

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 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 is to ensure that staff reviews of ESP applications and associated environmental reports (ERs) are efficient, effective, and consistent, and that the reviews result in high-quality products. The primary source of guidance for the site safety assessment review is applicable portions of NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants," as modified for the ESP review. The primary source of guidance for the ER review is applicable portions of NUREG-1555, "Standard Review Plans for Environmental Reviews for Nuclear Power Plants," as supplemented by RS-002. The Commission has directed the staff to develop specific criteria that the staff will use in making its determination whether former siting information must be supplemented and new findings made with respect to an ESP application at or near a previously licensed facility. In developing this guidance, the staff will consider the five criteria in proposed § 52.16 for augmenting information. RS-002 and the specific criteria will assist the NRC's review in determining whether the referenced information is technically relevant to the ESP and focus the review on newly identified issues of significant technical merit.

With respect to adjudicatory decisions, it is clear that Commission and Licensing Board holdings on legal issues in an earlier proceeding constitute precedent for all subsequent

proceedings where the same legal issue is presented. The Commission also believes that, apart from the issue resolution provisions in Part 52 applicable to an ESP referenced in a COL application, the doctrines of *res judicata* (or "claim preclusion") and collateral estoppel (or "issue preclusion") may be available to preclude certain claims and issues from being relitigated in an ESP proceeding where the same party has raised the claims and issues in an earlier licensing proceeding at or near a previously licensed facility. However, the Commission does not believe that either *res judicata* or collateral estoppel provides a sufficient basis for adopting the petitioner's rulemaking proposal. *Res judicata* applies where (1) there has been a final adjudication of the merits of a particular cause of action or claim by a tribunal of competent jurisdiction; and (2) one of the parties to that adjudication (or party in privity with such party) subsequently seeks to advance or defeat the same cause of action or claim in either the same proceeding or in a separate proceeding involving the parties to the first action or their privies. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 212 (1974). The related doctrine of collateral estoppel applies when (1) the issue for which preclusion is sought is the same issue involved in the previous action; (2) the issue was actually litigated; (3) the issue was determined by a valid final judgment; and (4) determination of the issue was essential to the prior judgment. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986); see also Alabama Power Co. (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 213 (1974) (collateral estoppel, unlike *res judicata*, does not require an identity between two causes of action). Additionally, the party in the second litigation, who is to be bound by the judgment of the prior litigation, must be in privity to a party in the earlier litigation.² *Id.* at 1560. The primary purpose of collateral estoppel and *res judicata* is to "protect litigants from the burden of relitigating an identical issue with the same party or his privy * * *." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Both doctrines operate in the interest of fairness and

² The concept of privity is the same for *res judicata* and collateral estoppel. It pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party.

efficient case management to bar a party to a prior litigation from relitigating an issue or claim resolved adverse to it in the prior litigation. Neither of these legal doctrines provides a basis for the petitioner's rulemaking proposals, inasmuch as the petitioner's proposed rule would attempt to bar any party, including a nonparty to the original proceeding, from raising the issue in the subsequent ESP proceeding whose application references the earlier proceeding.

The Commission does not agree with the petitioner's suggestion that the petitioner's proposed rule is akin to the License Renewal Rule, 10 CFR part 54, the generic environmental impact statement (GEIS) for license renewal which was adopted by rule in part 51, or part 52, each of which provide for a delineated scope of issue resolution and a bar to litigation. The limited scope of review at license renewal under part 54 was supported by technical bases which were referenced in the part 54 rulemaking. (See 56 FR 6443; December 13, 1991, and 60 FR 22461; May 8, 1995). For the GEIS supporting license renewal, the environmental issues were resolved on their merits as part of a rulemaking adopting the GEIS. (See 10 CFR part 51, appendix B to subpart A; 61 FR 66564; December 18, 1996). By contrast, the petitioner's proposed rule does not include any reviews of the technical basis or a rulemaking finding on the merits of the issues that would be precluded in later proceedings. With respect to part 52, the Commission explicitly stated that the rule establishes a process for determining the adequacy of siting (including related environmental issues) for a period of up to 20 years for the purpose of providing issue resolution in subsequent proceedings where the ESP is referenced. (See 54 FR at 15372, 15378; April 16, 1989). The public is provided notice and opportunity to participate in the ESP through a request for hearing. Thus, Part 52 establishes a regulatory regime whereby the public has fair notice that siting issues must be raised in the ESP proceedings, inasmuch as the Commission's resolution of the adequacy of siting will ordinarily be binding in a subsequent proceeding referencing that ESP. By contrast, when a current plant's siting decisions were considered in the construction permit proceeding, there was no knowledge or contemplation that issues reviewed and resolved in that construction permit proceeding would be given preclusive effect in another proceeding for an entirely different plant to be licensed to a different location on the same site and