AA61-2 PDR

DRAFT 8/17/81

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: SECY-81-366 - LICENSE AMENDMENTS INVOLVING "NO SIGNIFICANT HAZARDS CONSIDERATION"

Discussion: In SECY-81-366 staff requests Commission approval of a final rule defining the "no significant hazards consideration" concept in section 189a. of the Atomic Energy Act. The final rule is similar to the proposed rule which was strongly criticized by two commenters as clearly illegal. The "no significant hazards consideration" concept has never been judicially construed and an adverse judicial decision on review of this rule would have a substantial adverse impact on the processing of hundreds of facility license amendments each year. Thus we believe that special care must be taken in drafting the notice of final rulemaking so as to avoid unnecessary litigative risks.

We believe, as a policy matter, that the Commission should have fairly broad authority to amend licenses without prior notice or hearing where this would advance the public safety or interest, all relevant factors considered, and that the Commission should

Contact: Martin G. Malsch, OGC, 41465

seek legislation to this effect. A broad definition of the "no significant hazards consideration" concept in current law would also advance this policy objective. However, the law does not vest unbridled discretion in the Commission to define the concept as best suits its policy objectives. Rather, current law imposes some constraints on the Commission. These constraints, and their implications for the notice of rulemaking in SECY-81-366, are discussed below.

Section 189a. of the Atomic Energy Act provides that no prior public notice of a nuclear power reactor, testing reactor or other large facility license amendment needs to be given if the Commission determines that it "involves no significant hazards consideration". "No significant hazards consideration" is not a generally recognized and defined technical or legal concept and is not defined in the statute itself. In these circumstances the common or dictionary definition of the words is used as an indication of Congressional intent. E.g., Perrin v. U.S., 444 U.S. 37 (1979); Sutherland Statutory Construction, 4th Ed., ¶ 47.28. The dictionary definitions (Merriam-Webster's Third

New International Dictionary, 1961 Ed.) of "consideration" that seems most in point indicates that the word means "continuous and careful thought", "a taking into account", or "the act of regarding or weighing carefully". This suggests that an amendment involving "no significant hazards consideration" means an amendment involving no careful thought about or weighing of significant hazards.

This dictionary definition is fully consistent with the legislative history of the term. This history indicates that the "no significant hazards consideration" concept was derived from an AEC regulation then in effect, 10 CFR 50.59 (27 Fed. Reg. 5491, June 9, 1962). S.Rep. No. 1677, 87th Cong. 2d Sess. (July 5, 1962). That regulation provided, among other things, that a license technical specification could be amended by AEC without prior public hearing or referral to ACRS "upon determining that it does not present significant hazards considerations not previously described or implicit in the hazards summary report [the forerunner to the current FSAR] and upon finding that the public health and safety would not be endangered." As can be seen, the regulation contemplated two distinct findings -- one on

"significant hazards considerations" and another on "public health and safety would not be endangered." The latter finding was, under the regulation, essentially identical to the general standard for issuance or denial of license amendments on their merits.

The dictionary definition fits in quite nicely with the AEC regulation and, therefore, with the legislative history. If we use the dictionary definition, the AEC regulation would be read to authorize amendment issuance without prior hearing or ACRS review if the amendment is not only safe but also involves or requires no careful thought about or weighing of significant safety hazards. This also fits in quite nicely with the role of the ACRS. There would be no need for referral to ACRS for a safety review of the merits of the amendment if it appeared to AEC that no careful thought or weighing process was required in order to reach any conclusion about the safety merits. 1/

1/ The dictionary definition and the legislative history still leave at least one important statutory construction issue not clearly resolved. It is unclear whether the "no significant hazards consideration" concept entails careful thought and weighing of significant hazards in order for it to involve a significant hazards "consideration", careful thought and weighing about the possibility that significant hazards could result, or both. SECY-81-366 does not address this issue. We have assumed in this paper that the concept includes both kinds of "considerations" since both would seem to be relevant in determining the need for ACRS review under the 1962 regulation.

Thus we have a fairly clear indication that the "no significant hazards consideration" concept relates to whether the amendment review by NRC involves careful thought about or weighing ~~or of~~ significant hazards. The concept relates to the type of safety review that will need to be conducted rather than the ultimate outcome of that review. 2/

Another legal conclusion can be drawn from the language of the statute itself. The statutory

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2/ This is in accord with the language in S.Rep. No. 97-119 on NRC's FY 1982 Authorization Bill. That Report states on page 15 that "the determination of 'no significant hazards consideration' should represent a judgment on the nature of the issues raised by the license amendment rather than a conclusion about the merits of those issues." It would be the nature of the issues that would dictate whether the amendment review requires careful thought or weighing of hazards. The House Commerce Committee Report on H.R. 2330 notes that the Commission has accumulated years of case precedents defining no significant hazards considerations and states that "the Committee expects that the Commission will interpret the terms ... in a manner consistent with prior court decisions." The Committee Report goes on to also state, as did the Senate Committee Report, that the term "should represent a judgment on the nature of the issues raised by the license amendment rather than a conclusion about the merits of those issues." This is confusing, since there are no prior court precedents. It is unclear what the Committee's views would be if past administrative precedent in fact represented a conclusion on the merits rather than on the nature of the issues. In any event such legislative history compiled almost 20 years after the legislation was finally enacted is of doubtful value in construing the statute. Of course, new legislation could always change the law.

language indicates that amendments are to be pre-noticed unless the "no significant hazards consideration" finding is made. No affirmative determination of a "significant hazards consideration" is required in order to pre-notice. The Commission may pre-notice whenever it wishes. Thus there is a presumption in favor of pre-noticing amendments. That presumption is overcome if the Commission makes a "no significant hazards consideration" determination. With these two legal conclusions or principles in mind we can then examine the proposal in SECY-81-366.

The draft final rule in SECY-81-366 seems to be fully consistent with the first principle that "no significant hazards consideration" means that no careful and continuous thought is required for the safety review. It seems logical that not much careful thought or weighing would need to be given to an amendment that involves no significant increase in the probability or consequences of an accident previously evaluated, creates no possibility of a new or different kind of accident from any accident previously evaluated, and involves no significant reduction in a margin of safety.

There is a problem with the second principle. Commission rules on pre-noticing license amendments are now found in 10 CFR 2.105(a)(3), 50.58(b), and 50.91. 10 CFR 50.58(b) follows the statute in requiring notice unless the Commission finds no significant hazards consideration. However, 10 CFR 2.105(a)(3) and 50.91 provide in effect that pre-notice is required only if the Commission affirmatively finds that there is a significant hazards consideration. 3/ The draft amendments to these sections in SECY-81-366 continue this dual approach, with the result that some of the Commission's rules will include the correct presumption in favor of pre-notice, while others will include an incorrect presumption against pre-notice. No policy reason has been offered to support a deviation from the statutory language and, in our opinion, the deviation presents an unnecessary litigative risk. However, this seems to be a matter that can easily be corrected by changing the draft language in SECY-81-366 to conform to 10 CFR 50.58(b).

3/ There is no explanation in the history of these rules of the justification for the difference from the statutory terms.

We have other and more serious reservations about some of the language in the preamble to the rule. The preamble would indicate Commission approval of a list of examples of amendments not likely to involve a significant hazards consideration. For some of the examples on the list -- for example item (i) dealing with purely administrative changes -- it is reasonably clear that the safety review would entail little thought about or weighing of significant hazards. For other examples -- examples (iv)-(vii) in particular -- this is far from obvious. Examples (iv)-(vii) read as follows:

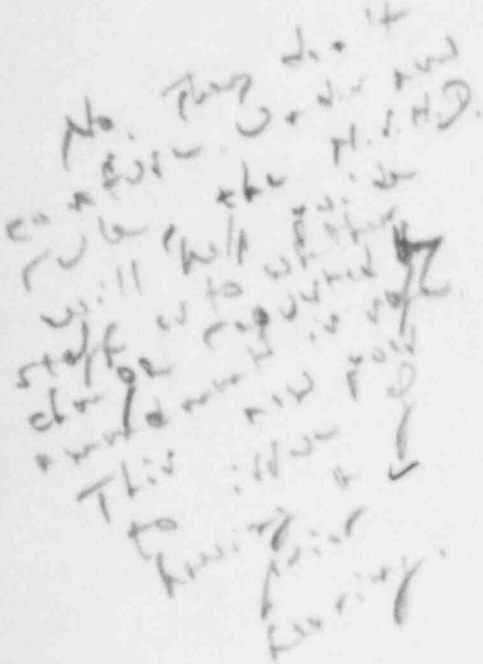
(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria: 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.

As can be seen these examples are specifically tied to "demonstration of acceptable operation" (iv), "satisfactory completion of construction" (v), a determination that the results "are within regulation acceptance criteria" (vi), and a determination that the amendment "conform[s] to changes in the regulations" (vii). No analysis is offered in SECY-81-366 as to how or why it is unlikely that "demonstration of acceptable operation" and the other determinations involve no careful thought or weighing process. Indeed, these examples appear on their face to confuse "hazards considerations" with whether the amendment is safe. This is because the "demonstration of acceptable operation" and other determinations are identical to the conclusions in the final staff review of the merits of the types of license amendments addressed by the examples. Thus, for example, (vi) would seem to lead to a no significant hazards consideration determination even if it took a long and careful review before it could be determined that the amendment was indeed "within regulation acceptance criteria".



It is not at all clear that judicial review could be obtained of some language that appears in the preamble but not in the rule itself. NRC could reasonably argue that the examples constitute only informal guidance from Commission to staff, that the examples are only of amendments "not likely" to involve a significant hazards consideration and therefore they do not actually determine the course of action in any particular case, and that judicial review would therefore be premature. 4/ On the other hand it seems unnecessary to us to freight the rule with legal issues associated with the examples. Thus we suggest that the examples of amendments "not likely" to involve a significant hazards consideration be deleted from the preamble and treated as an item separate from the rulemaking. In reviewing the separate item we believe the Commission will need the development by staff of a rationale that connects the examples to the rule itself.

Alternatively, some simple language changes to examples (iv)-(vii) in the rule preamble could cure the difficulty. In example (iv) the staff may have

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4/ These "premature" arguments are not always successful. See NRDC v. NRC, ___ F.2d ____ (2d Cir. 19__).

assumed that the operating restriction and the criteria to be applied to a request for relief had been established in some prior review and that satisfaction of the criteria would be essentially self-evident. Similarly, example (v) may be intended to only involve restrictions where it would be essentially self-evident whether construction had been completed satisfactorily. In example (vi) staff may have had in mind situations where the amendment was clearly within acceptance criteria. And finally, in example (vii) staff may have had in mind situations where the regulation change itself resolved all significant safety issues and implementation of the regulation involved only some ministerial act or very minor safety review. All these examples could easily be modified to explicitly include these assumptions. If that were done the connection between the examples and the statute and regulation would be self-evident and no further rationale would be required.

We have one other issue to raise regarding the "careful and continuous thought" principle. The draft final rule seems to focus on circumstances where the only possible hazards consideration

relates to the possibility that plant operation under the amendment may be less safe than operation without the amendment. This focus leaves out a class of license amendments which improve safety but which, nevertheless, at least arguably involve a significant hazards consideration. Such amendments typically are proposed by a licensee as an interim or final resolution of some significant safety issue that was not raised or resolved prior to issuance of the operating license, and they result in partial or full restoration of safety margins believed to have been present in initial licensing but considered to be diminished based on evaluation of the new safety issue. Whether applicant's resolution of the new safety issue is a satisfactory one may have required a long and careful review. It is thus arguable that Congress intended public participation in matters such as these and did not wish findings of no significant hazards consideration to preclude such participation in these circumstances. The matter is far from clear, however, and a contrary conclusion by the Commission would not in our view entail substantial litigative risk. Nevertheless, whether some amendments of this type should be pre-noticed presents a policy issue that the Commission should consider. 5/

5/ Even if the Commission determines that a finding of no significant hazards consideration can not be made in the case of any such amendment, the Commission's rules permit the imposition of amendments on licensees without prior public notice or hearing where the public health, safety or interest requires. See 10 CFR 2.202(f), 2.204.

One final matter. As indicated, NRDC and UCS strongly criticized the proposed rule as illegal. The comment analysis (Enclosure B of SECY-81-366) neither accurately describes their comment nor adequately responds to it. This presents unnecessary litigative risk because it would support an argument that NRC issued a final rule without confronting the issues. Staff should be requested to provide an adequate response.

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