AA61-2 PDR

AFFIRMATION

cc: Dircks
Roe

RESPONSE SHEET

K. cunningham FYI WO

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ROBERTS

SUBJECT: SECY-83-16B - REVISED REGULATIONS TO IMPLEMENT LEGISLATION ON (1) TEMPORARY OPERATING LICENSING AUTHORITY AND (2) NO SIGNIFICANT HAZARDS CONSIDERATION (THE "SHOLLY AMENDMENT") - SECY-83-16 AND 83-16A

APPROVED X DISAPPROVED _____ ABSTAIN _____

NOT PARTICIPATING _____ REQUEST DISCUSSION _____

COMMENTS:

Approve with modifications. Agree with Chairman Palladino's changes has modified.

Thomas Roberts
SIGNATURE

3/15/83
DATE

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

clearly contemplate that the procedural framework is both useful and needed to govern the Commission's actions in exercising the new authority and to preserve for the public its right to participate in licensing decisions.

Proposed Subpart C to 10 C.F.R. Part 2 - "Procedures Under Section 192 for the Issuance of Temporary Operating Licenses."

Subpart C would simply add procedural requirements to 10 C.F.R. Part 2 needed to implement the temporary operating licensing authority in section 192 of the Act as provided for in a new § 50.57(d) of 10 C.F.R. Part 50. Unlike the hearing process on the final operating license, the temporary operating licensing process would be subject neither to the hearing requirements of section 189a. of the Act nor to the requirements of subparts A or all the requirements of subpart G of the Rules of Practice in 10 C.F.R. Part 2. However, certain sections of subpart G would be applied to resolve needless controversy about such items as the filing of papers, service on parties, and so on. These are 10 C.F.R. § 2.701, 2.702 and 2.708 - 2.712, relating to service and filing of documents, maintaining a docket, and time computations and extensions; § 2.713, relating to appearance and practice before the Commission; § 2.758, generally prohibiting challenges to the Commission's rules; and § 2.772, generally granting the Commission's Secretary the authority to rule on procedural matters. It should be noted that 10 C.F.R. § 2.719 and 2.780, relating to separation of functions and ex parte communications, would not apply. This would mean that the Commission's staff, applicants and intervenors would be free to contact individual Commissioners as well as the Commission's Office of General Counsel and Office of Policy Evaluation to ~~argue their respective positions~~ discuss

proposed modification to NUP vote

~~or~~ the temporary operating license. The Commission is sensitive to the concern that informal contacts should not be extensive and that they should not result in significant data or argument that is both relied on by the Commission in its temporary operating licensing decision and unavailable to the parties for comment before the decision. ~~It will separate ex parte contacts in the in the area of temporary operating licensing from those with respect to operating licensing proceedings and attempt to ensure that such contacts do not contaminate operating licensing proceedings.~~ proposed modification to NJP vote The Commission's decision not to apply separation of functions and ex parte rules to temporary operating licensing is based on the belief that operating licensing and temporary operating licensing proceedings on a given plant are separate proceedings for the purpose of application of the formal hearing requirements of the Administration Procedure Act (APA). The amendment to section 192 of the Atomic Energy Act (Act) states that section 189a. of the Act does not apply to a temporary operating licensing proceeding; thus, if section 189a. does not apply, then the APA's formal hearing requirements do not apply either. Consequently, the Commission's consideration of private communications with the parties in a temporary operating licensing proceeding would not prevent the Commission from eventually considering, as necessary, issues arising from the operating licensing proceeding. In this context, it bears mention that the Conference Committee noted that, under section 192, the Commission cannot issue a temporary operating license before "all significant safety issues specific to the facility in question have been resolved to the Commission's satisfaction." See Conf. Rep. No. 97-884, 97th Cong., 2d Sess. 35 (1982).

~~to involve a significant hazards consideration, accordingly, a new example (viii) has been added to the list of examples in § 50.92(b)(2) to make clear that a reracking of a spent fuel storage pool should be treated in the same way as an example considered likely to involving a significant hazards consideration. Note that, under § 134 of the Nuclear Waste Policy Act of 1982, if a hearing is held in connection with this type of example, it would take the form of a "hybrid" hearing.~~ has been providing, as a matter of public interest, prior notice and an opportunity for a prior hearing on amendment requests involving this issue. As explained in the separate FEDERAL REGISTER notice, it will continue to offer prior notice for public comment of these and other amendment requests. It is not prepared to say, though, that a reracking of a spent fuel storage pool should or should not be treated in the same way as an example considered likely or not likely to involve a significant hazards consideration. Each such amendment request should be treated with respect to its own intrinsic circumstances, using the standards in § 50.92 of the rule to make a judgment about significant hazards considerations. Consequently, the Commission has decided not to include reracking of a spent fuel storage pool in the list of examples or in the rule. If it does determine that a particular reracking involves significant hazards considerations, it will provide an opportunity for a prior hearing, as explained in the separate FEDERAL REGISTER notice. Additionally, it should be noted that under section 134 of the Nuclear Waste Policy Act of 1982, an interested party may request a "hybrid" hearing ~~rather than a formal adjudicatory hearing~~ in connection with reracking, and may participate in such a hearing, if one is held. The Commission will publish in the near future a FEDERAL

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 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 ~~of some~~ significantly reduced from those believed to have been present when the license was issued.

~~(viii) Reracking of a spent fuel storage pool.~~

(viii) Permitting a significant increase in the amount of effluents or radiation emitted by a nuclear power plant.

AA61-2 PDR

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

MAR 30 1983

MEMORANDUM FOR: William Olmstead
Regulations Division Director
and Chief Counsel, ELD

Edson G. Case, Deputy Director
Office of Nuclear Reactor Regulation

FROM: G. Wayne Kerr, Director
Office of State Programs

SUBJECT: NOTIFICATION TO GOVERNORS' STATE DESIGNEES FOR NO SIGNIFICANT HAZARDS CONSIDERATION, SECY-83-16B

Attached is a list of State designees to be used in carrying out the State consultation procedures for no significant hazards consideration for licensing amendments involving operating power reactors and test facilities. Also attached is a suggested draft letter to be sent to each Governor notifying him of his State's designee. The State designees are presently receiving copies of all Licensee Event Reports for operating reactors and test facilities in their States.

Please let me have your comments on the enclosed draft letter to the Governors by C.O.B. April 4, so that we can have the letters ready to mail when the Federal Register Notice is signed.

After receiving your concurrence we will have Document Control set up the list of State designees in their system. We would expect NRR to transmit the list of State designees to appropriate licensees.

If you have any questions regarding the letter or list, please contact Sue Weissberg at 492-9877.

G. Wayne Kerr, Director
Office of State Programs

cc: T. Rehm

Enclosures:
1. List of State Designees
2. Draft Ltr to Governors

~~8304220130~~

7pp

DRAFT GOVERNOR LETTER

Dear Governor_____:

The Commission is preparing to adopt amendments to its ~~"Rules and Regulations~~ to reflect Public Law 97-415 enacted January 4, 1983, ~~authorizing the Commission to issue temporary operating licenses.~~

The legislation directs the Commission to promulgate, within 90 days of enactment, 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 for dispensing with, prior notice and opportunity for public comment on such a determination, and (c) procedures for consultation on such a determination with the State in which the facility involved is located.

With regard to the State consultation procedures ~~for Public Law 97-415~~, Mr. (Name and Title) is the designated State contact for (State). Mr. ~~.....~~ is presently receiving copies of all NRC licensee event reports, ~~for your State~~.

To implement this legislation, the Commission has prepared the enclosed regulations for publication in the Federal Register. The Statement of Consideration describes and explains ~~the regulations~~ in detail. A public announcement is also enclosed.

Sincerely,

William J. Dircks
Executive Director for Operations

Enclosures:
As stated

cc: State Liaison Officer
State Designee

State Designees
"No Significant Hazards"

Alabama

Ira L. Myers, M.D., State Health Officer
State Department of Public Health
State Office Building
Montgomery, Alabama 36130
Tel.: (205) 832-3120

Arkansas

E. Frank Wilson, Director
Division of Environmental Health Protection
Department of Health
4815 West Markham Street
Little Rock, Arkansas 72201
Tel.: (501) 661-2301

California

Joseph O. Ward, Chief
Radiological Health Branch
State Department of Health Services
714 P Street, Office Building #8
Sacramento, California 95814
Tel.: (916) 322-2073

Colorado

Albert J. Hazle, Director
Radiation Control Division
Department of Health
4210 East 11th Avenue
Denver, Colorado 80220
Tel.: (303) 320-8333, Ext. 6246

Connecticut

Arthur Heubner, Director
Radiation Control Unit
Department of Environmental Protection
State Office Building
Hartford, Connecticut 06115
Tel.: (203) 566-5668

Florida

Ulray Clark, Administrator
Radiological Health Services
Department of Health and Rehabilitative Services
1323 Winewood Blvd.
Tallahassee, Florida 32301
Tel.: (904) 487-1004

Georgia

James G. Ledbetter, Commissioner
Department of Human Resources
47 Trinity Avenue
Atlanta, Georgia 30334
Tel.: (404) 656-5680

Illinois

Mr. Gary N. Wright, Manager
Nuclear Facility Safety
Illinois Department of Nuclear Safety
1035 Outer Park Drive, 5th Floor
Springfield, Illinois 62704
Tel.: (217) 546-8100

Iowa

Thomas Houvenagle
Regulatory Engineer
Iowa Commerce Commission
Lucas State Office Building
Des Moines, Iowa 50319
Tel.: (515) 281-6592

Louisiana

William H. Spell, Administrator
Nuclear Energy Division
Office of Environmental Affairs
P.O. Box 14690
Baton Rouge, Louisiana 70898
Tel.: (504) 925-4518

Maine

Wallace Hinckley, Manager
Radiological Health Program
Department of Human Services
State House, Station 10
Augusta, Maine 04333
Tel.: (207) 289-3826

Maryland

Robert Corcoran, Chief
Division of Radiation Control
Department of Health and Mental Hygiene
201 West Preston Street
Baltimore, Maryland 21201
Tel.: (301) 383-2744

Massachusetts

Robert M. Hallisey, Director
Radiation Control Program
Massachusetts Department of Public Health
600 Washington Street, Room 770
Boston, Massachusetts 02111
Tel.: (617) 727-6214

Michigan

Mr. Ronald Callen, Supervisor
Advance Planning and Review Section
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909
Tel.: (517) 373-8690

Minnesota

John W. Ferman, Ph.D.
Nuclear Engineer
Minnesota Pollution Control Agency
1935 W. County Road B2
Roseville, Minnesota 55113
Tel.: (612) 296-7276

Mississippi

Alton B. Cobb, M.D., State Health Office
State Board of Health
P.O. Box 1700
Jackson, Mississippi 39205
Tel.: (601) 354-6646

Nebraska

H. Ellis Simmons, Director
Division of Radiological Health
Department of Health
301 Centennial Mall, South
P.O. Box 95007
Lincoln, Nebraska 68509
Tel.: (402) 471-2168

New Jersey

Frank Cosolito, Acting Chief
Bureau of Radiation Protection
Department of Environmental Protection
380 Scotch Road
Trenton, New Jersey 08628
Tel.: (609)292-5586

New York

Jay Dunkleberger
Division of Policy Analysis and Planning
New York State Energy Office
Agency Building 2, Empire State Plaza
Albany, New York 12223
Tel.: (518) 474-2178

North Carolina

Dayne H. Brown, Chief
Radiation Protection Branch
Division of Facility Services
Department of Human Resources
P.O. Box 12200
Raleigh, North Carolina 27605
Tel.: (919) 733-4283

Ohio

Helen W. Evans, Director
Division of Power Generation
Ohio Department of Industrial Relations
P.O. Box 825
Columbus, Ohio 43216
Tel.: (614) 466-2743

Oregon

Donald W. Godard, Administrator
Siting and Regulation
Oregon Department of Energy
Room 111, Labor and Industries Building
Salem, Oregon 97310
Tel.: (503) 378-6469

Pennsylvania

Thomas M. Gerusky, Director
Bureau of Radiation Protection
Pennsylvania Department of Environmental Resources
P.O. Box 2063
Harrisburg, Pennsylvania 17120
Tel.: (717) 787-2480

South Carolina

Heyward G. Shealy, Chief
Bureau of Radiological Health
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbus, South Carolina 29201
Tel.: (803) 758-5548

Tennessee

Michael H. Mobley, Director
Division of Radiological Health
T.E.R.R.A. Building
150 9th Avenue North
Nashville, Tennessee 37203
Tel.: (615) 741-7812

Vermont

Richard Saudek, Commissioner
Vermont Department of Public Service
120 State Street
Montpelier, Vermont 05602
Tel.: (802) 828-2321

Virginia

James B. Kenley, M.D., Commissioner
Department of Health
109 Governor Street
Richmond, Virginia 23219
Tel.: (804) 786-3561

Wisconsin

Clarence Riederer, Chief Engineer
Wisconsin Public Service Commission
P.O. Box 7854
Madison, Wisconsin 53707
Tel.: (608) 266-1567

AA61-2 PDR

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

March 29, 1983

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

FROM: HHEP Herzel H. E. Plaine, General Counsel

SUBJECT: SHOLLY REGULATIONS - SECY-83-16B (ENCLOSURE 3)

At last Friday's Commission meeting we made two substantive comments regarding the rulemaking notices in SECY-83-16B. It was requested that we summarize the comments in writing, which relate to the treatment of (1) amendments having irreversible effects, and (2) NRDC's comment on the proposed rule. We do so below and attach to this paper revisions to the Sholly regulations jointly developed by this office and ELD which partially answer OGC's concerns.

(1) Irreversible Amendments

The Sholly legislative history is very clear that, while "irreversibility" is not the equivalent of "significant hazards consideration", the Commission is to be especially careful in examining amendments with irreversible consequences under the "no significant hazards consideration" statutory criterion. Two examples of such "irreversible" amendments are offered in the legislative history -- an amendment authorizing operation with less than the full complement of safety systems operable, and an amendment authorizing an increase in allowable radioactive effluents from normal operation. Joint Explanatory Statement of Conferees at 32, 38; Cong.Rec. S 13506, S 13292 (Oct. 1, 1982), H 8823, 8825 (Dec. 21, 1982). The proposed response to this concern is set forth in the rule preamble at page 24. The two examples cited in the legislative history are included in the preamble's listing of amendments likely to involve a significant hazards consideration. However, it is not at all clear how the effluent increase example fits within the rule itself, which is controlling over the examples and which, as drafted, does not appear to contemplate that any effluent increase could ever fail the "no significant hazards consideration test".

Contacts:
Martin G. Malsch, OGC, 41465
Michael B. Blume, OGC, 41493

package
Sholly

(2) NRDC Comment

NRDC filed opposing comments on the proposed rule in 1980. It argued that the proposed rule impermissibly intertwined the determination of "no significant hazards consideration" with the ultimate decision on the merits of the amendment itself -- the "no undue risk" finding. NRDC argued in support of this view that despite the Commission's ostensible intent to use the three proposed criteria regarding probabilities and consequences of accidents, types of accidents, and margins of safety, NRC safety evaluations do not contain any useful information on the probabilities or consequences of particular accident sequences, do not categorize "types" of accidents, and do not specify "margins of safety." Because NRC reviewers would have no meaningful information on which to make conclusions based on these criteria, NRDC argued, the criteria were meaningless and would lead NRC reviewers to conclude simply that if an amendment was safe, then it presented no significant hazards consideration.

The comment is equally applicable to the draft final rule since the text of the proposed and draft final rule are nearly the same. Moreover, Congress agreed with the essential premise of the NRDC comment -- that the no significant hazards consideration statutory criterion should not be confused with the no undue risk standard for the merits of the amendment. E.g., S.Rep. No. 97-113 at 15; Joint Explanatory Statement of Conferees at 37. However, the notice of rulemaking does not respond to this NRDC comment. NRC has an obligation to respond to comments of this sort. Part of the response can be found in the legislative history which, on the Senate side, includes the following colloquy discussing the NRC's proposed rules:

> Mr. DOMENICI. .... Indeed, prior to the court decision NRC had already proposed regulations to which I have referred. NRC's approach is a tough one which appears responsible [sic] to the expressed intention of the conference report that its standards should to the extent practicable draw a distinction between those amendments which do or do not involve a "significant hazards" determination. Accordingly, I would like the gentleman's assurance that nothing in the bill or conference report is intended to relax or in any way restrict the stringent standards which NRC has in the past and now proposes to continue to apply in making such determinations.
>
> Mr. Simpson. You have my assurance. My friend from New Mexico is indeed correct.

Cong.Rec. S 15315 (Dec. 16, 1982). See also H.R.Rep. No. 97-22, Part 2 at 26; S.Rep. No. 97-113 at 15.

However, ultimately NRC must use its own technical judgment in analyzing and responding to the comment.

As noted above, we have discussed both of these concerns with staff, reaching full agreement on the first problem (see Enclosure at 24-28,38), and partial agreement on the second (see Enclosure at 17-18). Our partial agreement on the second problem can be seen from a review of the revisions to the "Sholly rule" preamble (at 17-18), where an argument similar to that set out above, which relies on Congress' awareness and apparent endorsement of the proposed standard to respond to the NRDC comment, has been added.

However, the staff could not agree with us that a technical justification for the 50.92 (no significant hazards consideration) criteria in response to the NRDC comments was both possible and necessary. We realize that it may be late at this point to put such a statement into the interim final rule. Hence, we recommend that the Commission request the staff to draft a technical response to the NRDC comment within a week so that the Commission will have time to evaluate it for use in the preamble to the eventual final rule.

We make this recommendation in light of severe judicial criticism in several recent review proceedings for doing a poor job in drafting technical and policy justifications for rulemaking decisions. If we leave the Sholly rule in its present form, it could inspire similar criticism.

Attachment:
Revision to SECY-83-16B,
Enclosure 3

cc: OPE
SECY
ELD ✓

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Standards for Determining Whether License Amendments

Involve No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Interim final rule.

SUMMARY: Pursuant to Public Law 97-415, NRC is amending its regulations to specify standards for determining whether requested amendments to operating licenses for certain nuclear power reactors and testing facilities involve no significant hazards considerations. These standards will help NRC in its evaluations of these requests. Research reactors are not covered. However, the Commission is reviewing the extent to which and the way such standards should be applied to research reactors.

EFFECTIVE DATE:_____.* The Commission specifically requests comments on this interim final rule by _____.* Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

---

*/ 30 days following publication in the FEDERAL REGISTER. This footnote will be deleted after the Commission has acted.

ADDRESSES: Written comments should be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D. C. 20555, Attention: Docketing and Service Branch. Copies of the documents discussed in this notice and of the comments received on the proposed rule and interim final rules may be examined in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D. C.

FOR FURTHER INFORMATION CONTACT: Thomas F. Dorian, Esq., Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Telephone: (301) 492-8690.

SUPPLEMENTARY INFORMATION:

INTRODUCTION

Pursuant to Public Law 97-415, NRC must promulgate, within 90 days of enactment, regulations which establish (a) standards for determining whether an amendment to an operating license involves no significant hazards considerations, (b) criteria for providing or, in emergency situations, for dispensing with prior notice and reasonable opportunity for public comment on any such determination, and (c) procedures for consultation on any such determination with the State in which the facility involved is located.

Proposed regulations to specify standards for determining whether amendments to operating licenses or construction permits for facilities licensed under §§ 50.21(b) or 50.22 (including testing facilities) involve no significant

hazards considerations (item (a) above) were published for comment in the FEDERAL REGISTER by the Commission on March 28, 1980 (45 FR 20491). Since the Commission rarely issues amendments to construction permits and has never issued a construction permit amendment involving a significant hazards consideration, it has decided not apply these standards to amendments to construction permits and to handle these case-by-case. This is in keeping with the legislation which applies only to operating license amendments. Additionally, these standards will not now be applied to research reactors. The Commission is currently reviewing whether and how it should apply these or similar standards to research reactors. In sum, the interim final rule will amend Part 50 of the Commission's regulations to establish standards for determining whether an amendment to an operating license involves no significant hazards consideration.

The rule takes account not only of the new legislation but also the public comments received on the proposed rule. For the sake of clarity, affected prior legislation as well as the Commission's regulations and practice are discussed as background information.

Simultaneously with the promulgation of these standards in § 50.92, the Commission~~, as required by the new legislation,~~ is publishing an interim final rule which contains criteria for providing or, in emergency situations, for dispensing with prior notice and reasonable opportunity for and public comment on a determination about whether an amendment to an operating license involves a significant hazards consideration (item (b) above). This rule also specifies procedures for consultation on any such a

determination with the State in which the facility involved is located (item (c) above). The rule appears separately in the FEDERAL REGISTER.

These regulations are issued as final, though in interim form, and comments will be considered on them. They will become effective 30 days after publication in the FEDERAL REGISTER. Accordingly, interested persons who wish to comment are encouraged to do so at the earliest possible time, but not later than 30 days after publication, to permit the fullest consideration of their views.

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 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. Public Law 85-256 (71 Stat. 576) amending § 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), p. 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 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 provides 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 any interested person. Section 189a. also permits 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 the Commission that the amendment involves no significant hazards consideration. These provisions have been incorporated into §§ 2.105, 2.106, 50.58(a) and (b) and 50.91 of the Commission's regulations.

The regulations provide for prior notice of a "proposed action" on an application for an amendment when a determination is made that there is a significant hazards consideration and provide an opportunity for interested members of the public to request a hearing. See §§ 2.105(a)(3) and 50.91. Hence, if a requested license amendment is found to involve a significant hazards consideration, the amendment would not be issued until after any required hearing is completed or after expiration of the notice period. In addition, § 50.58(b) further explains 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.

Thus, it is very important to note that a determination that a proposed license amendment does or does not present a "significant hazards consideration" ~~has generally been coupled to now~~ has involved the hearing and attendant notice requirements. Consequently, under its present rules the Commission has generally coupled its determination about whether it should ~~issue an amendment~~ provide a hearing before issuing an amendment with its determination about whether it should issue a prior notice, ~~after the fact,~~ and the central factor in both determinations has been the determination about "no significant hazards consideration." It has been charged that in practice this has meant that the staff has sometimes coupled the decision about the merits of an amendment to the decision about when it should notice the amendment, i.e., whether it should give prior notice or post notice. Additionally, there has been some concern that the Act and the regulations have not defined the term "significant hazards consideration" and that they have not established criteria for determining when a proposed amendment involves a "significant hazards consideration." Section 50.59 does set forth criteria for determining when a proposed change, test or experiment involves an "unreviewed safety question," but it is clear that not every such question involves a "significant hazards consideration." In any event, 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, have occurred after the amendment was issued.

It is also very important to bear in mind that there is no intrinsic safety significance to the "no significant hazards consideration" standard. Whether or not an action requires prior notice, 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). Also, whether or not an amendment entails prior notice, no amendment to any license may be issued unless it conforms to all applicable Commission safety standards. Thus, the "no significant hazards consideration" standard has been a procedural standard only, governing whether public notice of a proposed action must be provided, before the action is taken by the Commission. In short, the "no significant hazards consideration" standard has been a notice standard and has had no substantive safety significance, other than that attributable to the process of prior notice to the public and reasonable opportunity for a hearing.

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 101 S.Ct. 3004 (1981) (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. The Supreme Court has ~~not yet acted.~~ remanded the case to the Court of Appeals with instructions to ~~reconsider it in light of the legislation.~~ vacate it if it is moot and, if it is not, to reconsider its decision in light of the new legislation.

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."

However, 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. The Commission believes that, since most requested license amendments involving no significant hazards consideration are routine in nature, prior hearings on such amendments could result in unwarranted disruption or delay in the operations of nuclear power plants and could impose regulatory burdens upon it and the nuclear industry that are not related 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 consideration:

> (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

consideration, even though NRC has before it a request for a hearing from an interested person. At the same time, however, the legislative history makes it clear that Congress expects NRC to exercise its authority only in the case of amendments not involving significant safety questions. 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. Id. at p. 37.

In this regard, the Senate 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. S. Rep. No. 97-113, 97th Cong., 1st Sess. 14 (1981).

It should be also noted, in light of the previous discussion about the coupling of the decision on the merits of an amendment with the decision about when to notice the amendment, that Section 12 of Public Law 97-415, by providing for prior public notice and comment, in effect uncouples the determination about prior versus post notice from the determination about whether to issue an amendment.

In sum, the Commission is promulgating as an interim final rule the proposed standards in § 50.92 for determining whether an amendment to an operating license involves no significant hazards consideration, and it

is publishing separately an interim final rule to establish (a) procedures for noticing operating license amendment requests for an opportunity for a hearing, (b) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any proposed determination on no significant hazards consideration, and (c) procedures for consulting with the requisite State on any such determination.

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

A. Petition and Proposed Rule

The Commission's interim final rule on standards for determining whether an amendment involves no significant hazards consideration completes its actions on the notice of proposed rulemaking (discussed above), which was issued in response to a petition for rulemaking (PRM 50-17) submitted by letter to the Secretary of the Commission on May 7, 1976, Mr. Robert Lowenstein. For the reasons discussed below, the petition is denied. However, the Commission is promulgating 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). The staff's recommendations on the interim final rule are in SECY-81-366, 81-366A, 83-16, 83-16A and 83-16B. (These documents are available for examination in the Commission's Public Document Room at 1717 H Street, N.W. Washington, D.C.)

The petitioner requested that 10 C.F.R. Part 50 of the Commission's regulations be amended with respect to the procedures for issuance of amendments to operating licenses for production and utilization facilities.) The petitioner's proposed amendments to the regulations would have required that the staff take into consideration (in determining whether a proposed amendment to an operating license involves no significant hazards consideration) whether operation of the plant under the proposed license amendment would (1) substantially increase the consequences of a major credible reactor accident or (2) decrease the margins of safety substantially below those previously evaluated for the plant and below those approved for existing licenses. Further, the petitioner proposed that, if the staff reaches a negative conclusion about both of these standards, the proposed amendment must be considered not to involve a significant hazards consideration.

In issuing the proposed rule, the Commission sought to improve the licensing process by specifying in the regulations standards on the meaning of no significant hazards consideration. These standards would have applied to amendments to operating licenses, as requested by the petition for rulemaking, and also to construction permits, to whatever extent considered appropriate. As mentioned before, the Commission now believes that these standards should not be applied to amendments to construction permits, not only because construction permits do not normally involve a significant hazards consideration but also because such amendments are very rare; the proposed rule has been modified accordingly. Additionally, the Commission is reviewing the extent to which and the way standards should be applied to research reactors. The Commission will handle

case-by-case any amendments requested for construction permits or for research reactors with respect to the issue of significant hazards considerations.

In the statement of considerations which accompanied the proposed rule, the Commission explained that it did not agree with the petitioner's proposed standards because of the limitation to "major credible reactor accidents" and the failure to include accidents of a type different from those previously evaluated.

During the past several years the Commission's staff has been guided, in reaching its determinations with respect to no significant hazards consideration, by standards very similar to those now described in this interim final rule as well as by examples of amendments likely to involve, and not likely to involve, significant hazards considerations. These have proven useful to the staff, and the Commission employed them in developing the proposed rule. 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, they had to be used together with standards ~~to be applied where the examples were not definitive~~ in determining whether or not a proposed amendment involved significant hazards considerations.

The three standards proposed in the notice of proposed rulemaking were whether the license amendment would: (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.

Before responding to the specific comments on the proposed rule, it should be noted again that it was structured so that the three standards would have been used to decide not only whether the Commission would publish prior notice of an amendment request (as opposed to notice after the amendment was issued) but also to decide whether to grant an opportunity for hearing before issuance of the amendment (as opposed to granting the opportunity after issuance). As explained before, the standards were not meant to be used to make the ultimate decision about whether to issue an amendment -- that final decision is a public health and safety judgment on the merits, not to be confused with the decisions on notice and reasonable opportunity for a hearing.

As a result of the legislation, under the final rule the three standards would no longer be used to make a determination about whether or not to issue prior notice of an amendment request. As fully described in the separate FEDERAL REGISTER notice mentioned before, the Commission has formulated separate notice and State consultation procedures that will provide in all (except emergency and some exigent) situations prior notice of amendment requests. The standards and the examples will usually be limited to a proposed determination and, when a hearing request is received, to a final 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. The decision about whether or not to issue an amendment is meant to remain one that, as a separate matter, is based on public health and safety.

B. Comments on the Proposed Rule

1. General

Nine persons submitted comments on the petition for rulemaking and nine persons submitted comments on the proposed amendments. The comments on the petition are in SECY-79-660. The comments on the proposed rule are in SECY file PR-2, 50 (45 FR 20491). A summary of the comments and initially-proposed responses to the comments are in SECY-81-366, available for examination at the Commission's Public Document Room. In light of the legislation, the Commission has decided to make its approach more precise (as described below) and has, therefore, revised its response to the comments. The new response is found in SECY-83-16A and 83-16B.

One of the commenters stated that all three standards are unclear and useless in that they imply a level of detailed review of amendment applications far beyond what the staff normally performs. It is the Commission's considered judgment that the standards have been and will continue to be useful in making the necessary reviews. Moreover, the Commission believes that the standards when used together with the examples will enable it to make the requisite decisions. In this regard, it should be noted that Congress was more than aware of the Commission's standards and proposed their expeditious promulgation. For example, Senate Report 97-113, cited above, 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]. Id. at 15.

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.R. 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. 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.

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 they result 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). Such amendments typically are 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, even 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).

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. It 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. Id., at p. 15.

The Commission agrees with the Committee "that reasonable persons may differ on whether a license amendment involves a significant hazards consideration"

and it has 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." The Commission believes that the standards coupled with the examples help draw as clear a distinction as practicable. ~~Therefore,~~ It has decided not to include the examples in the text of the rule 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.

The Commission wishes licensees to note that when they consider license amendments outside the examples, ~~falling within the examples of amendments likely to involve significant hazards considerations or not falling within any of the examples but only within the standards,~~ the Commission may need additional time for its determination on no significant hazards considerations; ~~for action on amendments of this type;~~ thus, they should factor this information into their schedules for developing and implementing such changes to facility design and operation.

The interim final rule thus goes a long way toward meeting the intent of the legislation. In this regard, the Conference Report 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).

~~This statement should be read in light of the previous discussion.~~

It should be noted that the Commission has attempted to draft standards that are as useful and as clear as possible, and it has tried to formulate examples that will help in the application of the standards. These final standards are 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 standards and examples ~~in this interim final rule~~ are as clear and certain as the Commission can make them -- and, to repeat the Conference Report, "should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration." The Commission welcomes suggestions from the public to make them clearer and more precise, recognizing, in the Senate Committee's words, "that reasonable persons may differ on whether a license amendment involves a significant hazards consideration."

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," as will be recalled, it has been the Commission's general practice to couple the determination about prior versus post notice with the determination about ~~issuance of an amendment;~~ provision of a prior hearing versus a hearing after issuance of the amendment; thus, occasionally, the issue of prior versus post notice was seen by some as including ~~included with~~ a judgment on the merits ~~about~~ of issuance of an amendment. ~~In the same context,~~ Consequently, one commenter

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. 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.

In any event, the legislation has made these comments moot by requiring separation of the criteria used for providing or dispensing with public notice and comment on no significant hazards consideration determinations from the standards used to make a determination about no significant hazards consideration. Under the legislation, the Commission's criteria for public notice and comment would not be the same as its standards on the determination about no significant hazards consideration. In fact, the Commission will normally provide prior notice (for public comment and for an opportunity for a hearing) for each operating license amendment request. ~~thereby, normally uncoupling its determinations about prior versus post notice from its determinations about issuance of the amendment.~~ (The Commission's criteria on public notice and comment are discussed in the separate FEDERAL REGISTER notice noted before.) Additionally, the Commission believes that use of these standards and examples will help it reach sound decisions about the issues of significant versus no significant hazards considerations and that their use would not prejudge the merits of a decision.

~~about-holding-as-opposed-to-not-holding-a-prior-hearing-on-a-requested amendment.~~ It holds this belief because the standards and the examples are merely screening devices for a decision about whether to hold a hearing before as opposed to after an amendment is issued and cannot be said to prejudge the Commission's final decision to issue or deny the amendment request. As explained above, that decision is a separate one, based on separate public health and safety findings.

2. Reracking of Spent Fuel Pools

Returning to the Senate Committee Report noted above with respect to the issue of a reracking of a spent fuel pool, the Commission has been providing prior notice and an opportunity for a prior hearing on amendment requests involving this issue. The Commission has not been prepared to say, though that, as a technical matter, a reracking should necessarily be treated as involving a significant hazards consideration. The Congress has addressed this subject. As shown by the legislative history of Public Law 97-415, Section 12a, the Congress was aware of the Commission's practice in these cases and wanted it to continue. (The report on the Senate side has been quoted above; the discussion in the House is found at 127 Cong. Record H 8156, Nov. 5, 1981.)

In light of this legislative history, the Commission has decided that it would put its previous practice on a more formal footing. Therefore, as a matter of policy, it will include reracking in § 2.105 of the rule, and, thereby, continue to provide both prior notice and an opportunity for a prior hearing.

Additionally, it should be noted that under section 134 of the Nuclear Waste Policy Act of 1982, an interested party may request a "hybrid" hearing ~~rather than a formal adjudicatory hearing~~ in connection with reracking, and may participate in such a hearing, if one is held. The Commission will 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.

3. Amendments Involving Irreversible Consequences

The Conference Report 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) Id. at 37-38.

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) S. 13056 (daily ed. Oct. 1, 1982).

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. Id. (Part III) at S. 13292.

In light of the Conference Report and colloquies quoted above, the Commission wishes to note that it will make sure "that only those amendments that clearly raise no significant hazards issues will take effect prior to a public hearing." It will do this by providing in § 50.92 of the rule that it will review proposed amendments with a view as to whether they involve irreversible consequences; if one does (by, for example, permitting a significant increase in the amount of effluents or radiation emitted by a nuclear power plant), the Commission may treat it as involving significant hazards considerations. In this regard, ~~it has decided to add the two examples described in the Conference Report to its list of examples in § 50.92(a). Accordingly, a new example (viii) has been added to the list of examples in § 50.92(a) and~~ example (iii) ~~has been revised to~~ makes clear that~~, as a matter of public policy,~~ an amendment which ~~involves such irreversible consequences as (in example (viii)) a significant increase in the amount of effluents or radiation a facility emits or as (in revised example (iii)) allowing~~ 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 ~~the~~ other examples considered likely to involve a significant hazards consideration. ~~Each amendment request falling within the two examples will be examined carefully by the Commission in light of the applicant's specific circumstances.~~

Finally, it is once again important to note that the examples ~~in § 50.92(b)(1) and (b)(2)~~ do not cover all possible examples and may not be representative of all possible ~~problems and~~ concerns. ~~As problems are resolved and as~~ As new information is developed, the Commission will refine these examples and

add new examples, in keeping with the standards in § 50.92 of the interim final rule -- and, if necessary, it will tighten the standards themselves.

The Commission has left the proposed rule intact to the extent that the rule states standards with respect to the meaning of "no significant hazards consideration." The standards in the interim final rule ~~(new § 50.92(c))~~ are substantially identical to those in the proposed rule, though the attendant language in new § 50.92 as well as in § 50.58 has been revised ~~(1)~~ to make the determination easier to use and understand.~~, (2) to incorporate the examples (formerly in the preamble of the proposed rule) into the rule (§ 50.92(b)(1) and (b)(2)) in order to better carry out the intent of the legislation, (3) and to ensure consistency between the interim final rule and the proposed rule.~~ To supplement the standards that are being incorporated into the Commission's regulations, the examples will be incorporated into the procedures of the Office of Nuclear Reactor Regulation, a copy of which will be placed in the Commission's Public Document Room.

EXAMPLES OF AMENDMENTS THAT ARE CONSIDERED LIKELY TO INVOLVE SIGNIFICANT HAZARDS CONSIDERATIONS ARE LISTED BELOW

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 ~~of some~~ significantly reduced from those believed to have been present when the license was issued.

~~(viii) Reracking of a spent fuel storage pool.~~

~~(viii) Permitting a significant increase in the amount of effluents or radiation emitted by a nuclear power plant.~~

EXAMPLES OF AMENDMENTS THAT ARE CONSIDERED NOT LIKELY TO INVOLVE SIGNIFICANT HAZARDS CONSIDERATIONS ARE LISTED BELOW

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 satisfaction of the criteria is essentially self-evident.

(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 essentially self-evident whether 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.

Paperwork Reduction Act Statement

This final rule contains no new or amended requirements for record keeping, reporting, plans or procedures, applications or any other type of information collection.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule affects only the licensing and operation of nuclear power plants and testing facilities. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 C.F.R. Part 121. Since these companies are dominant in their service areas, this rule does not fall within the purview of the Act.

Regulatory Analysis

The Commission has prepared a regulatory analysis on these amendments, assessing the costs and benefits and resource impacts. It may be examined at the address indicated above.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Sections 552 and 553 of Title 5 of the United States Code, notice is hereby given that the following amend-

ments to Title 10, Chapter I, Code of Federal Regulations, 10 C.F.R. Parts 2 and 50, are published as a document subject to codification.

List of Subjects in 10 C.F.R. Parts 2 and 50.

Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

Part 50

Antitrust, Classified information, Fire prevention, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting requirements.

PART 2 -- RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

AUTHORITY: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073,

2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239) Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5.U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Sections 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended. (42 U.S.C. 2039). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

2. In § 2.105, paragraphs (1)(4) through (a)(8) are redesignated as paragraphs (a)(5) through (a)(9) and a new paragraph (a)(4) is added to read as follows:

(a) * * *

(4) An amendment to an operating license for a facility licensed under § 50.21 or § 50.22 or for a testing facility as follows:

(i) If the Commission determines under § 50.58 that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafer; or

(ii) If the Commission determines under § 50.58 and § 50.91 that an emergency or exigent situation exists and that the amendment involves no significant hazards considerations, it will provide notice of opportunity for a hearing pursuant to § 2.106 (if a hearing is requested it will be held after issuance of the amendment); or

(iii) If the amendment involves a reracking of a spent fuel pool, the Commission will provide notice of opportunity for a hearing pursuant to this section and will provide an opportunity for a prior hearing if one is requested.

3. In § 2.105, redesignated paragraph (a)(6) is revised to read as follows:

(a) * * *

(6) An amendment to a license specified in paragraph (a)(5) of this section, or an amendment to a construction authorization granted in proceedings on an application for such a license, when such amendment would authorize actions which may significantly affect the health and safety of the public; or....

PART 50 -- DOMESTIC LICENSING OF
PRODUCTION AND UTILIZATION FACILITIES

4. The authority citation for Part 50 is revised to read as follows:

AUTHORITY: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.58, 50.91 and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 and 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100-50.102 also issued under sec. 186, 68 U.S.C. 955 (42 U.S.C 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10(a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10(b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e), 50.59(b), 50.70, 50.71, 50.72, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

5. In § 50.58, paragraph (b) is revised to read as follows:

§50.58 Hearings and report of the Advisory Committee on Reactor Safeguards.

* * * * *

(b) 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 of this part, 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, in an emergency situation, as defined in § 50.91, that no significant hazards consideration is presented by an application for an amendment to ~~a construction permit or to~~ an operating license, it may dispense with public ~~such~~ notice and ~~publication~~ and comment and may issue the amendment. If the Commission finds that exigent circumstances exist, as described in § 50.91, it may reduce the period provided for public notice and comment. Both in an emergency situation and in the case of exigent

circumstances, the Commission will provide 30 days notice of opportunity for a hearing, though this notice may be published after issuance of the amendment if the Commission determines that no significant hazards considerations are involved. The Commission will use the standards in § 50.92 to determine whether a significant hazards consideration is presented by an amendment to an operating license for a facility of the type described in § 50.21(b) or § 50.22, or which is a testing facility, and may make the amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

6. Section 50.91 is redesignated as § 50.92 and revised to read as follows:

§ 50.92 Issuance of amendment.

(a) In determining whether an amendment to a license or construction permit will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate. If the application involves the material alteration of a licensed facility, a construction permit will be issued prior to the issuance of the amendment to the license. If the amendment involves a significant hazards consideration, the Commission will give notice of its proposed action pursuant to § 2.105 of this chapter before acting thereon.

The notice will be issued as soon as practicable after the application has been docketed.

(b) The Commission will be particularly sensitive to a license amendment request that involves irreversible consequences (such as one that, for example, permits a significant increase in the amount of effluents or radiation emitted by a nuclear power plant) and may treat one that does as if it involves significant hazards considerations.

(d) The Commission may make a final determination, pursuant to the procedures in § 50.91, that a proposed amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 or for a testing facility involves no significant hazards considerations, if operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or

(3) Involve a significant reduction in a margin of safety.

Dated at Washington, D.C. this _____ day of _____, 1983.

For the Nuclear Regulatory Commission,

_____
Samuel J. Chilk
Secretary for the Commission

AA61-2 PDR

Comments

1983

United States Senate
WASHINGTON, D.C. 20510

March 24, 1983

The Honorable Nunzio J. Palladino
Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chairman:

I am writing to confirm our telephone conversation of March 23rd. I appreciate your making the effort to know further my views on the question of reracking as it pertains to the Commission's proposed implementing regulations for the Sholly provision in the Fiscal Year 1982-1983 NRC Authorization Act.

As I stated in our conversation, I believe the Senate Committee made explicitly clear its position that reracking should be listed in the rule as an example of an event that poses significant hazards consideration. The stipulation in the Senate Committee Report (No. 97-113) represents an unequivocal signal to the Commission which was in no way contradicted or opposed in the House or Conference Reports.

The letter of March 15 signed by myself and Senators Simpson and Hart clearly defines the basis for the unified Senate Committee position on the matter. Moreover, the letter expressly reflects our opposition to the Commission's proposed case-by-case approach to reracking (e.g. SECY 83-16B) or to any other approach which may allow a reracking case to be treated as posing no significant hazards consideration.

I would also reiterate that, should the Commission decide to exclude from the rule reracking as an example which poses significant hazards consideration, I will closely consider introducing legislation which would mandate this requirement by law. Such legislation would reaffirm for the Commission the determination already made by the Senate in the Committee Report, that the Commission should treat reracking as posing a significant hazards consideration.

3/24...To OCA for Appropriate Action..Cpys to: RF, EDO..83-1613

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Again, I appreciated the opportunity to discuss this matter with you. I will look forward to reviewing the deliberations of the Commission on the Sholly rule.

Sincerely,

George J. Mitchell
United States Senator

GEORGE J. MITCHELL
MAINE

AA61-2 PDR

SECY-83-16B
SHOLLY
HP
MM
ST
ELS

United States Senate

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