

POLICY ISSUE NOTATION VOTE

November 8, 2002

SECY-02-0199

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: DENIAL OF PETITION FOR RULEMAKING TO USE INFORMATION FROM
PRIOR LICENSING ACTIONS AS RESOLVED INFORMATION FOR EARLY
SITE PERMIT AND COMBINED LICENSE APPLICATIONS (PRM-52-1)

PURPOSE:

To obtain Commission approval for denial of a petition for rulemaking to use information from prior licensing actions as resolved information during the preparation and review of early site permit (ESP) and combined license (COL) applications.

BACKGROUND:

By letter dated July 18, 2001, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM) seeking to amend Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52. The petitioner requested that the Nuclear Regulatory Commission (NRC) regulations governing ESP and COL applications at existing reactor sites be amended to improve the efficiency of the application and review process for applicants seeking ESPs or COLs at sites with existing licensed facilities. The ESP amendment would allow an applicant seeking an ESP at a site for which a construction permit or operating license had been previously issued to use siting information from the previous licensing action in which stakeholders had the opportunity to raise concerns on site-related matters in a public hearing and such siting information has been approved by the NRC as baseline information and treat it as resolved information. The COL amendment would allow an applicant to incorporate and treat as resolved "programmatic"

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information as well as site information. The petitioner believes that its proposed amendments would improve the focus and efficiency of the ESP and COL licensing processes.

A notice of receipt of the petition was published in the *Federal Register* on September 24, 2001 (66 FR 48832). The NRC received letters from 10 commenters. Nine of the 10 commenters were in favor of the petition. Seven of the favorable letters were from nuclear utilities, one was from a vendor, and one was from the petitioner. One of the commenters, a member of a public advocacy group, opposed the petition.

Separately, the NRC is conducting rulemaking to amend Part 52. This rulemaking activity addresses lessons learned during previous design certification reviews and addresses certain elements of the ESP, design certification, and COL review processes. NEI requested that its petition be incorporated into the ongoing rulemaking effort; however, the staff proposes to deny the petition.

DISCUSSION:

According to the petitioner's proposal, the regulatory requirements and siting and programmatic information to be used as a basis for evaluating the acceptability of an ESP or COL located on a site for which a construction permit or operating license has been previously issued by the NRC would be established, in part, by the regulatory requirements and information that the applicant proposes to "incorporate by reference" from the "current licensing basis" for that construction permit or operating license. The applicant would have to supplement the incorporated information to the extent that there is significant new information on, *inter alia*, the ability of the site to support the additional nuclear facility contemplated by the ESP, information on cumulative radiological impacts, and information addressing new regulations. The programmatic information would be supplemented to address new regulations. Regulatory requirements and information incorporated by reference that do not need to be supplemented per the petition would be treated as resolved, unless the NRC complies with the Backfit Rule, 10 CFR 50.109. Regulatory requirements and information incorporated by reference that must be supplemented would be subject to NRC review and approval, and the Backfit Rule would not apply.

The NRC staff recommends that the Commission deny the petitioner's proposal. An applicant that wants to expand the use of a site that currently has one or more nuclear power reactors or for which a reactor was previously considered by the NRC may incorporate by reference information already filed with the Commission. The burden for demonstrating the relevance of the information to the pending action and to current regulatory requirements rests with the applicant.

The fundamental objective of the petitioner's proposal—resolution of issues in an ESP or a COL proceeding—appears to be based upon a misapplication of the "current licensing basis" concept and the Backfit Rule. The "current licensing basis" of a facility represents the licensing basis of that facility as it has evolved over time. There is no "current licensing basis" of a site for which a construction permit or operating license may already have been issued that could be applied to an ESP or COL. More importantly, information for an existing facility may not be technically applicable to support the licensing of a new facility to be located on the same site. The Backfit Rule was intended to address a licensee's reasonable expectation of regulatory stability. An ESP or a COL applicant, even one that already possesses a construction permit or

operating license for a facility at the site for which an ESP or a COL is being sought, should have no regulatory expectation that the NRC's determination on whether the application complies with applicable regulatory standards would be constrained by the "current licensing basis" for the earlier-issued construction permit or operating license for a facility at the site. It is inappropriate to extend the concepts of the "current licensing basis" and backfitting from prior separate licensing actions to new licensing actions.

The petitioner claims the proposed regulations will enhance the efficiency of the regulatory process by eliminating duplicate reviews of matters resolved in previous proceedings. The NRC staff does not believe that the petitioner's proposal would produce efficiencies in the review of an ESP or COL for a site on which a nuclear power reactor is currently or was formerly located. First, the potential complexity of the issues and the level of analysis necessary to establish that there is no significant new information for each relevant ESP or COL subject matter is likely to require at least as many resources as would be consumed if the proposed amendments were not adopted. Second, regardless of whether the petitioner's rule is adopted, the NRC has to evaluate cumulative radiological and environmental impacts of the proposed new facility, the potential safety impacts of the existing facility on the proposed facility and the proposed facility on the existing facility. Third, quite apart from the question of whether the Commission could bind interested persons who were not parties to the earlier proceedings, the NRC staff does not believe that there would be any significant reduction in the matters that may be addressed in a hearing. The proposal would merely change the focus of the hearing to whether (1) the applicant considered and adequately characterized all new and significant information, (2) the referenced information meets current requirements, and (3) the accuracy and completeness of any new information to support the existing information is adequate to meet the new requirement. Lastly, the NRC does not believe that there would be any increase in regulatory efficiency in the agency's compliance with the National Environmental Policy Act (NEPA). Following the receipt of an ESP application, the NRC would conduct a scoping process involving interested stakeholders. Under existing provisions, the scoping process in Part 51 already permits the NRC to identify existing information and determine whether the environmental issues related to a proposed ESP may be narrowed.

The NRC believes that some stakeholders may perceive the petitioner's proposal as increasing public confidence in the NRC, inasmuch as it provides for a regulatory process and standard for assessing whether prior NRC findings on siting may have validity with respect to a new facility to be located at the same site. By contrast, the NRC believes that other stakeholders may view the petitioner's proposal as decreasing public confidence in the NRC. These stakeholders may perceive the proposal as narrowing, rather than refocusing, the scope of the ESP or COL application and review process, the scope of the NRC's compliance with NEPA, and the scope of hearings associated with the issuance of an ESP or a COL. Such stakeholders may (incorrectly) perceive that the NRC is accepting old, out-of-date information and compliance with old requirements solely because the ESP is located on a site with an existing facility. Overall, the impact on public confidence in the NRC is unclear.

The NRC staff recommends the denial of the petition as submitted.

The attached *Federal Register* notice provides the bases for denial.

COORDINATION:

The Office of the General Counsel has no legal objection to the denial of this petition.

RECOMMENDATIONS:

That the Commission:

- (1) Approve denial of the petition for rulemaking and publication of the *Federal Register* notice of denial (Attachment 1).
- (2) Note that:
 - a. a letter is attached for the Secretary's signature (Attachment 2) informing the petitioner of the Commission's decision to deny his petition; and
 - b. the appropriate congressional committees will be informed.

/RA/

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Executive Director
for Operations

Attachments:

1. *Federal Register* Notice of Denial
2. Letter to Bishop

The Commissioners

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ACCESSION NUMBER: ML022240555 (package)

Secy Paper: ML022240601

Attachment 1: ML022250050

Attachment 2: ML022250414

Incoming: ML012060191

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