

## Public Comments on the Petition

The NRC received ten comments in response to the petition. Nine of the ten comments were in favor of the petition. Seven of the favorable comments were from nuclear utilities, one was from a vendor, and one was from the petitioner. These commenters summarized the arguments in the petition but provided no additional bases in support of the petition. They suggested that the petition be included in the current Part 52 rulemaking activity. One commenter, a member of a public advocacy group, opposed the petition.

## 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 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. For example, referencing already proven programs utilized by a mature industry is much less uncertain than new programs proposed for an emerging industry. 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 limitations to using previously filed information and insufficient legal bases for the petitioner's proposals. Existing information may be referenced, however, applicants need to demonstrate the information is technically applicable to the prospective licensing action. 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, 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 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 by the NRC<sup>1</sup> 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 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].

### Use of Information From Prior Licensing Actions

The petitioner's proposal implies that prior regulatory determinations by the NRC staff and licensing decisions in NRC adjudicatory proceedings with respect to siting for currently licensed plants should have preclusive effect in proceedings for ESPs to be located at or near a site for which a construction permit or operating license has been issued for another facility. The Commission recognizes that practical efficiencies may occur through

<sup>1</sup> In 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.

incorporation of previously filed information or reference in some instances to prior adjudicatory hearings.

The Commission's regulations and guidance already afford an applicant the opportunity to use information from prior licensing decisions. Under § 50.32, "Elimination of Repetition," an applicant may incorporate by reference information already filed with the Commission. This regulatory provision may be used by an ESP applicant to reference information from existing sources, including the safety analysis report and the environmental report on the facility which is near the location that the applicant proposes to obtain an ESP for. Although the current part 52 does not contain a provision that explicitly allows ESP applicants to take advantage of § 50.32, it was the intent of the Commission that the licensing provisions in Part 50 would be applicable to the licensing processes in Part 52. See SECY-02-0077 (May 8, 2002; ADAMS Accession No.: ML021040011), Attachment at p.10.

With respect to the agency's compliance with the National Environmental Policy Act (NEPA), the current part 51 regulations already permit an applicant or licensee to use prior information. Following the receipt of an ESP application, the NRC would conduct a scoping process involving interested stakeholders. Under the provisions of § 51.29(a), the NRC would use the scoping process to "identify and eliminate from detailed study those issues which are 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