Authority: 7 U.S.C. 138f; 7 U.S.C. 450; 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

2. Section 381.170 would be amended by revising paragraph (a) to read as follows:

§ 381.170 Standards for kinds and classes, and for cuts of raw poultry.

(a) The following standards specify the various classes of the specified kinds of poultry, and the requirements for each class:

(1) *Chickens*—(i) *Rock Cornish game hen or Cornish game hen.* A ''Rock Cornish game hen'' or ''Cornish game hen'' is a young immature chicken (less than 5 weeks of age), of either sex, with a ready-to-cook carcass weight of not more than 2 pounds.

(ii) *Broiler or fryer.* A ''broiler'' or ''fryer'' is a young chicken (less than 10 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and flexible breastbone cartilage.

(iii) *Roaster or roasting chicken.* A ''roaster'' or ''roasting chicken'' is a young chicken (less than 12 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that is somewhat less flexible than that of a broiler or fryer.

(iv) *Capon.* A ''capon'' is a surgically neutered male chicken (less than 4 months of age) that is tender-meated with soft, pliable, smooth-textured skin.

(v) *Hen, fowl, baking chicken, or stewing chicken.* A ''hen,'' ''fowl,'' ''baking chicken,'' or ''stewing chicken'' is an adult female chicken (more than 10 months of age) with meat less tender than that of a roaster or roasting chicken and a nonflexible breastbone tip.

(vi) *Cock or rooster.* A ''cock'' or ''rooster'' is an adult male chicken with coarse skin, toughened and darkened meat, and a nonflexible breastbone tip.

(2) *Turkeys*—(i) *Fryer-roaster turkey.* A ''fryer-roaster turkey'' is an immature turkey (less than 12 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin, and flexible breastbone cartilage.

(ii) *Young turkey.* A ''young turkey'' is a turkey (less than 6 months of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that is less flexible than that of a fryer-roaster turkey.

(iii) *Yearling turkey.* A ''yearling turkey'' is a turkey (less than 15 months of age), of either sex, that is reasonably tender-meated with reasonably smooth-textured skin.

(iv) *Mature or old (hen or tom) turkey.* A ''mature turkey'' or ''old turkey'' is an adult turkey (more than 15 months of age), of either sex, with coarse skin and toughened flesh. Sex designation is optional.

(3) *Ducks*—(i) *Duckling.* A ''duckling'' is a young duck (less than 8 weeks of age), of either sex, that is tender-meated and has a soft bill and soft windpipe.

(ii) *Roaster duck.* A ''roaster duck'' is a young duck (less than 16 weeks of age), of either sex, that is tender-meated and has a bill that is not completely hardened and a windpipe that is easily dented.

(iii) *Mature duck or old duck.* A ''mature duck'' or an ''old duck'' is an adult duck (more than 6 months of age), of either sex, with toughened flesh, a hardened bill, and a hardened windpipe.

(4) *Geese*—(i) *Young goose.* A ''young goose'' is an immature goose, of either sex, that is tender-meated and has a windpipe that is easily dented.

(ii) *Mature goose or old goose.* A ''mature goose'' or ''old goose'' is an adult goose, of either sex, that has toughened flesh and a hardened windpipe.

(5) *Guineas*—(i) *Young guinea.* A ''young guinea'' is an immature guinea, of either sex, that is tender-meated and has a flexible breastbone cartilage.

(ii) *Mature guinea or old guinea.* A ''mature guinea'' or ''old guinea'' is an adult guinea, of either sex, that has toughened flesh and a non-flexible breastbone.

* * * * *

Done at Washington, DC, on September 24, 2003.

Linda Swacina,

Acting Administrator.

[FR Doc. 03–24536 Filed 9–26–03; 8:45 am]

BILLING CODE 3410–DM–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 52

[Docket No. PRM 52–2]

Nuclear Energy Institute; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC or Commission) is denying a petition for rulemaking (PRM) submitted by the Nuclear Energy Institute (NEI or the petitioner) and docketed as PRM 52–2. The petitioner requested that the NRC amend its regulations to remove requirements that applicants and licensees analyze, and the NRC evaluate, alternative energy sources and the need for power with respect to the siting, construction, and operation of nuclear power plants. The NRC is denying the petition because the NRC must continue to consider alternative energy sources and the need for power to fulfill its responsibilities under the National Environmental Policy Act of 1969, as amended (NEPA).

ADDRESSES: Copies of the petition for rulemaking, the public comments received, and the NRC's letter of denial to the petitioner may be viewed electronically on public computers located at the NRC's Public Document Room (PDR) at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. These documents are also available on the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.*

FOR FURTHER INFORMATION CONTACT: Nanette V. Gilles, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–1180, e-mail *nvg@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

By letter dated July 18, 2001, NEI submitted a petition for rulemaking (ADAMS accession no. ML012060198) to modify Title 10, Part 52, of the *Code of Federal Regulations* (10 CFR Part 52), Subpart A, ''Early Site Permits.'' The petitioner requested that the NRC amend its regulations in 10 CFR part 52 to eliminate the requirement that an early site permit (ESP) applicant include, and the NRC review, alternatives to the site proposed in an ESP application. The petitioner further requested that the NRC initiate a rulemaking to remove requirements in 10 CFR parts 2, 50, and 51 that applicants and licensees analyze, and the NRC evaluate, alternative sites, alternative energy sources, and the need for power with respect to the siting, construction, and operation of nuclear power plants. The NRC docketed the petition as PRM 52–2.

The regulations in 10 CFR part 52 govern the issuance of ESPs, standard design certifications, and combined licenses (COLs) for new nuclear power facilities licensed under section 103 or 104b of the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974. The provisions of 10 CFR part 52, subpart A, apply to applicants seeking an ESP. The regulations in 10 CFR part 52, subpart A, are designed to resolve site suitability

issues in a licensing proceeding as early as possible, before an applicant commits significant resources. The ESP process in subpart A allows an applicant to ''bank'' sites and is expected to improve the effectiveness of the nuclear power plant licensing process.

The regulations in 10 CFR parts 2, 50, and 51 referenced by the petitioner relate to requirements for filing and acceptance of licensing applications, review of site suitability issues, environmental reports, and environmental impact statements (EISs).

A notice of receipt of the petition was published in the **Federal Register** on September 24, 2001 (66 FR 48828). The comment period closed on November 8, 2001. The NRC received letters from 12 commenters, 9 of which favored the petition and 3 opposed it. Of the nine letters in favor, seven were from nuclear power plant owners and/or operators, one was from a nuclear steam supply system vendor, and one was from the petitioner. Of the three letters in opposition, two were from representatives of public advocacy groups and the other was from a private citizen. This notice presents a discussion of the comments received.

In its petition, NEI requested that the NRC grant the petition as part of an ongoing NRC rulemaking to update 10 CFR part 52. This rulemaking activity addresses lessons learned during previous design certification reviews and discussions with stakeholders about the ESP, design certification, and COL review processes. As discussed below, the NRC decided to deny this petition. Therefore, further consideration of the petition during the 10 CFR part 52 rulemaking is not necessary.

On December 18, 2002, NEI sent the NRC a letter (ADAMS Accession No. ML023570346) on the subject ''Petition for Rulemaking PRM 52–2, Supplemental Comments.'' In the letter, NEI stated that a number of developments had caused it to recommend a different approach for addressing alternative sites than that presented in its petition of July 18, 2001, where it had urged the NRC to eliminate consideration of alternative sites from the NRC nuclear power plant siting and licensing processes. NEI further indicated that, based upon a legal analysis attached to the letter, ''the modifications to 10 CFR part 52, subpart A, that were proposed in [its petition] should not be adopted.'' *Supplemental Comments,* p. 2. The letter stated that alternative sites should continue to be evaluated, but the NRC should limit its analysis of alternatives to those that are pertinent in the context of the license application before it, *i.e.*, to sites that the applicant has identified as practicable alternatives. In the view of the petitioner, NRC review of the applicant's chosen alternative sites would be sufficient to satisfy NEPA's ''hard look'' requirement.[1] In addition, NEI asserted that where a license applicant has ownership or control of only one site and, because of the nature of its business, has conducted no alternative site analysis, the NRC should only determine ''whether the proposed facility could be located on that site in compliance with all pertinent laws and NRC regulations.'' *Id.* NEI's legal analysis set forth several additional propositions. First, where an ESP or COL applicant's purpose is to build new units at existing nuclear sites, NEPA does not require consideration of locating those units at alternative sites that the applicant does not control. *See ESP–18a: Alternative Site Reviews for Early Site Permit Applicants Using Existing Licensed Sites,* dated November 19, 2002, attached to NEI's letter of December 18, 2002, pp. 7–8. Second, NEI asserted that non-nuclear sites are unlikely to be obviously superior to an existing nuclear site that has already gone through the NEPA process. NEI believes that the most that NEPA would require is a comparison of a generic ''greenfield'' site and a generic industrial site to ''confirm the absence of any anomalous characteristics that might alter the presumption that no obviously superior site exists.'' *Id.,* pp. 8–9.

The Commission has decided to treat NEI's letter of December 18, 2002, as a partial withdrawal of its petition with respect to the matter of alternative sites. Accordingly, this denial does not address either the petitioner's proposal on alternative sites as described in its petition of July 18, 2001, or the petitioner's specific propositions on alternative sites as set forth in the submission of December 18, 2002. However, the remainder of this notice more fully discusses some of the legal decisions cited in NEI's submission of December 18, 2002.[2]

[1] NEPA requires any Federal agency considering a major action likely to significantly affect the quality of the human environment to take a ''hard look'' at the environmental impacts of the proposed action and all reasonable alternatives to it.

[2] Independent of NEI's petition for rulemaking, the NRC is considering a rulemaking to address the range of issues associated with the NRC's consideration of alternative sites in early site permit (ESP), construction permit (CP), and combined license (COL) proceedings. *See* 67 FR 79165 (December 27, 2002). On January 28, 2003, the NRC held a public meeting to discuss these issues and to solicit stakeholder views on potential options that the NRC could pursue. *See Transcript of Meeting: Criteria for Review of Alternative Sites* (''Meeting Transcript,'' ADAMS Accession No. ML030570019). At this meeting, NEI presented its views which were consistent with the positions expressed in its December 18, 2002 submission. *See Meeting Transcript,* pp. 60–63, 72–74, 78–80. Accordingly, the Commission will consider NEI's alternative siting proposal as described in its December 18, 2002 submission in considering whether to proceed with rulemaking addressing alternative sites.

The Petition

The petitioner requested that the Commission initiate a rulemaking to amend 10 CFR part 51 to remove requirements that applicants and licensees analyze, and the NRC evaluate, alternative energy sources and the need for power with respect to the siting, construction, and operation of nuclear power plants. The petitioner stated that the need for these changes is a direct outgrowth of the dramatic changes that have occurred in the electric power industry, most notably the passage of the Energy Policy Act of 1992 and the resultant actions by the Federal Energy Regulatory Commission (FERC) to impose open access transmission requirements on electricity transmission providers. The petitioner stated that these changes have fundamentally altered both the marketplace for electricity and the makeup of electricity generating companies, and that the regulatory framework that the NRC uses to implement its responsibilities under NEPA should be revised accordingly.

NEPA Requirements

The petitioner argued that NEPA requires consideration of ''alternatives'' to a proposed action but does not specifically require an analysis of alternative energy sources or the need for power. However, the NRC's implementing regulations in 10 CFR part 51 require that those matters be addressed. General guidance on the environmental reviews that are to be conducted is specified in Regulatory Guide 4.2, ''Preparation of Environmental Reports for Nuclear Power Plants'' (July 1976) and NUREG–1555, ''Environmental Standard Review Plan'' (March 2000), which call for a review of alternative energy sources and the need for power. The petitioner believes that the NRC's regulations and implementing guidance reflect the structure of the 1970s electric utility industry. However, because the electric power industry has experienced dramatic changes since that time, the petitioner believes that the NRC needs to reconsider its implementation of its responsibilities under NEPA. The petitioner also believes that the NRC has the statutory authority to revise its regulations to eliminate NRC review of

alternative energy sources and the need for power. In addition, the petitioner believes that the NRC can, and should, conclude that its implementation of NEPA no longer requires these reviews because of the fundamental changes that have occurred in the electric utility industry. Moreover, the petitioner believes that doing so is important to ensure the efficiency and the safety focus of NRC reviews of new licensing applications.

Role of State and Local Governments

The petitioner appeared to argue that the NRC's licensing process does not change the division of authority between the Federal Government and the States over the construction and operation of electric power generating facilities. According to the petitioner, an NRC license or permit constitutes approval of a site or plant only under the Federal statutes and regulations administered by the NRC, and not under other applicable laws. For example, individual State laws may require a State determination of the need for power and an evaluation of alternative energy sources, or may require the issuance of a certificate of public convenience and necessity, and various environmental permits.

The petitioner argued that the NRC's evaluation of the environmental impacts of the proposed plant neither supplants nor interferes with the traditional responsibilities of States in evaluating the need for power and the suitability of alternative energy sources with respect to the potential use of that site. The NRC explicitly recognized the extent of its authority in the evaluations of alternatives in 10 CFR 51.71(e), *Preliminary recommendation*, Footnote 4.[3]

Nonetheless, the petitioner noted that in the context of the license renewal rule (61 FR 28467; June 5, 1996) many States expressed concern that the NRC's findings, although not legally dispositive, would establish an official Federal position that the States believed would be difficult to rebut in State proceedings. Specifically, the States expressed concern regarding the NRC's consideration of the need for power and alternative energy sources in the generic environmental impact statement for license renewal (NUREG–1437, Chapters 8 and 9) and the associated proposed amendments to 10 CFR part 51 (56 FR 47016; September 17, 1991). The States were concerned that an NRC finding on those matters would infringe on State jurisdiction over economic regulation of utilities, including the generation, sale, and transmission of electric power produced by nuclear power plants. To address the States' concerns and the questions raised by the U.S. Environmental Protection Agency and the Council on Environmental Quality (CEQ), the NRC issued a supplement to its proposed License Renewal Rule (59 FR 37724; July 25, 1994) to address whether, under NEPA, the agency could and should eliminate consideration of issues over which States have primary jurisdiction.

The petitioner argued that, in that supplement, the NRC thoroughly and thoughtfully evaluated its responsibility under NEPA in the context of the States' expressed concerns. First, the NRC clearly recognized the primacy of State regulatory decisions regarding future energy options. Second, the agency recognized that the electricity-generating company will also make the choice of energy options. Third, the NRC characterized its process as one that preserves the option of continuing to operate nuclear plants.

The petitioner stated that, in the license renewal context, the NRC revised the definition of the purpose of the Federal action to reflect the applicant's goals in seeking NRC approval of the licensing action. According to the petitioner, the NRC's definition of the purpose of the Federal action in the license renewal context was ''to preserve the option of continued operation of the nuclear power plant for State regulators and utility officials in their future energy planning decisions'' (59 FR 37725; July 25, 1994).

The petitioner stated that the NRC revised the definition of the proposed Federal action to more accurately reflect what is really to be accomplished: establishing a stable and predictable regulatory approach to determine whether the option of nuclear power as a source of generating capacity at that site could be considered in future State energy planning decisions. The petitioner argued that the proposed definition allows only two basic alternatives: renewing the license to preserve the nuclear option or not renewing the license (59 FR 37725; July 25, 1994).

The petitioner believes that the license renewal example demonstrates that the NRC has the authority to determine which matters are pertinent to the agency's NEPA evaluation of an application to build new nuclear power plants. The petitioner did not mention that the NRC does, in fact, continue to consider alternative energy sources in its license renewal reviews. In addition, the petitioner did not mention that license renewal is a post-construction licensing activity.

Application of NEPA to the Construction and Operation of Nuclear Power Plants

According to the petitioner, NEPA requires consideration of ''alternatives,'' but does not require the NRC to evaluate the need for power or alternative energy sources. The petitioner argued that, although NEPA has never required these analyses, the electric utility structure in the 1970s was such that a typical environmental review for constructing and operating a nuclear power plant included an evaluation of the need for power and alternative energy sources. As a result, many licensing decisions and judicial determinations have been based on the NRC's interpretation of its responsibilities under NEPA and the corresponding NRC regulations and practices that the agency adopted accordingly. However, the petitioner believes that what may have been pertinent 30 years ago is no longer pertinent. The petitioner did not acknowledge that the ''utility'' regulatory structure that has been in place over the past 30 years remains in effect in a number of States and will remain in effect for the foreseeable future.

The petitioner pointed out that, in the 1970s, the typical applicant for a nuclear power plant was an electric utility that was regulated by a State public utility commission. Additionally, as a regulated electric utility, the applicant had the legal authority to exercise the power of eminent domain to build generating facilities and any necessary supporting infrastructure. The petitioner believes that any new nuclear power plant today is likely to be constructed and operated by an unregulated merchant generator, which will operate in a competitive marketplace. The petitioner argued that a merchant generator will not build and operate a plant unless it believes there is a need for power or that the facility will generate electricity at a lower cost than the competing facilities. Additionally, the petitioner believes that a merchant generator will not build and operate a nuclear power plant if a superior alternative source of energy is available. In States where utilities are still subject to regulation, the petitioner argued that the situation described

[3] ''The consideration of reasonable alternatives to a proposed action involving nuclear power reactors (*e.g.*, alternative energy sources) is intended to assist the NRC in meeting its NEPA obligations and does not preclude any State authority from making separate determinations with respect to these alternatives and in no way preempts, displaces, or affects the authority of States or other Federal agencies to address these issues.''

relative to license renewal is directly applicable. For these reasons, the petitioner concluded that it is not reasonable to believe that a nuclear power plant will be built in today's environment absent a need for power or some other benefit.

Furthermore, the petitioner stated that it is not reasonable to assume that the NRC will be able to identify an alternative energy source that is both feasible and preferable to the choices made by a merchant generator. Because the consideration of alternatives under NEPA is subject to a rule of reason, the petitioner believes that NEPA does not compel the NRC to consider these factors in today's environment. Even if other sources are available—perhaps even preferable in some respects to the applicant's proposal—the petitioner stated that the NRC lacks the authority to compel the applicant to use the alternative source. Therefore, the petitioner concluded that, because NRC consideration of alternative energy sources and the need for power is not required under NEPA, denial of a permit or license for reasons related to these matters is inappropriate.

The petitioner argued that, in the context of an ESP, the proposed major Federal action is to grant a permit for a site for one or more nuclear power plants. To actually build and operate one or more nuclear plants, an applicant must also obtain a COL. In a COL proceeding, the proposed major Federal action is the approval to build and subsequently operate a particular nuclear plant at a specified site. If the COL references an ESP, the site approval is already established, and the site suitability issue is restricted to whether the proposed nuclear power plant(s) fit(s) within the ESP's siting envelope. If the COL applicant does not reference an ESP, the major Federal action with respect to approving the specified site is the same as for an ESP. The petitioner argued that in each case (ESP or COL, with or without a referenced ESP), the proposed action does not decide if there is a need for power or which of the various possible sources of electric power best meets the needs of the given State or region, provides the most economic electricity to ratepayers, or is environmentally the most benign.

The petitioner stated that its proposal to eliminate the requirement for NRC consideration of alternative energy sources and the need for power is based on the fundamental NEPA principle that an agency need only consider alternatives that will accomplish the applicant's goal. The petitioner argued that, in the context of 10 CFR part 52, the ESP applicant's goal is to determine whether the proposed site satisfies statutory and NRC regulatory requirements as a suitable location for a nuclear power plant. Similarly, the petitioner stated that the goal of a COL applicant is to determine whether the proposed plant satisfies applicable safety and environmental requirements, including the criteria established in any referenced ESP.

The petitioner further stated that each Federal agency must determine which alternatives are reasonable and should be considered under NEPA. Morever, the NRC must consider the no-action alternative and actions that could mitigate the environmental impact of the proposed action. According to the petitioner, in addition to the no-action alternative, the NRC must consider only those alternatives that serve the purpose for which an applicant is seeking approval—and there are no alternatives. The petitioner believes that defining the proposed action in this manner reflects reality. Specifically, the NRC is not considering a proposal that would determine how or where electricity should be generated in the future. Rather, in either the ESP or COL proceeding, the NRC is considering only whether a specific application meets NRC regulations, not whether one or more nuclear facilities should, or will, be built.

The petitioner argued that, given the specific goals of ESP and COL applicants, the NRC should consider, in addition to the no-action alternative, only actions that serve the applicant's specific goal to determine whether the application meets all applicable requirements. Thus, the petitioner argued, it is unnecessary and inappropriate for the NRC to require applicants to analyze alternatives that would not fulfill the goal of determining whether the proposed site and facilities meet NRC requirements. Similarly, the petitioner argued, it is unnecessary and inappropriate for the NRC to use its limited resources to evaluate possible alternative energy sources or the need for power. Thus, the petitioner concluded that the NRC, in its NEPA analysis, is not legally obligated and should not attempt to reach any conclusions regarding alternative energy sources or the need for power.

Public Comments on the Petition

The NRC received 12 letters commenting on this petition. Nine commenters favored the petition. Seven of those letters were from nuclear power plant owners and/or operators, one was from a nuclear steam supply system vendor, and one was from the petitioner. Of the three letters opposed to the petition, two were from representatives of public advocacy groups and the other was from a private citizen.

Comments: The commenters in favor of the petition summarized the arguments in the petition and stated their support for the petitioner's position. The commenters also expressed interest in including the petition in the ongoing 10 CFR part 52 rulemaking activity.

Response: The comments received in favor of the petition provided no additional bases for the petition. Therefore, these comments are addressed by the NRC's reasons for denying the petition, as discussed below.

Comment: A private citizen stated that, instead of further degrading the defense of the United States of America by the actions proposed in the petition, the NRC should additionally require applicants to evaluate the impact of ''deep undergrounding'' of nuclear power plants.

Response: The NRC believes that the addition of requirements for applicants to evaluate the impact of ''deep undergrounding'' of nuclear power plants is outside of the scope of the petition. ''Deep undergrounding'' is a design matter rather than a siting matter.

Comments: A commenter representing Public Citizen, a public advocacy group, stated that NEI is asking the NRC to consider less information and fewer factors before approving a site for a nuclear power plant at a time when the public is seeking assurances that potential threats to public safety are being analyzed with more thoroughness, not less. The commenter further stated that the effect of the dramatic structural and economic transformation in the electric power industry is evidence that the review of alternative sites and energy sources should be of heightened, rather than diminished, concern to regulators and the public. The commenter argued that there is little in the story of electric utility restructuring thus far to suggest that nuclear power would ever be subjected to the same competitive market forces that apply in varying degrees to other sectors of the economy. The commenter stated that failure of nuclear power thus far to seriously compete in the new ''competitive'' electricity generation environment makes it more, rather than less, crucial to consider all options and alternatives before the NRC approves an ESP. The commenter also stated that the earlier in the process those alternatives are introduced, the better, lest a potential licensee expend considerable

resources on a failed siting application and subsequently attempt to retrieve its investment from ratepayers.

The commenter also argued that granting the petition would preclude consideration of alternative sites, alternative energy sources, and the need for power at any other point in the Federal regulatory process. The commenter stated that the NRC should use any discretion it has under NEPA to provide the most rigorous review possible in service of the greater public interest. Finally, the commenter stated that the NRC can best uphold the public's trust by denying NEI's petition.

Another commenter representing Greenpeace, a public advocacy group, expressed the general view that the NRC should deny the petition because ''to do otherwise will only serve to undermine public confidence in the legitimacy of the NRC and any future reactor licensing process,'' but did not address any of the specific matters raised in the petition.

Response: Although the NRC does not entirely agree with all of these commenters' arguments for denying the petition, the NRC agrees with their basic premise that the agency should deny the petition and continue to review the need for power and alternative energy sources in order to fulfill its obligations under NEPA. As discussed previously, the petitioner has withdrawn the proposal in its petition with respect to alternative sites; therefore, this Notice does not address the alternative site proposal from that petition.

Reasons for Denial

The petitioner has not demonstrated that applicable law or practice in other Federal agencies has changed in a manner that would lead the Commission to conclude that the NRC should no longer consider the need for power and alternative energy sources as a part of its nuclear power plant licensing proceedings in order to fulfill the agency's obligations under NEPA.

Need for Power

Section 102(2)(C) of NEPA requires that any recommendation for a major Federal action significantly affecting the quality of the human environment include a detailed statement addressing, among other things:

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action. * * *

42 U.S.C. 4332(2)(C).

As part of the NRC's NEPA analysis associated with nuclear power plant licensing,[4] the agency must include a balancing of costs and benefits. *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI–76–13, 4 NRC 67, 76 (1976) *citing Calvert Cliffs Coordinating Committee, Inc.* v. *AEC,* 449 F.2d 1109 (D.C. Cir. 1971). Although NEPA does not explicitly mention cost-benefit balancing, judicial interpretations of the statute have established that Federal agencies must balance environmental costs against the anticipated benefits of the action in the EIS. *Louisiana Energy Services, L.P. (LES)* (Claiborne Enrichment Center), CLI–98–3, 47 NRC 77, 88 (1998) *citing Idaho By and Through Idaho Public Utilities Commission* v. *ICC,* 35 F.3d 585, 595 (D.C. Cir. 1994); *Calvert Cliffs,* 449 F.2d 1109.

The petitioner asserted that its proposal to eliminate NRC consideration of the need for power is based on the fundamental NEPA principle that an agency need only consider alternatives that will accomplish the applicant's goal (*i.e.*, the purpose of the proposed project). The Commission agrees with the petitioner's general premise that the NRC may ''accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'' *Hydro Resources, Inc.,* CLI–01–4, 53 NRC 31, 55 (2001), *citing Citizens Against Burlington* v. *Busey,* 938 F.2d 190, 197 (D.C. Cir.), *cert. denied,* 502 U.S. 994 (1991). However, ''an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.'' *City of New York* v. *Department of Transportation,* 715 F.2d 732, 743 (1983); *see also, Citizens Against Burlington,* 938 F.2d at 196. In addition, the Commission recognizes that a proposed project may have more than one purpose. The Commission will ordinarily give substantial weight to a properly-supported statement of purpose and need by an applicant and/or sponsor of a proposed project in determining the scope of alternatives to be considered by the NRC.

The cost-benefit discussion also plays an important role in determining the appropriate scope of the NEPA analysis. In the past, the NRC equated the need for power with the benefits of the proposed action. '' 'Need for power' is a shorthand expression for the 'benefit' side of the cost-benefit balance, which NEPA mandates for a proceeding considering the licensing of a nuclear plant.'' *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB–573, 10 NRC 775, 804 (1979) (*quoting Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB–502, 8 NRC 383, 388 n. 11 (1978) *quoting Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB–422, 6 NRC 33, 90 (1977); *see also Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB–462, 7 NRC 320, 327 (1978).

Recently, the Commission has recognized that there may be multiple benefits to a proposed project. In *LES,* the Commission held that the Licensing Board should consider multiple benefits of the proposed uranium enrichment facility—including enhanced competition from another market participant, furtherance of national policy goals, and the creation of an alternative, more energy-efficient technology—when performing the ultimate cost-benefit balancing under NEPA. *LES,* 47 NRC at 89–96. Similarly, the Commission acknowledges that the construction and operation of a nuclear power plant could have multiple benefits such as reducing greenhouse gases and other air pollutants and increasing energy efficiency by retiring older, less efficient sources of power. *See also Niagara Mohawk,* 1 NRC at 353 (noting that ''a Licensing Board may also take cognizance of the effect which a shortage of fossil fuel, or a need to divert that fuel to other uses, might have upon demand for non-fossil fueled generating sources''). Therefore, in preparing an EIS for any future nuclear power plant licensing proceeding, the Commission will consider all reasonably foreseeable benefits of the proposed plant.

Consistent with the petitioner's claim, in considering the need for power as part of the NEPA process, the NRC does not supplant the States, which have traditionally been responsible for assessing the need for power generating facilities, their economic feasibility and for regulating rates and services. As the petitioner noted, the NRC has acknowledged the primacy of State regulatory decisions regarding future energy options. However, this acknowledgment does not relieve the NRC from the need to perform a reasonable assessment of the need for power. Moreover, in the non-regulated environment foreseen by the petitioner, NRC consideration of the need for power may become ''more, not less,

[4] The act of granting a permit or license for a nuclear power plant qualifies as a major Federal action significantly affecting the quality of the human environment; therefore, NEPA applies to the NRC when it engages in such licensing activity.

crucial'' (in the words of a commenter) because a State decisionmaker may no longer conduct need for power assessments. The Commission emphasizes, however, that while a discussion of need for power is required, the Commission is not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power. *See LES,* 47 NRC at 88, 94.

With regard to the petitioner's discussion of the relevance of the NRC's actions under NEPA in nuclear power plant license renewal, the Commission notes that the significant environmental impacts associated with the siting and construction of a nuclear power plant have already occurred by the time a licensee is seeking a renewed license. The Commission has determined that it is not necessary to consider the need for power during post-construction licensing (issuing and renewing operating licenses). Also, in 10 CFR 51.95(c)(4), the Commission narrowed the NRC's determination for license renewal to ''whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.'' By contrast, in the case of construction of a new nuclear power plant, the NRC must assess the need for power to accurately characterize the cost (*i.e.*, environmental impact) and benefits associated with the proposed action. For these reasons, the license renewal example is not relevant to consideration of need for power issues in new reactor licensing processes.

The petitioner contended that at the time the original licensing decisions and judicial interpretations of NEPA were being made and the NRC was developing a position on its responsibilities under NEPA, the typical applicant for a nuclear power plant was an electric utility regulated by a State public utility commission. By contrast, the petitioner argued that future nuclear power plants will, in all likelihood, be constructed and operated by an unregulated ''merchant generator,'' that will not build and operate a plant unless it believes that there is a need for power or that the facility will generate electricity at a lower cost than the competing facilities. Thus, it would not appear to be burdensome to state the need for the proposed facility. Further, even if this assertion is true, the Commission does not believe that the petitioner's prediction provides a judicially recognized basis for avoiding an agency-prepared determination of the benefits of a proposed action. The petitioner failed to cite any recent judicial decisions which interpret NEPA which hold (or otherwise suggest) that a Federal agency, acting on a project proposal presented by a private sponsor or applicant, need not conduct an independent review of the need for the project, but may simply accept the applicant's assertion with respect to need. In any event, there is no reason to believe that the traditional utility model will disappear. Thus, at most, the petitioner's argument would call for a supplement to the requirements of 10 CFR part 51 to address nuclear power plants built by unregulated, non-electric utility entities, rather than the wholesale elimination of NRC requirements to consider the need for power.

The petitioner has also not shown that other Federal licensing agencies, acting on power generation projects sponsored by private entities, have changed their practices with respect to considering the need for power in preparing EISs supporting their approval decisions. The NRC is also not aware of any such change in agencies' practices.

In conclusion, the petitioner has not demonstrated that consideration of the need for power is no longer a necessary part of the Commission's NEPA obligations for reactor licensing decisions.[5] The need for power must be addressed in connection with new power plant construction so that the NRC may weigh the likely benefits (*e.g.*, electrical power) against the environmental impacts of constructing and operating a nuclear power reactor. The Commission emphasizes, however, that such an assessment should not involve burdensome attempts to precisely identify future conditions. Rather, it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions.

Alternative Energy Sources

It is well established that once the purpose of and need for a proposed Federal action are understood, the agency is expected to follow a rule of reason in deciding which alternatives are ''reasonable'' or ''feasible.'' *See e.g., City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) (per curiam); *Druid Hills Civic Ass'n* v. *Federal Highway Admin.,* 772 F.2d 700, 713 (11th Cir. 1985). Moreover, ''[t]he goals of an action delimit the universe of the action's reasonable alternatives.'' *Citizens Against Burlington,* 938 F.2d at 195.

Similar to the proposal to eliminate NRC consideration of the need for power, the petitioner's proposal to eliminate NRC consideration of alternative energy sources is based on the proposition that, under NEPA, a Federal agency need only consider alternatives that will accomplish the applicant's goal. The Commission agrees with the petitioner's general proposition that a Federal agency, acting not as a proprietor but to approve a project sponsored by a private entity, should ordinarily ''accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'' *Hydro Resources, Inc.,* CLI–01–4, 53 NRC 31, 55 (2001), *citing Citizens Against Burlington,* 938 F.2d at 197. Thus, the Commission need only consider alternatives that will bring about the ends of the proposed action, *id., accord, City of Grapevine* v. *DOT,* 17 F.3d 1502, 1506 (D.C. Cir.), *cert. denied,* 513 U.S. 1043 (1994)), and need not consider alternatives that do not achieve the purpose and need of the applicant. *See City of Angoon,* 803 F.2d at 1021 (''When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.''), *cert. denied,* 484 U.S. 870 (1987). However, the petitioner failed to explain how the Commission could generically determine the purpose and need of all future applicants for CPs and COLs such that consideration of alternative energy sources would be unnecessary for all future applicants. In the absence of a basis for such rulemaking, the Commission concludes that it will continue the NRC's practice of determining the purpose and need on a case-specific basis. The Commission cautions that when describing the purpose of and need for its proposal, the applicant should not set forth an unreasonably narrow objective of its project, thereby artificially narrowing the scope of alternatives to be considered by the NRC. A Federal agency, acting as a sponsoring agency, would not be permitted to artificially narrow the objective of its action and

[5] The Commission notes that an applicant for an ESP need not include in its application ''an assessment of the benefits (for example, need for power) of the proposed action.'' 10 CFR 52.17(a)(2). Instead, the assessment of benefits of constructing and operating a nuclear power reactor on the ESP site may be deferred to the time (if ever) that the ESP is referenced in an application for a part 52 COL or a part 50 CP.

thereby circumvent the requirement to consider relevant alternatives. *See Citizens Against Burlington,* 938 F.2d at 196, *City of New York* v. *Department of Transportation,* 715 F.2d 732, 743 (1983). The Commission believes that this principle should also apply where a sponsoring entity or applicant seeks the NRC's approval. There may well be circumstances where an entity seeking a CP or COL may be able to establish, consistent with NEPA and current judicial precedents, a narrow statement of purpose and need for the project sufficient to justify excluding from the EIS a consideration of non-nuclear alternative energy sources.

The NRC's current policy is to consider alternative energy sources at the CP stage because alternatives to the construction of a nuclear power plant must be considered before the environmental impacts of construction are realized. The Commission's practice was acknowledged in the statement of consideration for the final rule amending 10 CFR part 51 to bar the consideration of alternative energy source issues in operating license proceedings for nuclear power plants (47 FR 12940; March 26, 1982). The Commission stated that ''in accordance with the Commission's NEPA responsibilities, the need for power and alternative energy sources are resolved in the construction permit proceeding.'' The Commission added that ''[a]lternative energy source issues receive and will continue to receive extensive consideration at the CP stage'' (emphasis added). Thus, the Commission has committed itself to consider alternative energy sources and continues to believe that it should do so to fulfill its NEPA responsibilities. Under 10 CFR part 52, alternative energy sources may be considered at the ESP stage or deferred until the COL stage.

The Commission's position on consideration of alternative energy sources is consistent with other Federal agencies' practices, which have consistently included alternative energy sources when preparing an EIS for a new power generation project. In addition, the NRC's position is consistent with case law. There are many cases involving the adequacy of an agency's alternative energy source review. *See, e.g., Association of Public Agency Customers* v. *Bonneville Power Administration,* 126 F.3d 1158, 1187 (9th Cir. 1997); *Swinomish Tribal Community* v. *FERC,* 627 F.2d 499, 514–16 (D.C. Cir. 1980); *Hawaii County Green Party* v. *Clinton,* 980 F. Supp. 1160, 1167 (D. Haw. 1997). The petitioner did not cite, and the NRC is not aware of, any judicial decision concluding that it is unnecessary for a Federal agency to consider alternative energy sources in licensing a new power generation project.

The petitioner argued, as it did with respect to the need for power, that future ''merchant generators'' will not build and operate a nuclear power plant if there is a superior source of energy. However, the petitioner failed to cite any recent judicial decisions interpreting NEPA which hold that a Federal agency, acting on a project proposal presented by a private sponsor or applicant, need not conduct an independent review of alternatives but may limit its discussion to alternatives that the sponsor or applicant deems reasonable.

The petitioner stated that it is not reasonable to assume that the NRC will be able to identify an alternative energy source that is both feasible and preferable to the choices made by the applicant, but provides no apparent basis for this assertion. The Commission does not agree with the petitioner's assertion. The NRC has extensive experience in identifying and evaluating the feasibility of alternative energy sources in a manner that is sufficient to meet the requirements of NEPA. Indeed, the NRC currently performs such analyses in connection with renewals of nuclear power plant operating licenses (including renewals for plants operated by non-utility entities).

Finally, the petitioner argued that the NRC need not consider alternative energy sources because ''the NRC lacks the authority to compel the applicant to use the alternative * * * [energy] source.'' Petition, at 7. The Commission agrees with the petitioner that the NRC does not have the authority to require the applicant to use an alternative energy source even if there is an alternative with potentially fewer environmental impacts than those associated with operation of the proposed nuclear power plant. However, if the alternative energy source is a reasonable alternative, it should be identified and evaluated. *See Dubois* v. *U.S. Dept. of Agriculture,* 102 F.3d 1273, 1286–87 (1st Cir. 1996), *citing Roosevelt Campobello Int'l Park Committee* v. *United States EPA,* 684 F.2d. 1041 (1st Cir. 1982).

In summary, the petitioner has not shown that it is no longer a necessary part of the Commission's NEPA obligations for the NRC to consider alternative energy sources in rendering decisions regarding reactor licensing.[6]

[6] As previously discussed in footnote [4], it is the Commission's view that § 52.17(a)(2) currently allows the ESP applicant the flexibility to choose to defer consideration of benefits (for example, need for power) of the proposed facility to the time (if ever) that the ESP is referenced by a COL or CP application. In this same context, the ESP applicant need not include an assessment or discussion of alternative energy sources in its environmental report supporting an ESP application. Rather, the applicant may choose to defer consideration of alternative energy sources to the COL or CP application. The Commission's proposed revision to 10 CFR part 52 includes a provision to amend § 52.17(a)(2) to clarify that an ESP applicant has the flexibility of either addressing the matter of alternative energy sources in the environmental report supporting its ESP application or deferring the consideration of alternative energy sources to the time that the ESP is referenced in a licensing proceeding (68 FR 40028, July 3, 2003).

Conclusion

The petitioner has not shown any change in other Federal agencies' practices, judicial consideration of the NEPA obligations of Federal regulatory agencies responsible for licensing privately proposed actions, or other factors underlying the Commission's current policies for considering the need for power or alternative energy sources that would lead the Commission to conclude that consideration of these issues is no longer a necessary part of the Commission's NEPA obligations for reactor licensing decisions. For applications that could result in the commencement of construction (*i.e.*, CP and COL applications), the NRC continues to believe that the agency should address alternative energy sources in the related EIS (unless, the CP or COL application references an ESP that considered alternative energy sources). The NRC also continues to believe that, for such construction approval applications, the agency should address the benefits assessment (*e.g.,* need for power) in the related EIS.

For the reasons cited in this document, the NRC denies the petition.

Dated at Rockville, Maryland, this 23rd day of September, 2003.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 03–24474 Filed 9–26–03; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15876; Airspace Docket No. 03–AGL–14]

Proposed Modification of Class E Airspace; Zanesville, OH

AGENCY: Federal Aviation Administration (FAA), DOT.