



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

COMSECY-03-0033

July 16, 2003

Approve, with edits.

MEMORANDUM TO:

Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

Nils J. Diaz
Nils J. Diaz 08/11/03

FROM:

William D. Travers
Executive Director for Operations

William D. Travers

SUBJECT:

TRANSMITTAL OF REVISED FEDERAL REGISTER NOTICE -
SECY-02-0199 - "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)"

In a staff requirements memorandum (SRM) dated May 7, 2003, related to SECY-02-0199, "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)," the Commission approved the staff's proposal to deny the petition for rulemaking. However, the Commission directed the staff to revise the *Federal Register* notice (FRN). Per Commission direction, the staff has revised the *Federal Register* notice, and this memorandum transmits the notice to the Commission. The staff has also attached a revised letter to the petitioner to reflect the Commission's comments contained in the SRM.

SECY, please track.

Attachments: As stated

- cc: SECY
- OGC
- OCA
- OPA
- CFO

Contact: Stephen Koenick, NRR/NRLPO
(301) 415-1239

CHAIRMAN REC'D
03 JUL 17 PM 2:48

For example, referencing already proven programs utilized by a mature industry is much less uncertain than ^{new} programs proposed for an emerging industry.

Reasons for Denial

The petition requests that the ESP and COL processes set forth in 10 CFR Part 52 be amended to allow an applicant to use existing information supplied to support the license for a different facility in an ESP or a COL application and to treat the information as resolved. The petition also discusses prior NRC activities that the petitioner claims are precedent for the petitioner's proposal. The Commission recognizes the ^{advantages} benefits of licensing plants in a mature industry environment, rather than an emerging industry as was the case for the majority of the existing plant licenses. To the extent practicable, the Commission expects applicants for ESPs and COLs to rely on previously filed siting and programmatic information, as is permitted under existing NRC regulations. To ensure that future license applicants and the public understand the staff's review process, the Commission has directed the staff to articulate in appropriate guidance documents the specific criteria it will use to make its determination as to whether new siting information or a program modification is necessary. However, there are ^{practical} limitations to using previously filed information, specifically, the Commission recognizes the ^{and insufficient legal bases for the petitioner's proposals} need for applicants to demonstrate the information is technically applicable to the prospective licensing action. Existing information may be referenced, however, need In addition, this information cannot be treated as resolved for the purposes of a hearing, in as much as principles of *res judicata* and collateral estoppel would not provide sufficient legal bases to support the petitioner's rulemaking proposal. Therefore, for these reasons, the Commission is denying the petition.

In addition, the Commission is denying the petitioner's proposal because certain key aspects of the proposal are based on a misapplication of the "current licensing basis" concept and the Backfit Rule. For ESPs and COLs there are no "current licensing bases" that exist with

peripheral or are not significant or which have been covered by prior environmental review" and to identify other environmental assessments and impact statements which are "related to but are not part of the scope of the statement under consideration." Another process to use prior information is "tiering." Tiering allows federal agencies to rely on previous environmental assessments (EAs) and EISs to aid in the presentation of issues, eliminate repetition, or reduce the size of an EIS. Tiering is encouraged by the Council on Environmental Quality (see 40 CFR 1520.20), and the NRC's regulations permit the use of tiering and incorporation by reference (see 10 CFR Part 51, Appendix A.1.(b)). The Commission expects that both scoping and tiering will be used in appropriate circumstances to limit and focus the environmental issues to be addressed in an EIS for an ESP application for a site near an existing licensed facility.

The Commission also expects that the NRC staff's licensing review of an application for an ESP located at or near the same site as a current or formerly licensed facility will draw upon, and be informed by, the body of information that has already been amassed for that site as part of the previous licensing review. After demonstrating the relevance and technical adequacy of the baseline of information for that site, the ESP application and the NRC's review ^{should} may be focused on determining whether (1) there is significant new information for determining site characteristics; (2) there are new methodologies or techniques for collecting and analyzing information on site characteristics which have been developed since the earlier review and which are now accepted by the staff for conducting such collections and analyses; and (3) the regulatory requirements governing the site evaluation and the criteria for acceptance of the site have changed since the earlier review. On December 23, 2002, the NRC staff issued NRR Review Standard, RS-002, "Processing Applications for Early Site Permits: Draft for Interim Use and Public Comment," (ADAMS Accession No.: ML023530045). The objective of this document

different plant to be licensed to a different location on the same site and perhaps an entirely different licensee, as is contemplated under the petitioner's proposed rule. For these reasons, the Commission does not find that any of these rulemakings constitute a valid legal model for the petitioner's proposed rulemaking.

Misapplication of "Current Licensing Basis" Concept and the Backfit Rule

While the Commission expects that practical efficiencies, as described above, would be realized from using previously filed information, the petitioner's proposal does not represent a viable approach for achieving such efficiencies. Paragraphs (b) through (f) of proposed § 52.16 constitute the heart of petitioner's proposal, viz., resolution of issues in an ESP proceeding. However, the NRC regards the proposal as a misapplication of the "current licensing basis" concept and the Backfit Rule. The petitioner's proposal uses the term "current licensing basis" in the context of a site for which a construction permit or license has been issued. The NRC developed this concept for renewing nuclear power plant operating licenses under 10 CFR Part 54. The NRC uses the concept to determine the scope of the NRC safety review necessary to support the NRC's decision to renew a nuclear power plant's operating license. The NRC limited the scope of the NRC safety review for license renewal partly because the NRC has already made a licensing finding for the facility. Furthermore, as part of the Part 54 rulemaking, the NRC completed a comprehensive examination of NRC's post-licensing regulatory activities and determined that for all facilities the current licensing bases have been subject to continuing NRC oversight and have been appropriately updated. Thus, a broad-scope safety review against current requirements is unnecessary at license renewal. The renewed license is issued to the same facility for which the NRC previously granted operating authority, and except for aging management programs, the operating authority for the facility

to treat such information as resolved

for a different facility

must be submitted by the applicant and evaluated by the NRC to demonstrate that the site is suitable.

The applicant would need to demonstrate, and the NRC must find, that the data originally collected to determine the suitability of a specific reactor type to be constructed and operated at a specific location supports the suitability of the site for some as-yet-unspecified design. The certified designs and contemplated designs provide a range of depths of embedment and implications for hydrological radionuclide transport. In addition, the applicant needs to demonstrate that the data collected more than 20 years ago ^{for example} is still relevant, given the current knowledge of regional seismic activity, current data collection and analytical methods, and that the acceptance criteria of the previous licensing action are still relevant. There have been advances in the knowledge of seismic activity in the United States and how ground motion propagates from the seismic source to the site, particularly in seismic source zones such as the New Madrid and the Wabash Valley regions in the Midwest. There have been changes in the state-of-the-art techniques for performing subsurface investigations, (e.g., cone penetrometer testing and suspension logging inside one of the deep boreholes rather than across two boreholes). Furthermore, the reactor site criteria in 10 CFR Part 100 were significantly revised in 1996, (61 FR 65176; December 11, 1996). The applicant would have to supplement the geotechnical information as necessary to meet the current requirements of the revised Part 100.

The NRC would need to evaluate the geotechnical and seismic information against the current knowledge of regional seismic activity, the current data collection and analytical methods, and the current acceptance criteria to make its safety determination against the revised Part 100. Thus, even in the most favorable case, the NRC believes that additional information, analyses and evaluation is necessary to determine whether existing findings on

not be changed after the NRC has issued the license, except as permitted in the Backfit Rule. The Backfit Rule established regulatory criteria to be used by the NRC in evaluating proposed new and changed regulatory requirements and changes in NRC interpretations and findings with respect to compliance with those requirements.

An ESP applicant, albeit one that already possesses a construction permit or operating license at the site for which an ESP is being sought, has no regulatory expectation that the NRC's determination of 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 at the site. An ESP application, submitted years after the issuance of the construction permit or license for an existing facility on the site, cannot reasonably be viewed as implicating the "regulatory stability" concept underlying the current Backfit Rule. The NRC further notes that the petitioner's proposal would also permit an ESP applicant that does not have a construction permit or license at the site to reference the "current licensing basis" of another licensee's facility located at the proposed ESP site. ^{and treat as resolved} Again, under current regulatory practice the ESP applicant does not have any reasonable expectation of regulatory stability with respect to *its* new application, inasmuch as the NRC has not taken any licensing action *for the ESP applicant* with respect to a facility located at that site.

Summary of Denial of Petitioner's ESP Proposal

In summary, most of the efficiencies and regulatory stability and predictability which are the object of the petitioner's proposal can be achieved under existing regulations and the guidance that the Commission has directed the staff to prepare. In addition, key aspects of the petition are based on a misapplication of the "current licensing basis" concept and the Backfit

The bases for evaluating the acceptability of the COL application would be established, in part, by the siting and programmatic information for which the applicant proposes to incorporate by reference from the "current licensing basis" of an existing licensed facility located at the same site or another site owned or operated by the COL applicant. See proposed § 52.80(b). The information incorporated by reference that need not be supplemented in accordance with § 52.16(b) or (c), or § 52.80(b)(1), would be treated as resolved, unless the NRC complies with the Backfit Rule. See proposed § 52.16(d). The information incorporated by reference that must be supplemented under § 52.16(b) or (c), or § 52.80(b)(1) would be subject to NRC review and approval, and the Backfit Rule would not apply.

Use of Information From Prior Licensing Actions

The petitioner's proposals to give prior NRC staff regulatory determinations and NRC adjudicatory decisions preclusive effect in subsequent COL proceedings are apparently rooted in a desire to maximize regulatory efficiency and predictability. The Commission shares the petitioner's desire that the regulatory processes for review and approval of COLs be fair and efficient and maximize regulatory stability and predictability. Clearly, the nature of review of a program for a new facility, which is based, in whole or in part, on a program currently being implemented at a licensed facility, should be different in approach than where the NRC is reviewing the adequacy of the program for the first time. Moreover, the Commission also recognizes that the context in which the review of program adequacy of a new plant is fundamentally different than when currently licensed plants were being reviewed and licensed. The regulatory standards and review criteria for many existing plants were being developed for the first time or were evolving concurrently with the original licensing of those plants. The NRC's review of the adequacy of an operating license applicant's proposed operational

programs occurred without extensive operational experience or data, and therefore, took conservative approaches to predicting the efficacy of such programs. Today, however, the NRC has the benefit of a body of regulatory requirements developed over a 45-year time span, and substantial experience and knowledge collected over 40 years on over 100 plants with thousands of reactor-years of operation. The Commission believes that the licensing review process can take advantage of this body of information and experience to focus the NRC's review of COL applications when the application references an existing program currently being implemented at another nuclear power plant. Indeed, there are substantial regulatory advantages where an applicant proposes to implement an existing proven program at a new plant, if the applicant demonstrates that such reliance is appropriate and technically justified. A mature program is likely to have been revised to reflect corrective actions and lessons learned. Application of such a program to a similar situation at a different nuclear power plant may be preferable to developing and implementing a completely new, untested program. That might *approach would likely* avoid the need for overly conservative program elements to compensate for unknowns and unproven assumptions or correcting errors in ineffective programs. *This*

Therefore, the Commission expects that the licensing review for COLs that rely upon existing programs at other plants will draw upon, and be informed by, the body of information associated with that program's approval and implementation over the years, so that review will be focused *and legal (or regulatory)* on technical issues of merit, and the review will avoid re-review of matters for which there does not appear to be significant new information or technical considerations. In such cases, the NRC's review should be focused on determining whether (1) there is significant new information on relevant issues; (2) there are new methodologies or techniques for complying with a relevant performance-based regulatory requirements, developed since the original program review and approval, which are now accepted as the "industry norm" for

complying with that requirement; ^{and} or (3) the relevant regulatory requirements governing the evaluation and approval of that program have changed since the earlier review and the existing program was not required to comply with the updated requirements. The Standard Review Plan (SRP) contains the staff's acceptance criteria that would be used in reviewing new applications, including COLs. The Commission has directed the staff to develop criteria for review of COL applications when the application references programmatic information from another license.* The Commission believes that the SRP, together with the review guidance to be developed, will provide the licensing discipline necessary to ensure that the NRC's review of COL applications is appropriately focused.

In addition, the Commission reiterates that prior adjudicatory holdings on matters of law have precedential weight in subsequent adjudicatory proceedings, and that there may be occasions where *res judicata* and collateral estoppel may be applied in a COL proceeding to avoid relitigation of claims and issues raised by the same parties in an earlier proceeding. However, for the reasons discussed in the context of ESPs, the Commission does not believe that *res judicata* or collateral estoppel would provide a legal basis for the petitioner's rulemaking proposals on COLs.

Misapplication of "Current Licensing Basis" Concept and the Backfit Rule

As with the ESPs, the Commission expects practical efficiencies may be realized from using previously filed information. ^{to treat such information as resolved} However, the petitioner's proposal does not represent a viable approach for achieving such efficiencies. The fundamental objective of the petitioner's

*The COL guidance will use the same ESP criteria for assessing siting information developed in an earlier licensing proceeding, as described in the section on ESPs.

proposal, viz., resolution of issues and regulatory standards in a COL proceeding referencing an earlier licensing decision, appears to be based on a misapplication of the "current licensing basis" concept and backfitting. The "current licensing basis" concept was intended only to apply to renewal of a license for a nuclear power plant. It was not intended, and has no regulatory meaning, in the context of licensing another separate and unrelated facility that may be located at the same site—much less a separate facility located at a different site. Moreover, with respect to information on compliance with programmatic requirements which may be incorporated by reference, proposed § 52.80(b) does not require the COL applicant to demonstrate that the programmatic information is relevant and technically applicable to the proposed COL site and facility.⁵ For example, under the petitioner's proposal, an applicant referencing an emergency plan from a licensee-owned facility located at a different site need not demonstrate that the siren alerting system for the referenced plant would be effective at the COL site. Thus, the petitioner's proposal to extend the "current licensing basis" concept in the manner contemplated by its proposed § 52.80 is not technically acceptable.

In addition, the NRC does not believe that programmatic information for an existing facility, even if that information was routinely updated in accordance with the NRC's regulatory requirements (e.g., 10 CFR 50.71(e) and 10 CFR 50.59) and oversight activities, may simply be "imported" and used at a new facility either at the same site (or a different site). In general, it is unlikely that such wholesale "importation" of programmatic information without change or supplementation to reflect the new facility and its location can be justified without NRC

⁵This may have been a drafting error on the part of NEI, which could be corrected by including a provision in the proposed § 52.80 requiring the COL applicant to demonstrate that the programmatic information from the referenced site and facility is relevant and technically applicable to the proposed COL site and facility. However, inclusion of such a provision would not address the other concerns with respect to "current licensing basis," backfitting, and regulatory effectiveness.

The petitioner's analogy is inapt. After the NRC licenses a facility, the safety and environmental findings made when NRC initially authorized the facility's construction and operation remain effective throughout the term of the license, and need not be revisited in their entirety in a subsequent license amendment proceeding of limited scope. Only those matters which are within the scope of the proposed license amendment and, therefore, are affected by the amendment, fall within the scope of the NRC's consideration of the license amendment.

Contrary to the petitioner's suggestion, an application for an ESP or COL is not analogous to a license amendment. The NRC's review of an ESP or COL application is the NRC's initial licensing action. As suggested in the earlier discussion on backfitting, the NRC's licensing decision for a facility located on a specific site is limited to that facility. The NRC never envisioned that its licensing decision for that facility would have any regulatory significance years later for either a new, separate facility (likely of different design) located at the same site, or a new, separate facility to be located at an entirely different site.

Table S-3 and Spent Fuel Storage Casks

The petitioner states that the Table S-3 generic environmental rulemaking and the rulemakings approving spent fuel storage casks are regulatory precedents for making generic findings by rulemaking, and thereby reducing the scope, or eliminating the need for consideration, of matters in a facility-specific hearing.

The NRC does not regard these rulemakings as analogous to the proposed §§ 52.16 and 52.80. In the Table S-3 rulemakings, the Commission made generic environmental findings which were applicable to all light-water-cooled nuclear power plants. In every spent fuel storage cask rulemaking, the Commission made generic safety and environmental findings

Implementation of changes without prior NRC approval is not valid for original licensing proceedings.

Conclusion

In conclusion, the petitioner proposes to incorporate by reference existing information for the site and, by so doing, eliminate the need for what it believes is duplicate applicant preparation and NRC review of existing information relating to a licensed facility that has been previously approved by the NRC and has been subject to a public hearing. The Commission is denying the petition because most of the efficiencies and regulatory stability and predictability which are the object of the petitioner's proposal, can be achieved under existing regulations and the guidance that the Commission has directed the staff to prepare. In addition, the Commission is denying the petition because key aspects of the petition are based on a misapplication of the "current licensing basis" concept and the Backfit Rule, and the petition does not represent a viable approach for achieving the desired efficiencies.

For these reasons, the Commission denies the petition.

Dated at Rockville, Maryland, this day of , 2003.

For the Nuclear Regulatory Commission

Annette Vietti-Cook,
Secretary of the Commission.



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

Mr. Robert W. Bishop
Vice President and
General Counsel
Nuclear Energy Institute
Suite 400
1776 I Street, NW
Washington, DC 20006-3708

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)

Dear Mr. Bishop:

I am responding to your letter of July 18, 2001, which submitted a petition for rulemaking on behalf of the Nuclear Energy Institute (NEI). Your petition requested that the NRC amend its regulations to allow applicants seeking an early site permit (ESP) and a combined license (COL) to use existing information from prior licensing actions as resolved information that has been approved by the NRC and has been subject to a public hearing.

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.

As the NRC staff understands your petition, the 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 information which 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 per the provisions in your proposal. Information incorporated by reference that does 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. Information incorporated by reference which must be supplemented would be subject to NRC review and approval, and the Backfit Rule would not apply.

^{advantages}
The NRC recognizes the benefits of licensing plants in a mature industry environment, rather than an emerging industry as was the case for the majority of the existing plant licenses. To the extent practicable, most of the efficiencies, regulatory stability and predictability which are the object of your proposal can be achieved under existing regulations and the guidance that the Commission has directed the staff to prepare. In addition, several key aspects of the petition are based on a misapplication of the "current licensing basis" concept and the Backfit

For example, referencing already proven programs utilized by a mature industry is much less uncertain than new programs proposed for an emerging industry.



REQUEST REPLY BY: 7/31/03

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

COMSECY-03-0033

July 16, 2003

Approved with
edits
Elle Joffe
7/29/03

MEMORANDUM TO:

Chairman Diaz
~~Commissioner McGaffigan~~
Commissioner Merrifield

FROM:

William D. Travers 
Executive Director for Operations

SUBJECT:

TRANSMITTAL OF REVISED FEDERAL REGISTER NOTICE -
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SECY, please track.

Attachments: As stated

cc: SECY
OGC
OCA
OPA
CFO

Contact: Stephen Koenick, NRR/NRLPO
(301) 415-1239

respect to a new facility—including a new facility to be located adjacent to a site of an existing licensed facility.

Early Site Permits

According to the petitioner's proposal, the siting information to be used as a basis for evaluating the acceptability of an ESP application for a site that is near a site for which a construction permit or license has been previously issued^{licensed} by the NRC¹ would be established, in part, by the siting information which the applicant proposes to "incorporate by reference" from the "current licensing basis" for ^{the prior} that construction permit or license. See proposed § 52.16(a). 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 applicant, information on cumulative radiological impacts, and information addressing new regulations. See proposed § 52.16(b). The information incorporated by reference that need not be supplemented under paragraph (b), would be treated as resolved, unless the NRC met the Backfit Rule. See proposed § 52.16(d). The information incorporated by reference that must be supplemented under paragraph (b) would be subject to NRC review and approval, and the Backfit Rule would not apply. A similar approach would be used for environmental information. See proposed § 52.16(c) and (f) [sic].

X

X

¹In pre-application interactions, two of the prospective ESP applicants have identified the physical locations of the proposed facilities to be at different locations on the proposed sites than were considered during the previous licensing actions.

must be submitted by the applicant and evaluated by the NRC to demonstrate that the site is suitable.

The applicant would need to demonstrate, ~~and the NRC must find,~~ that the data originally collected to determine the suitability of a specific reactor type to be constructed and operated at a specific location supports the suitability of the site for some as-yet-unspecified design. The certified designs and contemplated designs provide a range of depths of embedment and implications for hydrological radionuclide transport. In addition, the applicant needs to demonstrate that the data collected more than 20 years ago is still relevant, given the current knowledge of regional seismic activity, current data collection and analytical methods, and that the acceptance criteria of the previous licensing action are still relevant. There have been advances in the knowledge of seismic activity in the United States and how ground motion propagates from the seismic source to the site, particularly in seismic source zones such as the New Madrid and the Wabash Valley regions in the Midwest. There have been changes in the state-of-the-art techniques for performing subsurface investigations, (e.g., cone penetrometer testing and suspension logging inside one of the deep boreholes rather than across two boreholes). Furthermore, the reactor site criteria in 10 CFR Part 100 were significantly revised in 1996, (61 FR 65176; December 11, 1996). ^{Therefore, none of the currently licensed reactor sites} The applicant would have to supplement the ^{utilized} geotechnic information as necessary to meet the current requirements of the revised Part 100. ^{current reactor siting criteria}

The NRC would need to evaluate the geotechnical and seismic information against the current knowledge of regional seismic activity, the current data collection and analytical methods, and the current acceptance criteria to make its safety determination against the revised Part 100. Thus, even in the most favorable case, the NRC believes that additional information, analyses and evaluation is necessary to determine whether existing findings on

basis for the plant, inasmuch as they are unnecessary to support emergency action determinations. Furthermore, the meteorological data previously collected to support the existing facility's design may be insufficient to characterize the release characteristics unique to the specific design (or the envelope of designs) that may be built under the ESP. For example, the NRC guidance contains different consequence analyses, viz., elevated release versus ground-level release (and therefore the meteorological data necessary to support such analyses), depending upon whether the facility is a boiling water reactor or a pressurized water reactor. The application and review effort would only increase if the ESP was for an alternate location on the site. The distance between the existing licensed facility (or footprint for a facility that was authorized but not constructed) and the proposed facility may result in sufficient terrain differences or orientation differences ^{to} that call into question the applicability of the meteorological data collected at the existing facility to a facility that may be constructed under the proposed ESP. X

In summary, prior NRC findings with respect to the characteristics of a site and compliance with the then-current regulatory requirements with respect to an existing facility, updated in accordance with exiting requirements and practices, does not ensure that the data is sufficiently accurate and comprehensive to support a current ESP siting determination. Thus, the petitioner's proposal to extend the concept of a "current licensing basis" in the manner contemplated by its proposed § 52.16 is technically inappropriate.

The NRC also believes that the petitioner's proposal would essentially extend the Backfit Rule to situations for which the policies underlying the Backfit Rule are not applicable. The Backfit Rule was intended to address a licensee's expectation of regulatory stability. ~~That is, a~~ ^A licensee expects that the terms and conditions of the licensee's authority under a license will X

not be changed after the NRC has issued the license, except as permitted in the Backfit Rule. The Backfit Rule established regulatory criteria to be used by the NRC in evaluating proposed new and changed regulatory requirements and changes in NRC interpretations and findings with respect to compliance with those requirements.

the application to existing facilities of

An ESP applicant, albeit one that already possesses a construction permit or operating license at the site for which an ESP is being sought, has no regulatory expectation that the NRC's determination of 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 at the site. An ESP application, submitted years after the issuance of the construction permit or license for an existing facility on the site, cannot reasonably be viewed as implicating the "regulatory stability" concept underlying the current Backfit Rule. The NRC further notes that the petitioner's proposal would also permit an ESP applicant that does not have a construction permit or license at the site to reference the "current licensing basis" of another licensee's facility located at the proposed ESP site. Again, under current regulatory practice the ESP applicant does not have any reasonable expectation of regulatory stability with respect to *its* new application, inasmuch as the NRC has not taken any licensing action *for the ESP applicant* with respect to a facility located at that site.

Summary of Denial of Petitioner's ESP Proposal

In summary, most of the efficiencies and regulatory stability and predictability which are the object of the petitioner's proposal can be achieved under existing regulations and the guidance that the Commission has directed the staff to prepare. In addition, key aspects of the petition are based on a misapplication of the "current licensing basis" concept and the Backfit

which were applicable to every spent fuel storage cask constructed in accordance with the specific cask design approved in that rulemaking. Moreover, each cask design was reviewed and approved by the Commission through the rulemaking for generic use across the United States. By contrast, the NRC licensing determinations, which petitioner's proposals would permit an ESP and COL applicant to reference, are not generic but are limited solely to a consideration of an applicant's proposals and relevant information available at the time of the proposal. Nor did the NRC approve the applicant's proposals with the understanding that they would be deemed by rule to be acceptable in a subsequent licensing proceeding for a different facility, without a requirement that their suitability for use in the subsequent licensing action be assessed. *and notice to the public,*

Quality Assurance and Facility Procedure Change Process

The petitioner cites the quality assurance (QA) program change process under § 50.54(a)(3)(ii), and the facility and procedure change process under § 50.59(a)(2)(ii) as examples of situations in which the NRC by rule permits a licensee to implement changes that have been previously approved by the NRC for use by other licensees. See petition at p.8.

While the NRC acknowledges that these two regulatory provisions permit a licensee to implement changes that have been previously approved by the NRC for use by other licensees, these provisions both require that the licensee demonstrate that the proposed change previously approved by the NRC is applicable to the licensee's facility. For example, § 50.54(a)(3)(ii) requires a licensee desiring to make a QA program change to demonstrate that "the bases of the NRC approval are applicable to the licensee's facility." Such a demonstration is not required by proposed § 52.80(b). Therefore, the petitioner's analogy to the



REQUEST REPLY BY:

7/31/03

UNITED STATES
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COMSECY-03-0033

July 16, 2003

Concur subject to the
edits of Chairman Diaz.

MEMORANDUM TO:

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~~Commissioner Merrifield~~

FROM:

William D. Travers
Executive Director for Operations

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