[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 52

RIN 3150-AE42

Combined Construction Permits and Operating Licenses; Conforming Amendments

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission ("NRC" or "Commission") is amending its regulations governing the issuance of combined construction permits and operating licenses for nuclear power plants. The final rule incorporates all the changes to these provisions that are necessary because of the enactment of licensing reform legislation. The amendments serve to conform the regulations to the provisions of Title XXVIII of Public Law 102-486, the "Energy Policy Act of 1992," signed into law on October 24, 1992.

DATES: The rule becomes effective (30 days after publication in the Federal Register.) Submit comments by (60 days after publication in the Federal Register). 1/22/93 2/22/93

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attn: Docketing and Service Branch.

Pub 12/23/93

DS10

deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:45 am and 4:15 pm Federal workdays. (Telephone 301-504-1966.)

Copies of comments received may be examined at the NRC Public Document Room at 2120 L Street NW., Washington, DC 20555, in the lower level of the Gelman Building.

FOR FURTHER INFORMATION CONTACT: L. Michael Rafky, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: 301-504-1606.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Section-by-Section Analysis.
III. Environmental Impact: Categorical Exclusion.
IV. Paperwork Reduction Act Statement.
V. Regulatory Analysis.
VI. Backfit Analysis.

I. Background

Title XXVIII of Public Law 102-486, the "Energy Policy Act of 1992," signed into law on October 24, 1992, amends the Atomic Energy Act to facilitate the standardization of nuclear power plants and to provide explicit authority for the issuance of combined construction permits and operating licenses. The

legislation largely codifies the Commission's regulations in 10 CFR Part 52. However, the legislation also makes several changes to the licensing process set forth in those regulations.

The purpose of this rule is to make those changes necessary to conform the language of Part 52 to the provisions of the newly enacted Public Law. Because these changes are limited to incorporating the language of that statute into the regulations, the NRC finds, pursuant to 5 U.S.C. 553(b)(B), that there is good cause not to seek public comment on this rule, as such comment is unnecessary. The rule will become effective 30 days after the date of publication in the Federal Register. Nevertheless, any interested member of the public who believes that the Commission has not accurately conformed Part 52 to Title XXVIII of Public Law 102-486, the Energy Policy Act of 1992, is invited to submit comments on this matter within 60 days of the date of publication of this rule.

The final rule incorporates all necessary changes resulting from enactment of licensing reform legislation. The significant changes --

(1) Provide that the Commission may authorize a plant to operate during the pendency of a post-construction hearing on a combined construction permit and operating license (combined license) if it makes certain specified safety findings.

Previously, under Part 52, a post-construction hearing had to be completed prior to operation;

(2) Provide the Commission with the discretion to order use of either formal or informal procedures for a post-construction hearing on a combined license. Previously, under Part 52, only formal procedures were permitted;

(3) Provide the Commission with the discretion to permit post-construction license amendments to a combined license, notwithstanding the pendency of a hearing request, to become effective if the Commission makes a finding of "no significant hazards considerations." Previously, Part 52 required that hearings be completed prior to commencement of operation;

(4) Eliminate the requirement that there be a pre-operational antitrust review by the Department of Justice of a combined license if there have been significant developments from an antitrust perspective arising since the issuance of the combined license; and

(5) Eliminate the requirement that a combined license include the earliest and latest construction completion dates.

The amendments to the rule incorporate these changes as well as other less significant changes to ensure that Part 52 conforms as closely as possible to the statutory language.

In addition, 10 CFR 52.8 is being amended to correct a typographical error and to make revisions of a minor administrative nature.

II. Section-by-Section Analysis

The following analysis of those sections that are affected under this final rule provides additional explanatory information. All references are to Title 10, Chapter I, U.S. Code of Federal Regulations.

Section 52.8 Information collection requirements; OMB approval.

This section is revised to correct data provided in accordance with an Office of Management and Budget (OMB) regulation regarding the information collection requirements contained in this part. In paragraph (a), a typographical error in the OMB approval number is corrected. In paragraph (b), four sections are added to the list of sections containing approved information collection requirements. These revisions are of a minor administrative nature and are made to improve the accuracy of the information in this section and to comply with OMB regulations.

Section 52.79 Contents of applications; technical information.

The language of this section provides explicitly that the inspections, tests, analyses, and acceptance criteria must include those applicable to emergency planning and that the objective of the inspections, tests, analyses, and acceptance

criteria is to provide reasonable assurance that the facility was constructed and will operate in conformity with the combined license, the Atomic Energy Act, and the Commission's rules and regulations.

Section 52.83 Applicability of Part 50 provisions.

This section has been revised to remove the applicability of certain provisions of Part 50 which are no longer required under the legislation. These include § 50.55(a), (b) and (d), which had required a construction permit for a nuclear power reactor to state the earliest and latest dates for the completion of the facility's construction, and other conditions thereof; and § 50.58, which had required applications for construction permits or operating licenses to be reviewed by the Advisory Committee on Reactor Safeguards (ACRS). A final change to § 52.83 is the substitution of a reference to "§ 52.99" for "§ 52.103." This was done because the findings to which § 52.83 refers are now contained in § 52.99.

Section 52.97 Issuance of combined licenses.

This section has been amended with regard to making amendments to a combined license immediately effective under the so-called "Sholly Amendment." Under the Energy Policy Act, an amendment to a combined license can be made immediately effective

if the Commission determines there are no significant hazards considerations. This section of the rule has been revised to incorporate the statutory provisions and previously issued Commission regulations implementing the "Sholly" amendment. The Commission, however, stresses that it will not look with favor upon license amendments to a combined license filed shortly before planned operation that could have the effect of undermining standardization or changing the scope of imminent or pending hearings on conformance issues.

Section 52.99 Inspection during construction.

Like the other amended sections of Part 52, this section has been changed to track the language of the Energy Policy Act. In this case, the only change is to require explicitly that, prior to operation under a combined license, the Commission shall find that the prescribed acceptance criteria are met.

Section 52.101 Pre-operational antitrust review.

This section, which has been deleted as a result of the new legislation, had provided for a pre-operational antitrust review of a combined license by the Department of Justice if there had been significant antitrust-related developments arising after the issuance of that license.

Section 52.103 Operation under a combined license.

In an effort to adhere as closely as possible to the new statutory requirements of the Energy Policy Act, the NRC has replaced most of its old section § 52.103 with the text of section 2802 of that Act. Under the revised language, any request for a post-construction hearing must show, prima facie, both that one or more of the acceptance criteria are not or will not be met, and those specific operational consequences of nonconformance that would be contrary to providing reasonable assurance that the public health and safety will be adequately protected. The Commission may permit interim operation of a facility pending a hearing if it determines that this assurance exists. The Commission has the discretion to decide if any post-construction hearing will use formal or informal hearing procedures, and it must state publicly the reasons for choosing either set of procedures. The Commission must find, prior to operation of the facility, that the acceptance criteria have been met. The procedures with regard to § 2.206 petitions remain the same. Additionally, there is now a new paragraph (g), which is a modified version of old § 52.103(c). The Commission has done nothing in this section other than to incorporate the language of the Energy Policy Act into its rule.

Commissioner Curtiss' Separate Views on Final Rules Amending 10 CFR Part 52 to Incorporate Provisions of the Energy Policy Act:

With one exception, I approve the above final rulemaking changes to incorporate the provisions of the Energy Policy Act. The one exception concerns the proposed amendment to 10 CFR 52.97(b) to incorporate the so-called "Sholly" authority. For the reasons set forth below, I cannot agree with the recommendation to amend 10 CFR 52.97(b) for the purpose of extending the provisions of the "Sholly" amendment contained in section 189a.(2) of the Atomic Energy Act to amendments to combined licenses (COLs) prior to authorization to operate. Indeed, I believe that the adoption of this provision will serve to detract from the overall objective that we have established in Part 52 to achieve and maintain a high degree of standardization.

When § 52.97(b) was originally enacted by the Commission, it was adopted for the sole purpose of ensuring that the level of standardization reflected in a COL, once issued, would not be diluted by subsequent changes that a COL holder might seek during construction. Recognizing that such changes should not be foreclosed altogether, the approach taken by the Commission in § 52.97(b) was to establish a stringent procedural hurdle for the COL holder who wishes to seek a change in its COL, once issued: Section 52.97(b) provides that any such changes would be treated as amendments to the COL (thereby requiring a hearing upon

request), and that the hearing on any such amendments would have to be completed before operation of the facility.

This approach, the Commission reasoned at the time, would serve to provide yet another strong disincentive against a COL holder seeking changes to a COL, once issued.[1] Indeed, it was exactly this point that the Commission emphasized in its response to a question on this matter from one of our oversight Committees:

> The Commission did not extend Sholly <u>as a policy choice</u> because it wanted to discourage late changes to combined licenses or to the ITAAC therein. Such changes could have the effect of undermining standardization or changing the scope of imminent or pending hearings on conformance issues.

Hearing Before the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, United States Senate, on the Nuclear Licensing Provision in S.1220, the National Energy Security Act of 1991, January 23, 1992 (Committee Print), p. 56 (emphasis added).

---

[1]It should be noted that a COL holder is permitted to make certain changes in its COL, if those changes satisfy the criteria of the § 50.59-type change procedure. These § 50.59-type changes are not considered amendments, and hence would not be subject to the requirements of § 52.97(b).

This same point was set forth quite persuasively by Chairman Selin in that same hearing:

> The Commission specifically did not put [the "Sholly" provision] into part 52. We are not interested in encouraging design changes, particularly in the standardization area . . . .
>
> We want to discourage changes -- random changes -- even if they don't, in themselves, have a health and safety impact, because we believe the totality of the configuration has a health and safety impact . . . so we consciously did not put that in part 52.

Remarks of Chairman Selin, id. p. 22.

In my view, the fundamental policy of § 52.97(b) remains equally sound today. Hence, the only question that remains, in my judgment, is whether the recently-enacted Energy Policy Act of 1992 dictates a different result. In this regard, I would note that the Act gives the Commission the discretion to decide whether to modify Part 52 in a manner that would permit COL amendments to be made immediately effective where such amendments involve no significant hazards considerations. Of particular note, section 2803 of the Energy Policy Act provides that --

> The Nuclear Regulatory Commission shall modify part 52 of title 10, Code of Federal Regulations, to conform with sections 185b. and 189a.(1)(B) of the Atomic Energy Act of 1954, as amended by sections 2801 and 2802 of this Act, not later than 1 year after the date of the enactment of this Act (emphasis added).

This provision, which enumerates those sections of the Act for which we must adopt conforming regulations, is limited by its terms to sections 2801 and 2802 of the Act. It does not reference section 2804, the section of the Act containing the "Sholly" provision. As a consequence, I read the Act as giving the Commission the discretion to decide whether we wish to extend the "Sholly" authority to COL amendments.

In light of the discretion that we have, and based upon the reasons set forth above, I would not modify section 52.97(b), as proposed in this rulemaking.[2] In all other respects, I approve the changes to Part 52 that are proposed herein.

---

[2]In the alternative, if it is the will of the majority of the Commission to modify § 52.97(b), I believe this is a matter that deserves -- and indeed requires -- public comment. I say this not only because of the significant policy considerations involved here, but more importantly because, as a legal matter, if Congress has conferred upon the Commission the discretion to decide what approach to take in the regulations that we adopt to implement the statute, the justification for publishing this change as a final rule (i.e. that we are simply adopting the language of the newly-passed Act) no longer obtains.

Additional Views of Commissioners Rogers, Remick, and de Planque

If the Commission were to leave § 52.97(b) as it stood before enactment of the Energy Policy Act, requiring a prior hearing on every proposed postconstruction amendment to a combined license, our regulations would have been inconsistent with the Act. This is the view of the Commission's General Counsel, and we adopt it as our own. It is clear that Congress intended that the Sholly amendment be available for use with each combined license, because Congress did in fact amend Section 189a.(2) of the Atomic Energy Act to make the Sholly provisions available for use with each combined license. Congress thereby gave us the discretion in each individual case to decide, according to the Sholly provisions, whether to make an amendment immediately effective, but Congress did not give us the discretion to write rules which directly contradict the newly amended Sholly provisions. Standardization is afforded considerable protection by Part 52. We have no cause to try to protect it further by, in effect, trying to rewrite the newly amended Sholly provisions.

We would emphasize that the statutory provisions merely give us the discretion to make an amendment to a combined license immediately effective if it satisfies the criteria of Section 189(a) of the Atomic Energy Act. The Commission would retain the discretion to require a prior hearing in a specific case.

III. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental assessment nor an environmental impact statement has been prepared for the final regulation.

IV. Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0151.

V. Regulatory Analysis

The Nuclear Regulatory Commission has made statutorily mandated changes in 10 CFR Part 52 in order to conform it to the language of the Energy Policy Act of 1992. These changes reflect Congressionally mandated changes to the NRC's licensing process for power reactors. Only future applicants for combined construction permits and operating licenses will be affected by the changes to the regulations.

VI. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and that a backfit analysis is not required for this final rule. The backfit analysis is not required because these amendments are required by law and do not require the modification of or additions to systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility or the procedures or organization required to design, construct or operate a facility.

List of Subjects

Part 52 - Administrative practice and procedure, Antitrust, Backfitting, Combined license, Early site permit, Emergency planning, Fees, Inspection, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Reporting and recordkeeping requirements, Standard design, Standard design certification.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 52.

PART 52-EARLY SITE PERMITS; STANDARD DESIGN CERTIFICATIONS; AND COMBINED LICENSES FOR NUCLEAR POWER PLANTS

1. The authority citation for Part 52 continues to read as follows:

AUTHORITY: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

2. Section 52.8 is revised to read as follows:

§ 52.8 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). OMB has approved the information collection requirements contained in this part under control number 3150-0151.

(b) The approved information collection requirements contained in this part appear in §§ 52.15, 52.17, 52.29, 52.35, 52.45, 52.47, 52.57, 52.63, 52.75, 52.77, 52.79, 52.91 and 52.103.

3. In § 52.79 paragraph (c) is revised to read as follows:

§ 52.79 Contents of applications; technical information.

* * * * *

(c) The application for a combined license must include the proposed inspections, tests and analyses, including those applicable to emergency planning, which the licensee shall perform and the acceptance criteria therefor which are necessary and sufficient to provide reasonable assurance that, if the inspections, tests and analyses are performed and the acceptance criteria met, the facility has been constructed and will operate in conformity with the combined license, the provisions of the Atomic Energy Act, and the NRC's regulations. Where the application references a certified standard design, the inspections, tests, analyses and acceptance criteria contained in the certified design must apply to those portions of the facility design which are covered by the design certification.

* * * * *

4. Section 52.83 is revised to read as follows:

§ 52.83 Applicability of part 50 provisions.

Unless otherwise specifically provided for in this subpart, all provisions of 10 CFR Part 50 and its appendices applicable to holders of construction permits for nuclear power reactors also apply to holders of combined licenses issued under this subpart.

Similarly, all provisions of 10 CFR Part 50 and its appendices applicable to holders of operating licenses also apply to holders of combined licenses issued under this subpart, once the Commission has made the findings required under § 52.99, provided that, as applied to a combined license, 10 CFR 50.51 must require that the initial duration of the license may not exceed 40 years from the date on which the Commission makes the findings required under § 52.99. However, any limitations contained in Part 50 regarding applicability of the provisions to certain classes of facilities continue to apply. Provisions of 10 CFR Part 50 that do not apply to holders of combined licenses issued under this subpart include §§ 50.55(a), (b) and (d), and 50.58.

5. In § 52.97 paragraph (b) is revised to read as follows:

§ 52.97 Issuance of combined licenses.

* * * * *

(b)(1) The Commission shall identify within the combined license the inspections, tests, and analyses, including those applicable to emergency planning, that the licensee shall perform, and the acceptance criteria that, if met, are necessary and sufficient to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the Atomic Energy Act, and the Commission's rules and regulations.

(2)(i) Any modification to, addition to, or deletion from the terms of a combined construction and operating license,

including any modification to, addition to, or deletion from the inspections, tests, analyses, or related acceptance criteria contained in the license is a proposed amendment to the license. There must be an opportunity for a hearing on these amendments.

(ii) The Commission may issue and make immediately effective any amendment to a combined construction and operating license upon a determination by the Commission that the amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. The amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. The amendment will be processed in accordance with the procedures specified in 10 CFR 50.91.

6. Section 52.99 is revised to read as follows:

§ 52.99 Inspection during construction.

After issuance of a combined license, the Commission shall ensure that the required inspections, tests, and analyses are performed and, prior to operation of the facility, shall find that the prescribed acceptance criteria are met. Holders of combined licenses shall comply with the provisions of 10 CFR 50.70 and 50.71. At appropriate intervals during construction, the NRC staff shall publish in the Federal Register notices of the successful completion of inspections, tests, and analyses.

§ 52.101 [Removed]

7. Section 52.101 is removed.

8. Section 52.103 is revised to read as follows:

§ 52.103 Operation under a combined license.

(a) Not less than one hundred and eighty days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under subpart C of this part, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within sixty days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(b) A request for hearing under paragraph (a) of this section shall show, *prima facie*, that --

(1) One or more of the acceptance criteria in the combined license have not been, or will not be met; and

(2) The specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(c) After receiving a request for a hearing, the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers

thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(d) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under paragraph (a) of this section, and shall state its reasons therefor.

(e) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within one hundred and eighty days of the publication of the notice provided by paragraph (a) of this section or the anticipated date for initial loading of fuel into the reactor, whichever is later.

(f) A petition to modify the terms and conditions of the combined license will be processed as a request for action in accord with 10 CFR 2.206. The petitioner shall file the petition with the Secretary of the Commission. Before the licensed activity allegedly affected by the petition (fuel loading, low power testing, etc.) commences, the Commission shall determine whether any immediate action is required. If the petition is granted, than an appropriate order will be issued. Fuel loading and operation under the combined license will not be affected by the granting of the petition unless the order is made immediately effective.

(g) Prior to operation of the facility, the Commission shall find that the acceptance criteria in the combined license are met. If the combined license is for a modular design, each reactor module may require a separate finding as construction proceeds.

Dated at Rockville, Maryland this 16th day of December, 1992.

For the Nuclear Regulatory Commission,

SAMUEL J. CHILK
Secretary of the Commission.