

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 programs are reviewed for 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. This approach would likely avoid the need for overly

conservative program elements to compensate for unknowns and unproven assumptions or correcting errors in ineffective programs.

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 on technical and legal (or regulatory) 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 relevant regulatory requirements, developed since the original program review and approval, which are now accepted as the "industry norm" for complying with that requirement; and (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.⁴ 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.

⁴ 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.

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. However, the petitioner's proposal to treat such information as resolved does not represent a viable approach. The fundamental objective of the petitioner's 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 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 evaluation of the

⁵ This 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.