AA61-2 PDR

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

~~WFC WEB~~ 6/17/81
~~Bud Brown~~ DOrian
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June 16, 1981

attached are 2 of the marked up pages that were returned. The only change in codified text is marked O on p 8. Any legal objection? Do it ok to change it?

MEMORANDUM FOR: W. E. Campbell, Jr.
Office of Nuclear Regulatory Research

FROM: David L. Meyer
Rules and Procedures Branch
Division of Rules and Records
Office of Administration

SUBJECT: DRR REVIEW OF SECY-81-366, "AMENDMENTS TO 10 CFR PARTS 2 AND 50 WITH RESPECT TO CRITERIA INVOLVING NO "SIGNIFICANT HAZARDS CONSIDERATION"

Attached is a marked copy of the Commission paper and Federal Register Notice portion of SECY-81-366, "AMENDMENTS TO 10 CFR PARTS 2 AND 50 WITH RESPECT TO CRITERIA INVOLVING NO "SIGNIFICANT HAZARDS CONSIDERATION." In addition to the requested minor format changes, specific attention is called to the following:

1. On page 5 of the Commission Paper, notation f will require you to contact Steve Scott, TIDC:DMB (extension 28585) to arrange for the rule to be distributed to licensees and other affected persons.

2. When preparing the rule for publication after Commission action, please remove all arrows, "Enclosure C" notations, etc., and the footnote on page 7. In addition, please leave blank the space to the right of "EFFECTIVE DATE" and include this information in the transmittal memorandum to J. M. Felton requesting publication in the Federal Register.

If you have any questions please call John Philips or me on extension 27086.

David L. Meyer

David L. Meyer
Rules and Procedures Branch
Division of Rules and Records
Office of Administration

Attachment: As stated

June 9, 1981

RULEMAKING ISSUE
(Affirmation)

SECY-81-366

For: The Commissioners

From: William J. Dircks, Executive Director for Operations

Subject: AMENDMENTS TO 10 CFR PARTS 2 AND 50 WITH RESPECT TO CRITERIA INVOLVING NO "SIGNIFICANT HAZARDS CONSIDERATION"

Purpose: To obtain Commission approval for publication of the final amendments in the Federal Register.

Category: Tnis paper covers a minor policy question.

Issue: Should the Commission amend its regulations to incorporate criteria for determining when a proposed amendment to a license involves no "significant hazards consideration."

Discussion: During the Affirmation Session on February 29, 1980, the Commission approved for publication in the Federal Register a notice of proposed rulemaking (Enclosure A) concerning incorporation into Title 10 Part 50 criteria for determining when an amendment to a construction permit or an operating license involves "no significant hazards consideration." The Commission action was in response to the staff recommendations contained in SECY-79-660 dated December 13, 1979. The notice of proposed rulemaking inviting public comments was published in the Federal Register (45 FR 20491) on March 28, 1980, with the comment period scheduled to expire on May 27, 1980. The proposed rulemaking was in response to a petition for rulemaking filed May 7, 1976, by Mr. Robert Lowenstein on behalf of three petitioners (Boston Edison Company, Florida Power and Light Company, and Iowa Power Company) requesting that criteria be specified to determine when no significant hazard is involved in an amendment to an operating license. The petition (PRM 50-17) was published for comment in the Federal Register on June 14, 1976 (41 FR 24006), and is available through SECY Docketing and Service Branch from file "PRM 50-17." If the staff recommendation is accepted, the petition would be granted in part.

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the Act or a testing facility licensed under section 104(c) → must ← be based on the criteria set forth in § 50.91(b) of this chapter; or*

* * * * *

(42 U.S.C. 2132-2135, 2233, 2239).

PART 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

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

AUTHORITY: Secs. 103, 104, 161, 182, 183, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2239); secs. 201, 202, 206, 88 Stat. 1243, 1244, 1246 (42 U.S.C., 5841, 5842, 5846), unless otherwise noted. Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended; (42 U.S.C. 2234). Sections 50.100-50.102 issued under sec. 186, 68 Stat. 955; (42 U.S.C. 2236). For the purposes of sec. 223, 68 Stat. 958, as amended; (42 U.S.C. 2273), §50.54 (i) issued under sec. 161i, 68 Stat. 949; (42 U.S.C. 2201(i)), §§50.70, 50.71 and 50.78 issued under sec. 161o, 68 Stat. 950, as amended; (42 U.S C. 2201(o)) and the Laws referred to in Appendices.

3. Paragraph 50.58(b) of Part 50 is amended by revising the final sentence to read: "If the Commission finds that no significant hazards

This footnote falls out when preparing for publication after Commission action.

*Additions to the currently effective regulation are underscored and deletions are within brackets. Changes to the proposed amendments that were published in the Federal Register on March 28, 1980, 45 FR 20491 are indicated with a line in the margin and the changes are between → and ← . Prior to publishing in the Federal Register the arrows, underscore, brackets, the material in the brackets and this footnote will be deleted. Also the text of 2.105(a) will be replaced by ***.

consideration is presented by an application for an amendment to a construction permit or operating license, considering the criteria set forth in § 50.91(b), it may dispense with such notice and publication and may issue the amendment.

4. Section 50.91 is amended by redesignating the present paragraph as paragraph "(a)" and adding a new paragraph (b) to read as follows:

§ 50.91 Issuance of amendment.

(b) The Commission will determine that a proposed amendment to an operating license or construction permit involves a significant hazards consideration if it finds that operation of the facility in accordance with the proposed amendment would (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 _____, 1981.

For the Nuclear Regulatory Commission.

_____
Samuel J. Chilk
Secretary of the Commission

AA61-2 PDR

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKET NUMBER
PRM 50-17 PROPOSED RULE PR-2,50 (3)
(45 FR 20491)

COMMENTS BY THE NATURAL RESOURCES DEFENSE COUNCIL AND THE UNION OF CONCERNED SCIENTISTS ON PROPOSED AMENDMENTS TO 10 CFR PARTS 2 AND 50: NO SIGNIFICANT HAZARDS CONSIDERATION

These comments on the NRC's proposed rulemaking to define "no significant hazards consideration" are offered by the Natural Resources Defense Council, Inc. (NRDC) and the Union of Concerned Scientists (UCS). NRDC is a non-profit public interest organization, with a membership of over 45,000 persons. NRDC is dedicated to the defense and preservation of the human environment and the wise use of natural resources. The organization has a strong interest in ensuring that the risks posed by nuclear energy are minimized and has actively participated in many proceedings before the NRC. UCS is a coalition of scientists, engineers and other professional, supported by the financial contributions of over 90,000 public sponsors. UCS has published a number of independent technical studies in the fiels of nuclear safety and energy policy and, like NRDC, has frequently participated in proceedings before the NRC. NRDC and UCS believe that the proposed rule is contrary to law and to sound policy.

The Atomic Energy Act, as amended, provides for a mandatory public hearing as a prerequisite to the issuance of a construction permit for a nuclear power plant. 42 USC §2239(a). Prior to the 1962 amendments to the Act, a hearing was also required in all cases before the issuance of an operating license.

While P.L. 87-615(1962) removed the requirement of a hearing at the operating license stage, it balanced this by providing that amendments to the construction permit and operating license should be issued only after notice and the opportunity for hearing, except in cases involving "no significant hazards consideration." The statutory language is as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . . The Commission may dispense with such thirty days' notice and publication with respect to any application for 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.
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> 42 USC §2239(a)

Thus, the law provides the opportunity for a hearing on all amendments, but permits the Commission to dispense with the prior notice provisions only in cases involving no significant hazards consideration.

The legislative history of the 1952 amendments shows that Congress was fully aware of the potential damage to the public interest from removing the mandatory operating license hearing and Congress specifically viewed the strict provisions for prior notice and opportunity for hearing on amendments as a major means to ensure that the public interest would not be compromised by indiscriminate changes to the proposal after it had passed through the period of public scrutiny. The Senate Report addresses this issue as follows:

> This amendment although relaxing the mandatory hearing requirement, should not prejudice the public interest in reactor safety determinations. A mandatory hearing will still be held at the critical point in reactor licensing - the construction permit stage - where the suitability of the site is to be judged. Succeeding regulatory actions will take place only upon publication and sufficient advance notice to afford an interested party the opportunity to intervene.
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> Finally, it is expected that the authority given AEC to dispense with notice and publication would be exercised with great care and only in those instances where the application presented no significant hazards consideration.
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> U.S. Code Cong. & Ad. News, 87th Cong., 2d Sess. 2207, 2214-2215 (1962). Emphasis added.

Further, the Senate Report took particular note that the possibilities for mischief are increased proportionally to the number of issues which remain unresolved at the time the construction permit is issued. In cases involving important post-construction permit unresolved safety problems, the legislators noted that the opportunity for a hearing on c.p. amendments is not enough; the Commission was directed to order hearings on its own motion in these circumstances.

> The Committee is cognisant of the provisional construction permit procedure which allows the issuance of a permit, subject to further research and development work, before becoming final.1/ When this research and development

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1/ Although the NRC no longer issues "provisional" construction permits, it continues the practice of issuing construction permits subject to the later resolution of unresolved safety problems. Gulf States Utilities Company, (River Bend Station, Units 1 and 2) ALAB-444, 6 NRC 760, 766 (1977). Thus, the quoted comments from the Senate Report are still fully applicable. See also, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-[illegible]

> work is directed toward the resolution of a difficult safety problem of unusual public importance it is expected that the Commission, on its own motion, would order a hearing before significant amendments or authorization of the final construction permit were issued.
>
> Id. at 2214.

The plain words of the statute, combined with its legislative history, envision an orderly, fair and open process which begins with public hearings on each construction permit application, followed by notice and the opportunity for hearing on all amendments and on the operation license and its later amendments. The only narrow exception is that the prior notice provision may be waived for a certain class of amendments, those involving no significant hazards consideration. In contrast to this statutorily mandated process, the Commission has developed a two-pronged practice which operates to frustrate public participation and is inconsistent with Congressional intent.

First, the staff has actively discouraged the holders of construction permits from filing for amendments when changes are made to the plant during the process of construction. Since such amendments tend to cause administrative problems and require the commitment of staff resources, it is well known that the utilities are encouraged to wait until the operating license review to seek post-hoc approval of modifications. The NRC has no regulations describing the situations which require filing for an amendment. The result is that no construction permits have ever been amended for a design change

In a recent case, the Commission requested the staff to describe in detail its practice in such cases:

> The staff's response stressed the preliminary nature of the design information submitted at the construction permit stage, and the brevity and lack of specificity of the construction itself. It noted that the Commission's regulations specifically authorize the issuance of a construction permit even though not all technical information has been supplied. The staff contrasted the preliminary design information supplied at the construction permit stage with the far more detailed review of final design information at the operating license review stage. The staff observed that as neither the Atomic Energy Act nor the Commission's regulations spell out the commitment made by, or the authority granted to, holders of construction permits, design changes proposed after issuance of a construction permit have long been treated on an ad hoc basis by licensees and staff. The staff stated that it learns of design changes during construction through formal or informal notification by licensees; through the inspection and enforcement effort; and sometimes only when the facility is ready for operating license review. Depending on the degree of significance, a proposed change may receive detailed staff review, but more commonly, detailed review is deferred to the operating license review stage. Although a sufficiently major change could warrant a construction permit amendment, a review of 88 extant construction permits indicated that none had been amended for a design change, according to the staff's submission. Taken as a whole, the burden of the staff's submission was that the definitive safety review which must take place before the plant can be licensed to operate, and the opportunity for a public hearing at that time, are the principal mechanism for resolving issues, such as this one, which arise in the course of construction.
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> Northern Indiana Pacific Service Co. (Bailly Generating Station, Nuclear-1), CLI-____, Dec. 12, 1979, Slip op. at 3-4.

It is self evident that the staff practice described above is one of systematic abuse of discretion and contravention of the statutory mandate with respect to construction

permit amendments. Unless and until the Commission addresses itself to the fundamental issue of requiring c.p. amendments when significant changes or additions are made to a design during construction, "refining" the criteria governing the prior notice provisions for non-existent amendments is a fraud on the public and patently meaningless.

It is true that the proposed regulations would also govern operating license amendments and it is at this point that the second prong of the staff's traditional practice become significant. The legislative history makes it abundantly clear that cases involving "no significant hazards consideration" were to be an exception from the general rule that notice and the opportunity for hearing should precede the authorization of amendments. The Commission was specifically directed to use the exception "with great care."2/ Instead, "no significant hazards consideration" has been so broadly interpreted as to stand this principle on its head. In essence, the presumption of the staff is that amendments do not involve a significant hazards consideration unless it can be shown otherwise. Operating license amendments are granted without prior notice as a matter of routine.

The proposed regulations incorporate and codify the staff's practice. They establish three criteria for judging whether an amendment requires prior notice. If it would

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2/ Supra, p. 1.

> (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of an accident of a type different from any evaluated previously, or (3) involve a significant reduction in a margin of safety.

The application of these three criteria in many cases will necessarily require the resolution of substantial factual questions. Indeed, these questions largely overlap the issues which bear on the merits of the license amendment. That is, if the amendment involves a significant increase in the probability or consequences of an accident or significantly decreases a safety margin, presumably it ought not to be permitted. It is our view that the staff's confusion of the issues bearing on the merits with the issues bearing on whether prior notice is required accounts for its traditional misapplication of the "no significant hazards consideration" exception. The staff is apparently reluctant to suggest the existance of any serious questions about the propriety of an amendment and may view the finding that some significant hazards consideration is involved as carrying a negative connotation on the merits.

In any case, it is clear that "no significant hazards consideration" is only a threshold test governing exceptions to the prior notice rule. The use of criteria which govern the merits of the amendment is inappropriate, as is the resolution of substantial factual issues. The approach to this threshold question should be entirely different; the presumption should be that prior notice is required unless the amendment

involves no significant previously unrevised safety issue. That is, the test should be completely neutral as to the merit of the amendment and keyed instead to whether or not it involves issues not previously reviewed in a proceeding subject to public participation. This would be in harmony with the legislative intent of 42 USC §2239(a) and with its clear language. Indeed, it is implicit in the use of the phrase "no significant hazards consideration" that the focus should be on whether a previously unreviewed issue exists, not on its resolution. Otherwise the phrase would have read "no significant hazards."

Finally, the criteria proposed by the Commission imply a level of detailed review of applications far beyond what is, in reality, the case. Specifically, criteria #1 inquires whether the amendment would "involve a significant increase in the probability or consequences of an accident previously evluated."3/ As a practical matter, neither license applications nor staff reviews contain any useful information on the probability of particular accidents sequences. Over the years, certain accidents have become included in the design basis as an exercise of what can best be described as the collective subjective judgment of the staff, utilities and vendors. To our knowledge, neither the PSAR, FSAR or SER's associate any

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3/ We note that this precludes consideration of the effects of an amendment on the probability or consequences of major reactor accidents which have not been "previously evaluated." It is NRDC's and UCS' view that this exclusion is contrary to law and has no rational basis or technical justification. This view is well known to the NRC and will not be discussed at length herein. If probability or consequences are to be considered, they must include the probability and consequences of the Class 9 accidents which the staff has not previously evaluated.

particular quantitative probability to any accidents. Therefore it is exceedingly unlikely that, without a substantial technical effort, any meaningful answer can be given to the question of whether and to what degree an amendment increases the probability of an accident. It should be remembered that even with the enormous technical effort involved in WASH-1400, the Risk Assessment Review Group found that the margins of uncertainty associated with the probability figures are very great. Even if the inquiry were susceptible of yielding a reasonably objective answer, the question is far too complex to be usefully addressed as a threshold test for providing prior notice of amendments. In sum, this criterion is inappropriate because it cannot possibly be addressed well with limited time and resources and arguably cannot be addressed well even with great time and resources, and because, to the extent it is relevant and useful, it goes to the merits of an amendment and not to whether prior notice is required. It can be reasonably predicted that, if adopted, the effect of this criterion will be to generate boilerplate in support of a finding that no significant hazards consideration exists.

Criterion #2 asks whether the amendment would "create the possibility of an accident of a type different from any evaluated previously." The meaning of this criterion is unclear. In particular, the rule does not refer to any grouping of accidents by "type" that would be employed as the benchmark for applying this criterion. It is further unclear whether the term "type" of accident refers to very broad groups (e.g., LOCA, loss of feedwater) or whether the level of detail of analyses

will be required to demonstrate that no new potential "type" of accident may be created by the amendment?

The third criterion addresses whether the amendment would "involve a significant reduction in a margin of safety." Without amplification, we find this standard essentially unintelligible. It lacks both quantitative and qualitative parameters. In the vast majority of situations, no quantitative margin of safety has been associated with a component or design. It is extremely difficult, therefore, to imagine how this criterion would be applied in most cases in any objective fashion and, similar to the other criteria, even in cases when it can be a useful tool for analysis, it is appropriate at the merits stage, not the threshold.

CONCLUSION

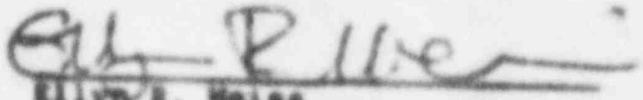
In conclusion, the proposed rule represents an attempt to codify historical staff practice which, while long-standing, is contrary to law and sound policy. First, the staff has perverted the intent of the statute by simply refusing to consider construction permit amendments. Licensees are routinely permitted to make changes and additions to the approved design without filing for construction permit amendments. By the time of the operating license review, these are literally cast in concrete. It becomes exceedingly expensive, if possible at all, to reverse the decisions made during construction. All of the fine words of the Commission with regard to its legal authority at the operating license stage, and even the existence of a few

exceptions, do not alter that fact. Not only does this policy frustrate public participation, it also fundamentally compromises the ability of the agency to do its job. The proposed rule would permit the practice to continue.

Second, the staff has traditionally confused the question of the ultimate propriety of an amendment with the question of whether prior notice can be waived. The proposed rule would codify that confusion. The criteria proposed effectively establish the unlawful presumption that notice can be waived except in unusual cases. The statutory language and legislative history compel the opposite presumption. In addition, they inappropriately focus on the merits of the amendment.

The NRC should promulgate a rule holding that prior notice and opportunity for hearing should be provided for construction permit and operating licences amendments in all cases except those involving so significant previously-unreviewed safety issue. In contrast to present practice, such a role would be fully consonant with the Atomic Energy Act and with the objective of permitting meaningful public and NRC scrutiny of significant amendments without inhibiting the staff's ability to approve those amendments which are warranted.

Respectfully submitted:



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DATED: May 23, 1980

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