REQUEST REPLY BY: 3/23/06

COMGBJ-06-0002

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

COMMISSIONER

Disapproved with comments.

March 8, 2006

Nils J. Diaz 5/21/06
Date

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Lyons

FROM: Gregory B. Jaczko

SUBJECT: VERMONT YANKEE'S EXTENDED POWER UPRATE LICENSE AMENDMENT

I have substantial concerns about the decision to make the license amendment approving the requested Vermont Yankee extended power uprate application immediately effective. While I understand that amendments to the Atomic Energy Act, and later revisions to NRC's regulations, allow for this to occur, they only do so if a "no significant hazards consideration" (NSHC) determination is reached. If such a determination is made, the NSHC then allows the license application to be issued prior to a hearing on the application. At first blush, the instance of the Vermont Yankee extended power uprate application does not appear unusual in this respect. As is permitted by statute and regulations, the license amendment application was made immediately effective following the staff's NSHC determination despite the pendency of an ongoing adjudicatory proceeding.

This case, however, is not quite that simple and it is this complexity that gives me reason for pause. At this point in time, the NRC staff has reviewed numerous power uprate requests and should, therefore, have ample experience with the issues surrounding a no significant hazards consideration determination for these applications. In this instance, however, the staff's determination regarding significant hazards did not come shortly after the filing of the application as you would expect with such routine amendments. Instead, the NSHC determination analysis came only after the issuance of the staff's safety evaluation report (SER). This in and of itself reveals that this determination was obviously complex - more of an analysis regarding whether there were *significant hazards* rather than an analysis of whether the application involved significant hazards *considerations.* A brief review of the legislative history surrounding the "Sholly amendment" which gave rise to this statutory provision, however, demonstrates that such a review is inconsistent with the intent of the provision.

Based upon this history, it appears that in complex cases like that confronting the NRC in Vermont Yankee's application, the agency has misapplied the implementation of the NSHC determination. The Conference Committee Report surrounding the relevant amendment to the Atomic Energy Act directed the NRC to establish standards to determine whether or not a license amendment involved a significant hazards consideration. According to the language of the report, the standards

Chairman Diaz's Comments on COMGBJ-06-0002

I agree with Commissioner Lyons that the existing NSHC determination process is acceptable and that the staff appropriately followed this process in the Vermont Yankee case. I appreciate the efforts of Commissioner Lyons in developing the detailed analysis presented in his vote.

The points made in the COMGBJ appear to stem from statements in the Conference Committee Report surrounding the "Sholly amendment" to the Atomic Energy Act. Two statements in the Conference Report are directed at ensuring that NSHC determination do not influence the safety evaluation of the amendment application. Another statement indicates that the standards for NSHC determinations should be capable of being applied with ease and certainty. The staff appropriately and deliberately chose to be cautious in the Vermont Yankee case and should not be faulted for doing so. In addition, Congress did not stipulate that the ease and certainty standard must be achievable soon after receipt of the amendment application. In the Vermont Yankee case, the staff was able to apply the standards with ease and certainty once it had completed its technical evaluation. I commend the staff for its cautious implementation of the NSHC determination standards in the Vermont Yankee case.

5/11/06

REQUEST REPLY BY: 3/23/06

COMGBJ-06-0002

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COMMISSIONER

Disapproved
See attached
comments.
E Mc Gaffigan Jr.
5/16/06

March 8, 2006

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Commissioner Lyons

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Commissioner McGaffigan's Comments on COMGBJ-06-0002

I join Commissioner Lyons in disapproving Commissioner Jaczko's proposal to amend the staff's current implementation of the "no significant hazards consideration" (NSHC) determination. There is therefore absolutely no need to stay the effectiveness of the license amendment granted by staff until the end of the pending adjudication on this amendment.

As Commissioner Lyons points out, the staff followed a process explicitly provided for its NSHC determination. The staff resolved all public comments on pages 315-329 of its safety evaluation report on the proposed NSHC determination issued on January 11, 2006. The staff clearly articulates why each of the criteria in 10 CFR 50.92(c) are met in this instance.

My only slight difference with Commissioner Lyons is that I do believe that the staff could have reached this judgment earlier based on their experience with previous extended power uprate license amendments. Certainly the staff's hands should not be tied by an example of a power uprate as involving significant hazards considerations (particularly since the examples were never meant to be static). Nor is there anything magical about the 7 percent power uprate level Commissioner Jaczko proposes as the demarcation point beyond which a NSHC determination would not be possible. Clearly the staff now has a clear track record that 20 percent power uprates at boiling water reactors meet the 10 CFR 50.92(c) criteria.

E McGaffigan Jr. 5/16/06

Edward McGaffigan, Jr. (Date)

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WASHINGTON, D.C. 20555

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March 8, 2006

5/22/06

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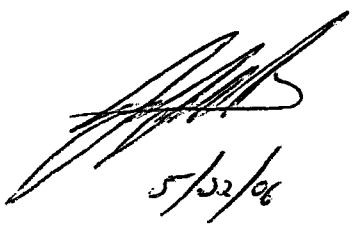
Commissioner Merrifield's Comments on COMGBJ-06-0002

Although I appreciate Commissioner Jaczko's concerns expressed in this COM, I must vote to disapprove his requested courses of action. Commissioner Lyons has conducted a thorough review of the legal sufficiency of the regulations implementing our section 189a authority, as well as the staff's application of these regulations in reaching its "no significant hazards consideration" determination with regard to the Vermont Yankee extended power uprate application. I agree with him that our regulations and the process used in the case of Vermont Yankee are legally sound and comply with the original intent of Congress when it granted the NRC authority to make license amendments immediately effective. On this basis, I do not believe direction to the staff to re-establish the policy that power uprates over 7% are likely to involve a significant hazards consideration determination or direction for the staff to review its NSHC process is necessary.

To the extent that Commissioner Jaczko is asking the Commission to deviate, as a matter of *policy*, from our past practice in making NSHC determinations, I cannot agree with him in this instance. I agree that the criteria in 10 CFR § 50.92 should be applied with "ease and certainty," but in my mind, such a standard does not necessarily equate to "quickly." Commissioner Jaczko appears to be concerned with the timing of the staff's NSHC determination, i.e. that it "did not come shortly after the filing of the application as you would expect with such routine amendments." I am unwilling to stay the effectiveness of this amendment on the grounds that the staff took approximately two months from the time of the hearing request to issue its NSHC determination. I would be reluctant to take any action that would send a message to the staff that it will be criticized for conducting a thorough review of an issue prior to taking a position.



REVISED RESP DT: 3/23/06

COMGBJ-06-0002

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

COMMISSIONER

Disapproved, with comments.

March 8, 2006

Peter B. Lyons 5/12/06
Peter B. Lyons Date

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Commissioner Merrifield
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Commissioner Lyons' Comments on COMGBJ-06-0002

In COMGBJ-06-0002, Commissioner Jaczko describes his concerns stemming from the staff's "no significant hazards consideration" (NSHC) determination made with respect to Vermont Yankee's extended power uprate (EPU) license amendment. While I appreciate Commissioner Jaczko's efforts in raising this matter to the Commission, I respectfully vote to disapprove COMGBJ-06-0002. A review of the legislative history, Commission's regulations, and staff policy demonstrates that the NSHC determination process is fully acceptable and was appropriately followed in the Vermont Yankee EPU matter. Therefore, the proposed actions sought by Commissioner Jaczko are not warranted.[1]

As Commissioner Jaczko notes, a license amendment may be issued prior to a hearing on the application if the staff makes a NSHC determination. The Sholly amendments to § 189a of the Atomic Energy Act allow the Staff to issue an immediately effective license amendment following a NSHC finding.[2] The Commission's regulations set forth the overall NSHC determination process.[3] They specify that a prior hearing is required if the NRC makes a final determination that a significant hazards consideration is involved.

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[1] Based on his concerns, Commissioner Jaczko seeks to: 1) stay the effectiveness of the Vermont Yankee license amendment until the outcome of pending adjudication on the application; 2) direct that extended power uprates be considered to likely involve a significant hazards consideration determination; and 3) require an options paper, which should include rulemaking proposals, that would review the NSHC determination process to ensure the "original intent" of the NSHC determination is followed.

[2]Specifically, section 189a.(2)(A) of the Atomic Energy Act states:

> The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing.

[3] The Commission's regulations provide that the Commission will publish in the *Federal Register* a notice of proposed action for an amendment for which it makes a proposed determination that NSHC is involved. 10 CFR § 50.91(a)(2)(I). For each amendment proposed to be issued, the notice will (A) contain the staff's proposed determination under the standards [for NSHC], (B) provide a brief description of the amendment and facility involved, ©) solicit public comments on the proposed determination, and (D) provide for a 30-day comment period. 10 CFR § 50.91(a)(2)(ii).

The Commission will not make a final determination on NSHC unless it receives a request for a hearing on that amendment request. 10 CFR § 50.91(a)(3). If the final determination is that NSHC are involved, the amendment will be effective on issuance despite the pendency of a hearing on the amendment. If the final determination is that a significant hazards consideration is involved, the Commission will provide an opportunity for hearing prior to the amendment's issuance. 10 CFR § 50.91(a)(4).

Neither the statute nor the Commission's regulations requires that a notice of opportunity for a hearing include a proposed finding as to whether the proposed action involves a significant hazards consideration. A final NSHC determination does not need to be made unless there is a request for a hearing.

This is the process the staff followed with respect to the Vermont Yankee EPU amendment issuance. For the Vermont Yankee EPU, the staff's initial notice of opportunity for hearing on July 1, 2004 did not contain a proposed NSHC determination. 69 Fed. Reg. 39,976. Rather, its proposed NSHC determination was published on January 11, 2006, following receipt of a request for a hearing. 71 Fed. Reg. 1774. After receipt and evaluation of comments, a final NSHC determination was issued on March 2, 2006. *See* 71 Fed. Reg. 11,682. The staff's actions were thus in accordance with both the AEA and the Commission's regulations.

Commissioner Jaczko does not appear to take issue with the effect of the staff's NSHC determination in the Vermont Yankee matter. Rather, the gravamen of Commissioner Jaczko's concern is that a NSHC determination should not have been made at all. According to him, because the NSHC determination "could not be finalized without the staff's safety evaluation report" (SER), the staff appears not to have met the principles articulated by Congress and the Commission. He highlights the following principles:

- A NSHC determination should not "prejudge the merits" of the amendment request.
- A NSHC determination should be capable of being made with "ease and certainty."

An examination of these principles in light of the staff's NSHC determination practice demonstrates that the staff's infrequent use of its SER to inform the NSHC determination is fully acceptable and does not run afoul of the intent of Congress and the Commission.

What Comes First: the NSHC Determination or the SER?

The staff is not precluded from making a NSHC determination at the time it issues the SER, although, normally, a proposed NSHC determination will precede the issuance of the SER. In this regard, the Statements of Consideration for the "Final Procedures and Standards on No Significant Hazards Considerations" specify that when the staff receives the amendment request "it makes a preliminary decision - - called a 'proposed determination' - - about whether the amendment involves no significant hazards considerations. Normally, this is done before completion of the safety analysis or evaluation." 51 Fed. Reg. 7744, 7759 (1986) (emphasis added). There are occasions, however, where the staff may choose to defer making a NSHC determination until after the completion of its technical review, or, if no hearing is requested, not make a determination at all.[4]

The Commission's regulations provide that the staff is to issue its approval or denial of the application promptly in accordance with its own review of the application, despite the pendency of a hearing. 10 CFR § 2.1202(a). Once the safety evaluation is complete, it and the NSHC finding may be formally included in a single document - the SER. In the case in which a hearing is requested, it makes sense to do so because both findings must be made in order to issue an amendment. In that case, it is convenient to both the public and the Commission to publish both in a single document.

- *NO PREJUDGING THE MERITS OF THE SAFETY CASE*

As Commissioner Jaczko notes, the Commission has stated that the NSHC determination standards and examples "are merely screening devices for a decision about whether to hold a hearing before as opposed to after an amendment is issued and cannot be said to prejudge the Commission's final decision to issue or deny the amendment request." 48 Fed. Reg. 14,864, 14,869 (1983) (emphasis added). Commissioner Jaczko states that it is difficult to see how the Vermont Yankee NSHC determination can be referred to as a "screening device" or how the staff determined the NSCH without "prejudging the merits" of the issues raised in the license amendment application when it "relied upon the staff's safety analysis in reaching its findings."

The simple answer is that the criteria for making a NSHC determination are different from those the Commission applies in determining whether to issue an amendment. In the passage above the Commission is confirming that it followed Congress' expectation that it establish standards for NSHC determinations that do "not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment."[5]

A final NSHC determination can be made if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability of an accident previously evaluated; (2) create the possibility of a new or different kind or accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. 10 CFR § 50.92. There is no "intrinsic safety significance" to the NSHC standard. Rather, it is "a procedural standard which governs whether an opportunity for a prior hearing must be provided before action is taken by the Commission." 51 Fed. Reg. 7744, 7746.

By contrast, "no amendment may be issued unless the Commission concludes that it provides reasonable assurance that the public health and safety will not be endangered and that the action will not be inimical to the common defense and security or to the health and safety of the public." 48 Fed. Reg. 14,864, 14,865. *See also* 10 CFR § 50.57 (issuance of operating license). Thus, the findings are different, although they may be documented together.

Moreover, it is fully acceptable to have the final NSHC determination informed by the substantive safety evaluation. In such cases, the final NSHC does not prejudge the merits of the license amendment application, rather the safety analysis may influence the NSHC determination.

Commissioner Jaczko states that the question of NSHC is "a question of significant safety

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[5] House Conference Report No. 97-884, at 37, reprinted in 1982 U.S. Cond Cong. & Ad. News 3592, 33608.

issues, not a question of significant additional risk."[6] Commissioner Jaczko states that the 9th Circuit Court of Appeals validated this assertion. The 9th Circuit, however, held that a prior hearing in a reracking case was required because NRC's analysis of the second [NSHC] factor in 10 CFR § 50.92 is "contradictory and in direct contravention of Congressional intent in enacting the Sholly amendment."[7] Thus, the Court did not strike down or substitute the NSHC determination criteria set forth in 10 CFR § 50.92 but, rather, concluded that NRC failed in that instance to follow it. The Court found that the NRC focused on a technical analysis of "why petitioners' claims lack merit" instead of whether the amendment creates the "possibility of a new or different kind of accident." The question of determining NSHC is whether the criteria in 10 CFR § 50.92 are being correctly applied.

Do Complex Safety Questions Preclude a NSHC Determination?

Much is made of this one sentence from the House Conference Report on the Sholly amendments:

> "[The NSHC] standards should be capable of being applied with ease and certainly, [sic], and should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration."[8]

- *EASE & CERTAINTY*

Commissioner Jaczko argues with respect to the Vermont Yankee NSHC determination that the determination was "obviously complex - more of an analysis regarding whether there were *significant hazards* rather than an analysis of whether the application involved significant hazards *considerations*," because the staff's determination came after the issuance of the staff's SER rather than shortly after the filing of the application. He states that applications receiving the NSHC determination were meant to be those that were "non-controversial; those that would have nothing of safety significance to raise in a hearing." He suggests that the fact that parties "raise significant safety contentions" in hearings before the Board, and the fact that "the staff [imposes] numerous license conditions" is determinative of whether a significant hazards consideration exists. This is a far reading from the plain language of the statute and is a significant departure from the Commission's regulations.

First, nowhere in any of the legislative history of the AEA or the Commission's regulations is it said that if the staff is unable to make a determination regarding the existence of a significant hazards consideration with ease and certainty a prior hearing is required. Rather, the passage quoted above states that the standards to be promulgated should be capable of being applied with ease and certainty. Thus, the passage speaks to the establishment of the standards themselves, which were promulgated over 20 years ago.

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[6] *See Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1,13 (1986) (views of Commissioner Asselstine).

[7] *See San Luis Obispo Mothers For Peace v. NRC*, 799 F.2d 1268, 1270 (9th Cir. 2006).

[8] House Conference Report No. 97-884, at 37, reprinted in 1982 U.S. Cond Cong. & Ad. News 3592, 33608.

Second, for the vast majority of NSHC determinations, the determination is made in advance of the issuance of the SER. In few cases, our so-called Category 3 notices, the staff chooses not to make that determination up front. The Commission recognizes that certain determinations may take longer to make than others. For example, in two sets of Statements of Consideration, the Commission warned licensees that for license amendments that do not fall within the examples of those deemed to involve NSHC, "it may need additional time for its considerations," which should be factored into scheduling. 51 Fed. Reg. 7744, 7749 (emphasis added). *See also* 48 Fed. Reg. 14,864, 14,868.

Third, by designating certain applications to be noticed without any NSHC determination, the staff is deferring such consideration until it has performed all or a part of the safety evaluation in those instances in which a hearing has been granted. This does not necessarily mean that the determination cannot be made with ease and certainty. It only is a staff choice to proceed with the determination at a later time. If, at that time, the staff identifies a significant hazards consideration, there will be a prior hearing (if a hearing is requested and granted) despite the completion of an SER approving the amendment. On those occasions, it is prudent for staff to wait until it can make a NSHC finding with the added benefit of the safety analysis. At that time, the staff is better equipped to make its determination with not just "ease," but "certainty."[9] The salient point is that even in cases in which the staff does not have the immediate ability to make a NSHC determination, so long as the staff can ultimately make that determination with ease and certainty, the staff may issue the amendment prior to holding any hearing on the matter.

Finally, I disagree with the suggestion that a finding of NSHC is relegated to matters that are "non-controversial," where parties to a hearing have not raised "significant safety contentions," and where the staff has not imposed "numerous license conditions." Such an interpretation replaces the criteria of 10 CFR § 50.92 with the combination of several unrelated considerations: the level of public interest in a matter (*i.e.* "controversy"); the contention admissibility standards of 10 CFR § 2.309; and the decision of the staff to impose license conditions. It is not accurate to state that the existence of any one of these conditions, without more, causes any one of the criteria in section 50.92 to be met.

- *BORDERLINE CASES*

NRC staff is not to "resolve doubtful or borderline cases with a finding of no significant hazards consideration." Nothing in the process followed by the staff defaults borderline cases to a NSHC finding. Rather, the staff conservatively and carefully applies the criteria in 10 CFR § 50.92. And if any one of the three criteria is found to be met, a significant hazards consideration is determined to be involved.

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[9] *See also* "Applications for License Amendments," GL-86-03, dated February 10, 1986 (addressing licensees' requirements to submit their 10 CFR § 50.92 analyses with their amendment requests). The staff noted in the GL that "the licensee must complete a safety evaluation before submitting the proposed amendment. Thus, the licensee should know on the basis of the completed technical evaluation whether the proposed amendment" meets the 10 CFR § 50.92 criteria. *Id.*

Are Power Uprates Special Cases?

Commissioner Jaczko notes that in 1983 the NRC deemed an increase in authorized maximum core power level to be "likely to involve significant hazards considerations." This does not mean, however, that over 20 years later, this must still hold true. Each amendment request must be judged against the criteria in 10 CFR § 50.92 and not viewed simply to see whether they fit an example.[10] Further, the examples are not static: the staff may refine the examples in light of new information.[11] Nothing in the operating and licensing experience since 1983 and nothing in the manner in which the staff made its NSHC determination in the Vermont Yankee case suggests that we should categorically and for all time decree that power uprates - even EPUs - involve significant hazards considerations. In fact, the staff in SECY-01-0142 found that sufficient evidence and information exist with respect to most power uprates to issue proposed NSHC determinations.

With respect to EPUs, the staff chose to be "cautious" about proposing NSHC determinations until the staff has had experience with a few EPU requests, and the staff stated that it would continue to notice applications for EPUs without proposed NSHC determinations.[12] I understand that the staff has now issued 10 extended power uprates.[13] With the experience of issuing 10 EPU applications, the staff may now be well-poised to make proposed NSHC determinations for EPU amendment requests routinely. Until the staff states it is ready to do so, however, the EPU process should mirror the approach taken in the Vermont Yankee matter.

/RA/ 5/12/06
Peter B. Lyons Date

[10] *See* 51 Fed. Reg. 7748.

[11] *See* 51 Fed. Reg. 7753.

[12] *See* SECY-01-0142.

[13] In only one other instance - the 1998 issuance of the Hatch amendment - did the staff include a final NSHC determination.