



NUCLEAR ENERGY INSTITUTE

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November 1, 1999

U.S. Regulatory Commission
Ms. Suzanne C. Black
Deputy Director, Division of Licensing Project Management
Office of Nuclear Reactor Regulation
Washington, DC 20555-0001

Proj 689

Dear Ms. Black:

The NEI Licensing Action Task Force (LATF) has prepared a draft white paper entitled "Use of Precedent in NRC Licensing Action." A copy is enclosed for your information. Please contact me at (202) 839-880 (am@nei.org), or Mike Schoppman at (202) 739-8011 (mas@nei.org), if you have any questions or comments.

NEI looks forward to continued dialogue with the NRR staff on the use of precedent in the licensing process.

Sincerely,

Alex Marion

AM/mas

Enclosure

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NEI LICENSING ACTION TASK FORCE
WHITE PAPER

USE OF PRECEDENT IN NRC LICENSING ACTIONS

I. Introduction

Section II is an overview of current law concerning the requirement that regulatory agencies act consistently in exercising their regulating authority. The case law supports the general proposition that agencies must provide a reason for treating parties differently if they are similarly situated.

Section III is a discussion of the Nuclear Regulatory Commission's current approach for using precedent licensing actions in reviewing license amendment applications.

Section IV provides recommendations for improving the current NRC approach for using precedent.

II. Administrative Law

The NRC must act in accordance with the provisions of the Administrative Procedure Act (APA).¹ The APA provides that agency actions, findings, or conclusions that are arbitrary or capricious are unlawful.² Thus, the NRC may not carry out its function of reviewing proposed licensing actions in an arbitrary and capricious manner.

The arbitrary and capricious standard is a term of art, the contours of which are shaped by case law wherein the appropriateness of agency action was at issue. The law is clear that an agency acts arbitrarily when it interprets and applies its rules and regulations inconsistently.³ The NRC recognizes that it is required to be consistent in its regulation of licensees.⁴ Inconsistent application of rules occurs when an agency treats similar situations differently absent a valid reason for doing so.⁵

An initial determination must be made by the agency (or ultimately by the court reviewing the agency action on appeal) whether two situations are similar. As observed by the NRC in *Offshore Power*, "the law does not require consistency in treatment of two parties in different circumstances."⁶ However, even where an agency determines that two situations are dissimilar, the agency may still be required to provide an explanation "why actual differences ... justify any conflict" with past practice, i.e., articulate a rationale for concluding that two situations differ.⁷

An agency may treat parties that are similarly situated differently where a valid reason exists for doing so. A change in rules or in policy is recognized as a valid reason for reaching different outcomes in similar situations.⁸ A policy change may occur during the interim between seemingly inconsistent agency decisions,⁹ or, new policy may be pronounced in an agency decision.¹⁰ However, adopting a policy for the first time with a particular decision may place a heavier burden on the agency to justify the change.¹¹

III. Current NRC Practice

A. Objectives

Guidelines for Staff review of license amendment requests are set forth in Office of Nuclear Reactor Regulation (NRR) Office Letter 803, Rev. 2, "License Amendment Review Procedures", and its attached "Guide for Processing Licensing Amendments." OL-803 is intended to provide to the NRC Staff the basic framework for processing license amendment applications. Stated objectives of OL-803 include, among others: (1) reducing the inconsistency in processing license amendments, and (2) increasing technical consistency for similar license amendments. An important part in meeting the stated objectives is the appropriate use of precedent set by prior, similar licensing actions.

B. Search for Precedent

The NRC recognizes that there are significant efficiencies to be gained by using precedent.¹² Accordingly, the first substantive step in the planning stage of processing a license amendment is for the Staff to "identify, assess, and review" precedent.¹³ OL-803 directs the Staff to continue to search for precedent until it is satisfied that either one or more precedents have been identified or that no appropriate precedent exists.¹⁴ The mechanisms that OL-803 suggests the Staff may use in its search for precedent include:

- License amendment application or licensee's response to Project Manager's request for information on precedent
- Informal discussions among Staff
- Relevant Staff guidance
- An Intranet "homepage" internal to NRC
- Designated software applications (i.e., NUDOCS and WISP)

- Standard Technical Specifications
- Federal Register notices

C. Work Planning

The precedent identified as a result of the Staff's search is then to be used in preparing the amendment review work plan and in performing the Safety Evaluation. In the planning stage, the availability of precedent is a factor to be considered in allocating the responsibility for developing the license amendment processing work plan between the Project Manager and the appropriate Technical Branch. In addition, estimations of Staff resources required for amendment review are based on the degree of similarity between the amendment request and any precedent. The availability of precedent helps determine the appropriate individual to act as lead reviewer. OL-803 specifically directs the Staff to give proper consideration to precedent when developing requests for additional information (RAIs) to avoid unnecessary requests.

D. Use of Precedent

OL-803 provides that precedent must be reviewed for accuracy, applicability, and completeness against the details of a license amendment submittal and the particular plant. The responsible reviewer must ensure that the precedent: (1) is appropriate for use with the intended amendment, and (2) meets current expectations for format, findings, internal NRR guidance for the item, NRR guidance to industry, and technical content. The diagram in Figure 1 relates the OL-803 guidance for using precedent to applicable administrative law principles.

IV. Recommendations

While the NRC recognizes that proper use of precedent (1) increases efficiency in the reviewing process, and (2) increases the "accuracy" of the outcome (i.e., approval or disapproval of the amendment), the NRC's current approach could be modified in order to maximize potential benefits. This paper offers recommendations to improve the current approach:

A. Define "precedent"

OL-803 does not contain a formal definition of "precedent." The nearest statement to a definition is, "Precedent license amendments are those with a similar proposed change and regulatory basis for the SE."¹⁵ OL-803 also

provides that the Staff must ensure that the precedent is appropriate for use with the intended amendment. However, no further guidance is available to licensees or the Staff for identifying licensing actions that may be useful in reviewing a license amendment. Thus, precedent is a somewhat elusive concept subject to inconsistent application. As a consequence, potentially applicable precedent may be overlooked by both licensee and Staff, or even if identified, may be discounted by the responsible reviewer.

RECOMMENDATION: Revise OL-803 to include criteria to be considered in determining suitable precedent. It would be helpful if the definition contained objective measures to guide the determination. For example, NRC guidance could specify objective factors for evaluation, such as physical characteristics, design basis information, and risk-significance. With objective criteria in place, licensees will better understand Staff expectations and be more likely to identify relevant precedent(s). The result would be a decrease in the number of RAIs and an increase in Staff and licensee efficiency.

B. Access to information sources

Licensees do not have access to precedent databases available to the Staff. Likewise, the Staff may not be aware of commercial databases available to licensees.

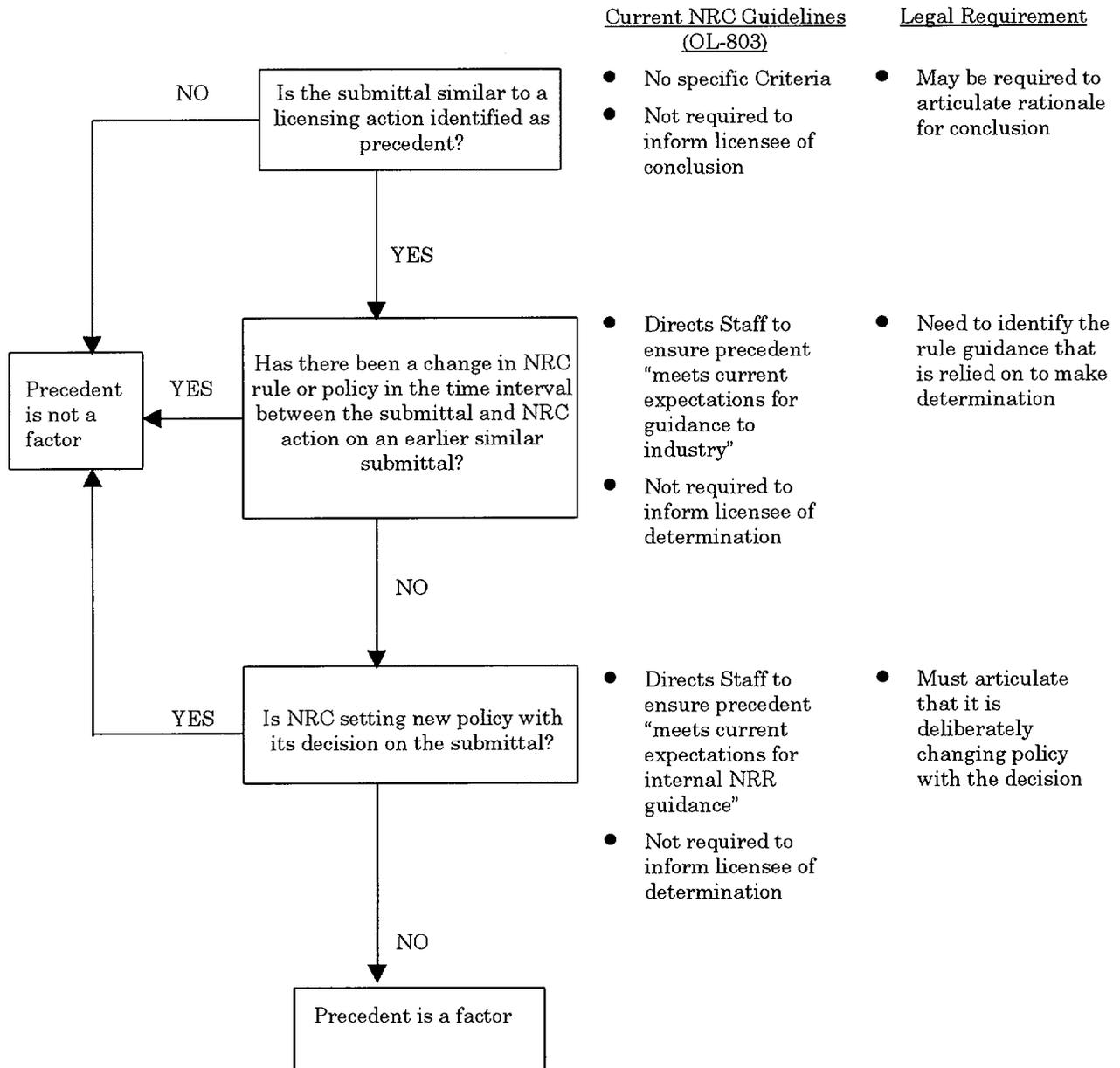
RECOMMENDATION: Identify sources of precedent information, and maximize common access for both the NRC Staff and the licensee community.

C. Communicating the results of a precedent search

Staff/licensee dialogue on precedent has not been common practice. Once a licensee submits an amendment application, there should be a consistent and joint effort to identify precedent.

RECOMMENDATION: Incorporate an intermediate step into OL-803 that would encourage Staff to communicate the results of its precedent search to the licensee, including a preliminary evaluation of whether the precedent is supporting or non-supporting. Communicating about precedent early in the review process would permit the licensee to take appropriate action, e.g., expand the precedent search, withdraw the amendment request, challenge Staff preliminary conclusions regarding non-supporting precedent, or resolve Staff concerns.

FIGURE 1



 ENDNOTES

¹ Atomic Energy Act of 1954 § 181, 42 U.S.C. § 2231; *see also Duke power Co. v. United States Nuclear Regulatory Comm'n*, 770 F.2d 386, 389 (4th Cir. 1985)(holding that judicial review of NRC decisions to grant or deny exemption requests is governed by Section 706(2)(A) of the APA).

² Administrative Procedure Act, 5 U.S.C. §706.

³ *See Airmark Corp. v. Federal Aviation Admin.*, 758 F.2d 685, 692 (D.C. Cir. 1985)(concluding that the Federal Aviation Administration's application of its exemption criteria was "grossly inconsistent and patently arbitrary"); *Offshore Power Systems (Floating Nuclear Plants)*, ALAB-489, 8 NRC 194 (1978)("We have no disagreement with the principle [that it is arbitrary to treat similarly situated parties inconsistently] and we are in accord with the judicial and administrative decisions (including our own) applying it.").

⁴ See the comments of NRC Commissioner McGaffigan attached to his Vote Sheet on SECY-98-264 (Apr. 22, 1999)(observing the "the virtue of consistency ... is among our Principles of Good Regulation").

⁵ *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)("A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently."); *Airmark Corp.* at 692 ("[I]t is equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents.").

⁶ *Offshore Power* at 222.

⁷ *Transactive Corp.* at 237.

⁸ Some courts have been willing to infer that a policy change has occurred from evidence of changed circumstances even where the agency did not explicitly defend inconsistent decisions on the basis of a policy change. For example, in *Duke Power Co.*, *supra*. The licensee argued that the NRC's denial of its exemption request from the requirement to establish a second Emergency Operating Facility (EOF) within 20 miles of its nuclear plant was arbitrary and capricious in light of a similar exemption previously granted to the Tennessee Valley Authority (TVA). However, the court held that because the TVA exemption was granted "while the Commission was in the formative stages of devising its [emergency preparedness] rules," and TVA had since experienced problems "created by the absence of 'interface' between on-site and off-site personnel" during emergency exercises, the NRC's denial of Duke's exemption request was "understandable." *Duke Power Co.* at 391.

⁹ *See Quivira Mining Co.* (Ambrosia Lakes Facility, Grants, New Mexico, LBP-97-20, 46 NRC 257, 271 (1997)(concluding that the petitioner lacked standing to intervene because it failed to show that it was similarly situated to the party seeking a license amendment since "regulatory requirements ... may well not be similar, because of the different years in which applications were submitted").

¹⁰ *See Airmark Corp.* at 691-92 (observing that "an agency is free to alter its past rulings and practices even in an adjudicatory setting").

¹¹ *Airmark Corp.* at 692 ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute.").

¹² “Searching for, identifying, and using precedents in the review process maximizes staff efficiency, minimizes the need to issue requests for additional information and ensures consistency of licensing actions.” OL-803 at § 2.3

¹³ OL-803 at § 2.0.

¹⁴ OL-803 at § 2.0

¹⁵ OL-803 at § 2.3