments in a timely fashion. It explained that it will decline to dispense with notice and comment on the no significant hazards consideration determination, if it determines that the applicant has failed to make a timely application for the amendment because of negligence or in order to create the emergency so as to take advantage of the emergency provision. Whenever an emergency situation is involved, the Commission expects the applicant to explain to it why it has occurred and why the applicant could not avoid it; the Commission will assess the applicant's reasons for failure to file an application sufficiently in advance of that event.

An emergency situation might also occur during the normal 30-day comment period. Depending upon the type of emergency (safety-related versus emergency situation in the "Sholly" sense).

With the "Sholly" regulations now in place, there are now two possible types of emergencies:

(a) a "safety-related emergency" in which very prompt NRC action may be necessary to protect the public health and safety; and

(b) the "emergency" referred to in the "Sholly" legislation in which the prompt issuance of a license amendment is required in order, for instance, to avoid a shutdown. This type of an emergency may differ from the "safety-related emergency" in that, here for example, prompt action is needed for continued full-power operation

but not necessarily to protect the public health and safety (health and safety, arguably, is protected by the shutdown, which would occur if the "emergency" license amendment were not issued). This "emergency" is more in the nature of an economic emergency for the licensee.

Two fundamentally different approaches to amending a license arise from these two different types of emergencies:

(a) For a safety-related emergency, the Administrative Procedure Act and the Commission's own regulations (10 CFR § 2.204) authorize (if not compel) the issuance of an immediately effective order amending a license without regard to whether the amendment involves significant hazards considerations and without the need to make a finding on no significant hazards considerations or to provide a prior Sholly-type of notice.

(b) For an "emergency" where a prompt amendment is required to prevent the shutdown but not to protect the public health and safety, an immediately effective license amendment, without prior notice, may be issued only if the amendment involves no significant hazards considerations.

Consequently:

(a) Where an immediately effective license amendment is needed to protect the public health and safety, the Commission can issue an immediately effective order amending a license without regard to whether the amendment involves significant hazards considerations and without regard to prior notice and prior hearing;

(b) Where an immediately effective license amendment is needed, for instance, only to prevent the shutdown but not to protect public health and safety, the Commission may issue such an immediately effective amendment only if the amendment involves no significant hazards considerations. If the amendment does involve a significant hazards consideration, the Commission is required by law to provide 30 days notice and an opportunity for prior hearing.

Another unusual case might be that the Commission receives an amendment request and finds an exigent circumstance, that is, a situation other than an emergency where swift action is necessary. The legislation, quoted above, states that the Commission should establish criteria which "take into account the exigency of the need for the amendment." The Conference Report, quoted above, points out that "the conference agreement preserves for the Commission substantial flexibility to tailor the notice and comment procedures to the exigency of the need for the license amendment" and that "the conferees expect the content, placement, and timing of the notice to be reasonably calculated to allow residents of the area surrounding the facility an adequate opportunity to formulate and submit reasoned comments."

In the interim final rules, the Commission stated its belief that extraordinary cases may arise, short of an emergency, where a licensee and the Commission must act quickly and where time does not permit the Commission

to publish a FEDERAL REGISTER notice soliciting public comment or to provide 30 days ordinarily allowed for public comment. There are various examples involving a net benefit to safety. Ond circumstance might occur if a licensee with a reactor shutdown for a short time wishes to add some component clearly more reliable than one presently installed; another might occur when the licensee wishes to use a different method of testing some system and that method is clearly better than one provided for in its technical specifications. In either case, the licensee may have to request an amendment, and, if the staff determines, among other things, that no significant hazards consideration is involved, it may wish to grant the request before the licensee starts the plant up and the opportunity to improve the plant is lost.

The Commission noted in the interim final rules that in circumstances such as the two just described, it may use media other than the FEDERAL REGISTER, for example, a local newspaper published near the licensee's facility, widely read by the residents in the area surrounding the facility, to inform the public of the licensee's amendment request. It stated that in these instances, the Commission will provide the public a reasonable opportunity to comment on the proposed no significant hazards determination. It also stated that, to ensure that the comments are received on time, it may also set up in such a situation a toll-free hotline, allowing the public to telephone their comments to NRC on the amendment request.

This method of prior notice for public comment is in addition to any individual notice of hearing that may be published; it does not affect the time available to exercise one's opportunity to request a hearing, though it may provide that opportunity only after the amendment has been issued, when the Commission has determined that no significant hazards consideration is involved.

The staff has modified slightly the procedure discussed above. In emergency situations the staff does not have time to issue a notice. In exigent circumstances, the staff has to act swiftly but has some time to issue a notice; in most instances it will be a FEDERAL REGISTER notice requesting public comment within less than 30 days, but no less than two weeks. The staff, of course, needs the cooperation of a licensee to make the system work and to act quickly. If the staff is put in a situation where it cannot issue a FEDERAL REGISTER notice for at least two weeks public comment, it will issue a media notice. It may consult with the licensee on a proposed release and the geographical area of its coverage and, as necessary and appropriate, may inform it of the State's and the public's comments. If a system of mailgrams or overnight express is workable, it may use that as opposed to a hotline; however, it has not ruled out the use of a hotline. If it does use a hotline, it may tape the conversations and may transcribe them, as necessary and appropriate, and may inform the licensee of these.

As with its provisions on emergency situations, the Commission explained in the interim final rules that it would use these procedures sparingly and that

it wants to make sure that its licensees will not take advantage of these procedures. It stated that it will use criteria similar to the ones it uses with respect to emergency situations to decide whether it will shorten the comment period and change the type of notice normally provided. It also stated in connection with requests indicating exigent circumstances that it expects its licensees to apply for license amendments in a timely fashion. It will not change its normal notice and public comment practices where it determines that the licensee has failed to use its best efforts to make a timely application for the amendment because of negligence or in order to create the exigent circumstances so as to take advantage of the exigency provision. Whenever a licensee wants to use this provision, it has to explain to the staff the reason for the exigency and why the licensee cannot avoid it; the staff will assess the licensee's reasons for failure to file an application sufficiently in advance of its proposed action or for its inability to take the action at some later time.

The staff could also receive an amendment request with respect to which it finds that it is in the public interest to offer an opportunity for a prior hearing. In this case, it would use its present individual notice procedure to allow for hearing requests. Whether or not a hearing is held, it would notify the public about the final disposition of the amendment in an individual FEDERAL REGISTER notice of issuance or denial.

It should also be re-emphasized that these procedures normally only apply to license applications. The staff may, under existing §§ 2.202(f) and 2.204,

make a determination that the public health, safety, or interest requires it to order the licensee to act without prior notice for public comment or opportunity for a hearing. In this case, the staff would follow its present procedure and publish an individual notice of issuance in the FEDERAL REGISTER and provide for an opportunity for a hearing on the order.

The new system has changed only the Commission's noticing practices; it has not altered its hearing practices. The Commission explained in the two interim final rules that it has attempted to provide noticing procedures that are administratively simple, involve the least cost, do not entail undue delay, and allow a reasonable opportunity for public comment; nevertheless, it is clear that they are burdensome and involve significant resource impacts and timing delays for the Commission and for licensees requesting amendments. Licensees can reduce these delays under the procedures by providing to the Commission their timely and carefully prepared appraisals on the issue of significant hazards, and the staff can further reduce delay by processing requests expeditiously.

B. State Consultation

As noted above, Public Law 97-415 requires the Commission to consult with the State in which the facility involved is located and to promulgate regulations which prescribe procedures for such consultation on a determination that an amendment to an operating license involves no significant hazards consideration. The Conference Report, cited earlier, stated that the conferees

expect that the procedures for State consultation would include the following elements:

(1) The State would be notified of a licensee's request for an amendment;
(2) The State would be advised of the NRC's evaluation of the amendment request;
(3) The NRC's proposed determination on whether the license amendment involves no significant hazards consideration would be discussed with the State and the NRC's reasons for making that determination would be explained to the State;
(4) The NRC would listen to and consider any comments provided by the State official designated to consult with the NRC; and
(5) The NRC would make a good faith attempt to consult with the State prior to issuing the license amendment.

At the same time, however, the procedures for State consultation would not:

(1) Give the State a right to veto the proposed NRC determination;
(2) Give the State a right to a hearing on the NRC determination before the amendment becomes effective;
(3) Give the State the right to insist upon a postponement of the NRC determination or issuance of the amendment; or
(4) Alter present provisions of law that reserve to the NRC exclusive responsibility for setting and enforcing radiological health and safety requirements for nuclear power plants.

In requiring the NRC to exercise good faith in consulting with a State in determining whether a license amendment involves no significant hazards consideration, the conferees recognize that a very limited number of truly exceptional cases may arise when the NRC, despite its good faith efforts, cannot contact a responsible State official for purposes of prior consultation. Inability to consult with a responsible State official following good faith attempts should not prevent the NRC from making effective a license amendment involving no significant hazards consideration, if the NRC deems it necessary to avoid the shut-down or derating of a power plant. Conf. Rep. No. 97-884, 97th Cong., 2d Sess., at 39 (1982).

The law and its legislative history were quite specific. Accordingly, the Commission adopted the elements described in the Conference Report quoted above in those cases where it makes a proposed determination on no significant hazards consideration. Normally, the State consultation procedures works as follows. To make the State consultation process simpler and speedier, under the interim final rules the Commission has required an applicant requesting an amendment to send a copy of its appraisal on the question of no significant hazards to the State in which the facility involved is located. (The staff compiled a list of State officials who were designated to consult with it on amendment requests involving no significant hazards considerations; it made this list available to all its licensees with facilities covered by § 50.21(b) or § 50.22 or with testing facilities.)

The staff sends its FEDERAL REGISTER notice, or some other notice in the case of exigent circumstances, containing its proposed determination to the State official designated to consult with it together with a request to that person to contact the Commission if there is any disagreement or concern about its proposed determination. If it does not hear from the State in a timely manner, it considers that the State has no interest in its determination -- in this regard, the staff made available to the designated State officials a list of its Project Managers and other personnel whom it has designated to consult with these officials.

In an emergency situation, the staff does its best to consult with the State before it makes a final determination about no significant hazards consideration before it issues an amendment.

Finally, in light of the legislative history, though the staff gives careful consideration to the comments provided to it by the affected State on the question of no significant hazards consideration, the State comments are advisory to the Commission; the Commission remains responsible for making the final administrative decision on the amendment request; a State cannot veto the Commission's proposed or final determination. Second, State consultation does not alter present provisions of law that reserve to the Commission exclusive responsibility for setting and enforcing radiological health and safety requirements for nuclear power plants.

AA61-2 PDR

IN RESPONSE, PLEASE REFER TO: M850516A

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

OFFICE OF THE SECRETARY

June 12, 1985

Cys: Dircks
Roe
Rehm
Stello
GCunningham
Denton
Davis
Minogue
Taylor
Barry
Rabideau
TDorian
Norry

MEMORANDUM FOR: William J. Dircks, Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - MID-YEAR BUDGET AND PROGRAM REVIEW, 10:00 A.M., THURSDAY, MAY 16, 1985, COMMISSIONERS' CONFERENCE ROOM, D.C. OFFICE (OPEN TO PUBLIC ATTENDANCE)

The Commission met with the staff to receive the mid-year status report on agency expenditures and major program accomplishments or the progress of staff towards program goals.

The Commission instructed the staff to prepare for the Commission a paper that describes the present difficulties with the "Sholly" procedures and possible improvements of them. One option for change to the amendment process should be to require an analysis of a licensing amendment only after a request for a hearing thereon. The pros and cons of this option should be discussed in the paper.
(NRR/ELD) (SECY Suspense: 7/5/85) *

The Commission decided to continue the mid-year budget briefing to a future date at which time the first topics of discussion would be quality assurance, enforcement, safety research programs, including risk assessment, safety goals, source terms, severe accidents and data on NRC responses to external inquiries.

(Subsequently, at the May 16, 1985 agenda planning session the Commission set a date of June 12, 1985 to continue the mid-year budget and program review briefing by staff.)

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
Commission Staff Offices
PDR - Advance
DCS - 016 Phillips

Rec'd Off. EDO
Date.... 6-12-85
Time.... 1:45 p

* COMPLETED - Commission paper sent to SECY 6/11/85

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