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DOCKET NUMBER
PETITION RULE PRM 51-7
(64FR48117)

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: Petition for Rulemaking (64 Fed. Reg. 48117; September 2, 1999)

Dear Ms. Vietti-Cook:

On September 2, 1999, the Nuclear Regulatory Commission (NRC) published notice of receipt and docketing of the NEI's Petition for Rulemaking on Severe Accident Mitigation Alternatives (SAMAs). NEI's petition, submitted on behalf of the nuclear energy industry, requested that the NRC institute a rulemaking proceeding to amend 10 CFR Part 51 to delete the requirement to consider SAMAs in the environmental review associated with license renewal. Although the industry already has made its position clear in the petition that SAMAs should not be considered as part of the license renewal review, we submit the following comments (Attachment 1) to supplement several of the points made in the petition.

We appreciate the NRC's prompt response to NEI's request to docket the petition and seek public comment. We encourage the NRC to continue to expeditiously process the petition. We suggest, for example, setting (and notifying the public of) a 90-day schedule for considering public comments and issues identified by NRC staff, and announcing the agency's action. The industry would welcome this or other agency action that would expedite this rulemaking and set a precedent for use in other rulemakings where expedited treatment is appropriate.

Sincerely,

Robert W. Bishop

PDR PRM 51-7

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Industry Comments on the Petition for Rulemaking to Amend 10 CFR 51.53(c)(3)(ii) and 10 CFR Part 51 Appendix B to Subpart A

I. Introduction

10 CFR 51(c)(3)(ii)(L) requires a license renewal applicant to evaluate Severe Accident Mitigation Alternatives[1] as part of its Environmental Report "if the staff has not previously considered an applicant plant's SAMA analysis in an environmental impact statement or related supplement or in an environmental assessment." As explained in NEI's petition for rulemaking, this requirement is inconsistent with the approach to license renewal established in 10 CFR Part 54.

The Commission promulgated Part 54 based on the premise that each plant's licensing basis remains adequate and is to be maintained in the renewal term. By limiting the scope of license renewal to aging management in the renewal term, the major federal action to be considered under the National Environmental Policy Act (NEPA) is limited to that same scope. Requiring a SAMA evaluation for license renewal is inconsistent with Part 54's dictates because that regulation does not require a re-evaluation of a licensee's vulnerability to severe accidents or the mitigation techniques already in place. The NRC already has reviewed these issues in each licensee's Individual Plant Examination (IPE) for Severe Accident Vulnerabilities and Individual Plant Examination of External Events (IPEEE) for Severe Accident Vulnerabilities (through responses to GL 88-20, Supp. 4) and, as such, they are part of an applicant's current licensing basis.

Further, and as was previously pointed out in the industry's petition, whether the NRC's requirement to consider SAMAs is mandated by NEPA or, as the industry contends, can be eliminated under existing NEPA case law, conceptually is not a question of first impression. The industry's petition cites *City of Aurora v. Hunt*[2] for the proposition that a major federal action that does not involve an increase in risk does not create a significant safety impact to trigger a NEPA assessment. The petition's discussion of *City of Aurora* focused on the fact that licensees will maintain a level of safety in the renewal term equivalent to the level of safety maintained in the initial operating license period.

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[1] Severe accident mitigation alternatives previously have been characterized as Severe Accident Mitigation Design Alternatives (SAMDAs). The text of 10 CFR 51.53(c)(3)(iii)(L) uses the term SAMAs without reference to "design." Although SAMAs are broader in concept than SAMDAs, the terms tend to be used somewhat interchangeably. Herein, the term SAMAs is used in the context of license renewal and SAMDAs is used to describe the historical context in which this issue first arose concerning severe accident mitigation issues.

[2] 749 F.2d 1457 (10th Cir. 1984) (rev'd on other grounds).

The petition also points out that the U.S. Court of Appeals for the Ninth Circuit held in *Upper Snake River Chapter of Trout Unlimited v. Hodel* that "where a proposed federal action would not change the status quo, an EIS is not necessary.[3]" This case focuses on a slightly different proposition than the equivalent level of risk principle on which *City of Aurora* was based. The line of cases using the status quo analysis does not turn on maintaining the level of safety *per se*, but on whether the major federal action will change the operation of the facility sufficient to warrant inquiry into changes in environmental effect. This distinction, and the cases based on it, are discussed further in Subsection II (A) below.

Subsection II (B) provides additional cases that support eliminating the requirement to consider SAMAs for license renewal. These cases hold that the "rule of reason" does not require a NEPA evaluation of specific future environmental impacts where those impacts cannot be ascertained readily and where the alternatives are deemed remote and speculative possibilities. In sum, an EIS is not necessary where ongoing safeguards exist (e.g., regulatory oversight) to protect against unanticipated or speculative future environmental impacts.

II. Additional Bases for Eliminating 10 CFR 51.53(c)(3)(ii)(L)

A. Previous NRC Decisions

Not only is there case law confirming that there is no need to consider the environmental impact of maintaining the status quo with respect to facility operation, but the NRC itself previously has ruled on this issue in two licensing cases.[4]

The *Consumers Power Company* decision involved a request for a license amendment to expand the Big Rock Point Nuclear Plant's spent fuel pool. In response to a contention alleging the NRC must address continued plant operation in an environmental impact statement (EIS), the Atomic Safety and Licensing Appeal Board ruled that unless the proposed spent fuel pool expansion would change reactor operation, the agency's environmental review for the license amendment need not consider the continued plant operation that spent fuel storage in the expanded pool might permit.

The Appeal Board clearly, and at length, articulated the reasoning on which its decision was based. Critically, the Appeal Board initially focused on the *scope* of the spent fuel pool expansion request. The Appeal Board correctly noted that, by

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[3] 921 F.2d 232, 235 (9th Cir. 1990).

[4] *In the Matter of Consumers Power Company*, (Big Rock Point Nuclear Plant), ALAB 636, 13 NRC 312 (1982); *In the Matter of General Electric Company*, (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530 (1982).

granting the license amendment request, the Commission is not also issuing approval to alter any other aspect of the plant's operation or the licensed operating term of the facility. Having evaluated the limited scope of the major federal action, the Appeal Board noted that at most, continued plant operation would be a secondary or indirect effect of the proposed federal action. The Appeal Board applied the "rule of reason" in reaching the conclusion that NEPA does not require an EIS when an action does not "directly or indirectly" bring about change in the status quo of reactor operation. The Appeal Board's language in the *Consumers Power* case bears emphasis:

> To be sure, such operation [resulting from an expansion of the spent fuel pool] will have the usual environmental impacts, *but they will be the same ones that have been present since the first day of operation.* Continued plant operation simply results in maintenance of the environmental status quo. Insofar as this secondary or indirect effect is concerned, there are no environmental changes to evaluate.[5]

* * * *

The Appeal Board further elaborated on its view, stating

> NEPA 'is not an authorization to undo what has already been done.' *Jones v. Lynn.* [citation deleted]. And just as we concluded in *Trojan* [citation deleted] and *Prairie Island* [citation deleted] that NEPA does not require duplicative environmental analyses, so too must we conclude that 'to formulate an EIS [on continued plant operation] under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.'[6]

Like the fuel pool expansion at issue in *Consumers Power*, license renewal for 20 additional years of operation will not result in modifications affecting reactor operation or other significant features of the facility likely to change the environmental status quo. *Consumers Power* confirms that NEPA does not mandate a review of SAMAs in license renewal because the incremental risk of a severe accident requiring mitigation design features is not affected by license

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[5] *In the Matter of Consumers Power Company,* supra at 326. (Emphasis added)

[6] Id. at 328.

renewal. Further, *In the Matter of General Electric, (Morris Operation Spent Fuel Storage Facility)*[7] squarely addressed NEPA consideration of the environmental status quo *in the context of a license renewal proceeding.*

In the *GE Morris* proceeding, the Atomic Safety and Licensing Board ruled on a contention alleging that NEPA obligates the NRC to issue an EIS for license renewal to address the environmental impact of normal operation of the facility. Citing the Appeal Board's decision in the *Consumers Power* fuel pool expansion proceeding, the Board held:

> [t]he Applicant proposes only to continue without changes the activities it has carried on for nearly 10 years, which activities were licensed subsequent to NEPA and after environmental review under that law. Intervenor has not brought forth, even after ample opportunity for discovery, evidence (or even allegations) of any specific impact which would require issuance of an EIS.[8]

The analysis in *GE Morris*, although it involved a spent fuel storage facility rather than a nuclear power plant, is equally apt to the SAMA issue currently before the Commission in the industry's Petition for Rulemaking. It is axiomatic, therefore, that carrying on the operation of a reactor during the renewal term does not occasion consideration of SAMAs when operation in the renewal term does not affect the likelihood of a severe accident that would require consideration of design or mitigation alternatives.

B. NRC's Ongoing Regulatory Oversight

The analysis and holdings of *Environmental Defense Fund v. Andrus*[9] and *Citizens for Environmental Quality v. Lyng*[10] provide additional support for eliminating the requirement to consider SAMAs in 10 CFR 51.53(c)(3). These cases demonstrate that NEPA's requirements are satisfied where the potential impacts to the environment are remote and difficult to quantify and ongoing regulatory safeguards are in place to protect against potential risks of impacts into the future.

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[7] *In the Matter of General Electric,* supra at 530.

[8] Id. at 550.

[9] 619 F.2d 1368 (10th Cir. 1980), *reh'g in banc denied.*

[10] 731 F. Supp. 970 (D. Colo. 1989).

The question presented in *Environmental Defense Fund v. Andrus* was whether a 1973 EIS prepared in connection with a prototype oil shale leasing program was sufficient when the licensee later sought to engage in another (in situ) mining process. The U.S. Court of Appeals for the Tenth Circuit found there was nothing new in the proposed in-situ mining process – that is, it did not involve any "elements unknown, undescribed or unidentified in the 1973 EIS."[11] However, the Court of Appeals did not base its decision solely on earlier EIS consideration of the in-situ process. Rather, the Court went on to consider the fact that the oil shale leasing program would be subject to ongoing monitoring by the U. S. Geological Survey. That regulatory oversight was sufficient to convince the Court "that significant safeguards have been built into the Program to protect against those significant environmental impacts not identified or anticipated in the 1973 EIS," and, therefore, no additional EIS was necessary.[12]

Similarly, in *Citizens for Environmental Quality v. Lyng*, a Federal District Court ruled that the final EIS for the Rio Grande National Forest Plan was adequate even though it did not include an analysis of the environmental impacts of timber harvesting and roadbuilding on unstable soils. Because the EIS provided for site-specific impact studies where soil inventories had not yet been conducted, the Court found that Forest Plan incorporated "sufficiently significant safeguards" to protect against unidentified or unanticipated environmental impacts.[13]

In light of these cases, we believe a reviewing court would consider the ongoing regulatory oversight exercised by the NRC as part of the system of safeguards to protect against future environmental impacts from, *inter alia,* severe accidents, and thereby not require consideration of SAMAs for license renewal. We note that, even after the completion of the IPEs and IPEEEs, the NRC Office of Research is continuing to evaluate specific potential severe accident risks, (e.g., thermal-induced steam generator tube rupture accidents, which are not the typical Chapter 15 event, but rather a subset of the station blackout sequences). As part of this effort, Argonne National Laboratory has undertaken a large, multi-year research effort on issues related to severe accidents. The NRC Office of Research also is participating with other countries in other cooperative severe accident phenomenological experiments and data analyses. Certainly, if the NRC concludes from its increasingly more detailed evaluations of severe accident risks and additional operating data that additional regulatory action is necessary, it can exercise its regulatory authority at any time – it need not wait for and, indeed, should not attempt to use a license renewal proceeding to address those issues.

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[11] *Environmental Defense Fund v. Andrus,* supra at 1382.

[12] Id.

[13] *Citizens for Environmental Quality v. Lyng,* supra at 994.

III. Conclusion

The Petition for Rulemaking, and the above comments supplementing the industry's petition, provide a sound legal basis for the NRC to amend 10 CFR Part 51 to eliminate the requirement to consider SAMAs in the environmental review for license renewal and thereby eliminate the inconsistency that currently exists between Part 51 and Part 54. The NRC should revise Part 51 accordingly.