



50-440

NUCLEAR ENERGY INSTITUTE

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SENIOR VICE PRESIDENT AND
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NUCLEAR GENERATION

July 10, 2002

Mr. Samuel J. Collins
Director, Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: License Amendments

Dear Mr. Collins:

At our May 14 senior management meeting, several proposed actions were discussed involving regulatory changes. In each case, the NRC staff has concluded that these changes require a license amendment based on its interpretation of the 1996 *Perry* decision. We have a fundamental disagreement with how the *Perry* decision is being applied in these cases. Given the broad implications of this issue, we believe NRC management attention is warranted.

Enclosed is an analysis of the statutory and legal requirements associated with license amendments. The analysis also focuses on the application of the criteria for license amendments contained in *Perry* to the following proposed regulatory actions:

- Regulatory Issue Summary 2002-05, Boiling Water Reactor Pressure Vessel Integrated Surveillance Program;
- Draft 10 CFR 50.69, Risk-Informed Treatment of Structures, Systems and Components;
- Proposed Steam Generator Program Generic Licensee Change Package; and
- Draft Fire Protection Rule allowing adoption of NFPA-805.

Each of these proposed actions exemplifies why the industry is concerned with the staff's interpretation of *Perry* as the rationale for requiring a license amendment. The RIS 2002-05 example is particularly confusing because it squarely fits into the analysis of 10 CFR 50, Appendix H, contained in *Perry*. While citing the *Perry* decision, RIS 2002-05 actually comes to the opposite conclusion.

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Add: NRR00



Mr. Samuel J. Collins

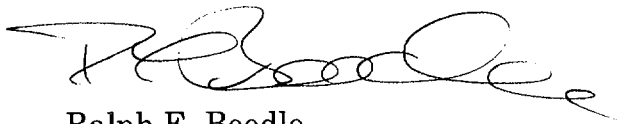
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In summary, NEI believes the *Perry* decision is instructive in articulating criteria for a license amendment. However, we have concerns with the staff's interpretation of *Perry* in several proposed regulatory actions as discussed in the enclosure. We urge the NRC to address this issue generically to ensure that the associated policy implications are appropriately considered.

We look forward to further dialogue with NRC on this important matter. If there are any questions regarding the enclosed analysis, please contact Tony Pietrangelo or Ellen Ginsberg of the NEI staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Beedle', with a long horizontal flourish extending to the right.

Ralph E. Beedle

Enclosure

c: Janice Moore, NRC/OGC
David Matthews, NRC/NRR
Chris Grimes, NRC/NRR

**LICENSE AMENDMENTS:
ANALYSIS OF STATUTORY AND LEGAL REQUIREMENTS**

I. INTRODUCTION

Given the marked changes in the NRC's regulatory regime implemented over the past several years, and additional changes being proposed to further incorporate risk assessments into the agency's regulatory approach for commercial nuclear power plants, licensees are seeking clear guidance on when a license amendment is required. Questions regarding the need for a license amendment have become pre-eminent in four areas: (1) the Boiling Water Reactor Vessel Integrated Surveillance Program; (2) a proposed rule permitting power reactor licensees to implement an alternative regulatory framework for special treatment requirements; (3) a proposed steam generator licensing package; and (4) performance-based fire protection standards. These issues are not related except that, in each, NRC staff has stated that implementation of the proposed changes requires a license amendment based on the Commission's ruling in *In the Matter of Cleveland Electric Illuminating Company, et. al.*, (hereinafter "*Perry*").¹

In 1996, the Nuclear Regulatory Commission considered whether a license amendment was necessary for a change to the Perry Nuclear Power Plant's withdrawal schedule for reactor vessel material specimens. Although NRC staff has cited *Perry* for various propositions, the Staff's views, as we understand them, generally can be summed up as follows:

- if Staff approval is required for a licensee to alter the way in which the licensee complies with a license condition, a license amendment is required;
- even if the revised manner of complying with a general license condition is specified in a legally promulgated rule (and is not prohibited by the specific terms of the license); a license amendment is required; and
- modification of the CLB (*e.g.*, to comply with 10 CFR Part 50, Appendix H through reactor vessel integrated surveillance program) constitutes a major licensing action requiring a license amendment.

The industry reads *Perry* to set out the criteria to be used in determining whether a license amendment is required. *Perry* states that a license amendment is not necessary, whether or not Staff approval is required, if the licensee's proposed

¹ In the Matter of Cleveland Electric Illuminating Company, et. al. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440-OLA-3, 44 NRC 315 (December 6, 1996).

action does not “provide greater operating authority” or “otherwise alter the original terms of a license.”²

II. STATUTORY AND REGULATORY AUTHORITY TO ISSUE LICENSE AMENDMENTS

The statutory basis for the NRC’s regulatory authority is grounded in the Atomic Energy Act (AEA). Section 161.i of the AEA authorizes the NRC to prescribe such regulations or orders as it may deem necessary to govern any activity authorized pursuant to the Act, “including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.” This language does not limit the Commission to reliance on license provisions to control licensed activities. It also establishes that license requirements can be modified by regulation or order. In addition, current provisions of NRC regulations provide mechanisms other than license amendments to effect changes to comply with regulatory requirements. For example, changes can be made through written authorization to deviate from codes (§ 50.55a(a)(3)), implement changes to quality assurance programs (§ 50.54(a)(3), (4)), and implement changes to security plans (§ 50.54(p)(2)).

Section 187 of the Atomic Energy Act, “Modification of License,” states that the “terms and conditions of all licensees shall be subject to amendment, revision, or modification, by reason of amendments of this Act, or by reason of rules and regulations issued in accordance with the terms of this Act.” This provision, on its face, authorizes the Commission to amend licenses, but does not specify any circumstance in which a license amendment is required.³

Section 189a of the Act requires the NRC to provide interested parties with notice and an opportunity to request a hearing on “the granting, suspending, revoking or amending” of any license or construction permit. To implement these provisions, the NRC promulgated 10 CFR Sections 50.90, 50.91 and 50.92. These regulations describe how a licensee must request a license amendment, the public’s opportunity to comment and request a hearing on a license amendment, and the standards for issuance of an amendment. They do not, however, define “license amendment” other than through the use of the phrase in Section 50.90 requiring the licensee to “describ[e] the *changes* desired” in its application (emphasis added). Thus, because neither the statute nor the regulations specify circumstances requiring a license amendment, case law and other sources of guidance must be evaluated.

² This statement assumes that any particular license in question does not contain a specific provision that would, by its terms, preclude modification of the license in the specific manner proposed.

³ See also section 183.d of the AEA, providing that every license is subject to “all valid rules and regulations of the Commission.”

III. THE PERRY DECISION

In 1996, the Commission spoke to the very question at hand—when is a license amendment required?—in response to an Atomic Safety and Licensing Board (ASLB) decision involving the Perry Nuclear Power Plant. The ASLB had concluded that the licensee must obtain a license amendment for any change to Perry’s withdrawal schedule for reactor vessel material specimens. The Commission reversed and vacated the ASLB’s decision and, in doing, so, provided insight on whether a particular action requires a license amendment.

The *Perry* facts are important to understanding the Commission’s decision. First, the request to revise the material specimen withdrawal schedule had been preceded by its removal from Perry’s technical specifications, meaning it was no longer included as a line item in Perry’s license. The schedule had been moved to the licensee-controlled Updated Safety Analysis Report (USAR). There was no dispute that the act of moving the schedule from the technical specification (which is part of the license) to the USAR required a license amendment. There also was no dispute that, had the withdrawal schedule remained a part of the technical specifications, any changes to the schedule would have required a license amendment.

Also important is that 10 CFR 50, Appendix H, § II.B.3 (which regulation controls material specimen withdrawal schedules) requires licensees to seek NRC Staff approval for all schedule changes. Thus, although items in the USAR ordinarily can be modified without prior staff approval pursuant to the limitations of 10 CFR 50.59, Appendix H mandates that modifications to the schedule required Staff approval.

After reviewing the facts and the Intervenor’s Staff’s and licensee’s arguments, the Commission concluded that Staff approval of the original and the revised material specimen withdrawal schedules was required. Having found that licensees were required to obtain Staff approval for schedule changes, the Commission explained “...the question before us then becomes: Are the staff approvals referenced in Appendix H *de facto* license amendments?”⁴ The Commission stated that neither the statute nor the legislative history “clarif[ied] what constitutes a license amendment within the meaning of section 189a.”⁵ The Commission added, “[b]ut it does make clear that Congress wished to provide hearing rights for only ‘certain classes of agency action,’ *not all*.”⁶ Thus the Commission sought guidance from judicial precedent.

In evaluating whether challenged NRC authorizations effected a license amendment within the meaning of section 189a, courts repeatedly have

⁴ *Perry*, 44 NRC 315, 326.

⁵ *Id.*

⁶ *Id.*, emphasis added; internal citation omitted.

considered the same key factors: did the challenged approval grant the licensee any 'greater operating authority,' [footnote deleted] or otherwise alter the original terms of a license'?⁷

The Commission began to answer the question by stating that existing case law on NRC license amendments requires that any agency action permitting a licensee to go beyond "existing license authority" is a license amendment within the meaning of the Atomic Energy Act.⁸ But the Commission did not adopt the Intervenor's "sweeping premise" that "any action for which NRC approval is required prior to implementation" necessarily "constitutes a license amendment."⁹ The Commission directly rejected this "generalization" as "erroneously" suggesting "that any time the NRC staff grants prior approval, the staff is permitting actions that will exceed existing licensing authority."¹⁰ The Commission defined "exceeding existing authority" as "those actions falling beyond the ambit of the *prescriptive* authority granted under the license."¹¹ The Commission refined the point, adding that a license amendment would not be required if the contemplated change was "encompassed within delineated categories of authorized conduct."¹² Citing as support the Supreme Court decisions in *Kelly v. Selin* and *Massachusetts v. NRC*, the Commission summarized its position: "Where the NRC approval does not permit the licensee to operate in 'any greater capacity' than originally prescribed and all relevant safety regulations and license terms remain applicable, the NRC approval does not 'amend' the license."¹³

In addition to applying judicial precedent to the facts in *Perry*, the Commission identified clear policy reasons supporting its decision.

By merely ensuring that required technical standards are met, the Staff's approval does not alter the terms of the license, and does not grant the licensee greater operating authority. Such a review indeed enforces license requirements. As an enforcement policy matter, the Staff may wish to police some licensee-initiated changes before they go into effect. *To insist—as the Intervenor do—that the NRC staff may never require prior approval for any change or activity without effecting some sort of major licensing action, would frustrate the agency's ability to monitor licensees and enforce regulations. As we have already noted, not every change that occurs at a nuclear power plant, even if significant, represents a license amendment.* Again, the key

⁷ Id.

⁸ Id. at 327.

⁹ Id.

¹⁰Id. The Commission included in the text of its decision examples of NRC approvals deemed by a Court not to constitute a license amendment.

¹¹ See, *Citizens Awareness Network, Inc. v. NRC*, 59 F. 3d 284, 295 (1st Cir. 1995).

¹² *Perry* at 328.

¹³ Id. at 327.

consideration should be: Did the agency action “supplement” the existing operating authority prescribed in the license?¹⁴

Finally, *Perry* examined whether license amendments are necessarily required to ensure members of the public are provided an opportunity to participate in the regulatory process. The Commission ruled that notice and comment rulemaking procedures sufficiently permit the public to raise concerns. Raising enforcement concerns through the 10 CFR 2.206 petition process also was cited as an alternative opportunity for the public to participate in the licensing process. Finally, the Commission noted that the Staff approval at issue in *Perry* is not the type of determination well suited to an adjudicatory hearing but, rather, appropriately falls within the staff’s technical expertise and its regulatory oversight role. The Commission explained that “[c]onfirming compliance with a self implementing, detailed, industry standard does not call into play the various common reasons for requiring an adjudicatory hearing under Subpart G of 10 CFR Part 2, such as the need to weigh various parties’ observations or the utility of cross examination.”¹⁵

Although the Commission did not say so directly, its comments can reasonably be read to reinforce the well established proposition that the public’s right to a participate (through a hearing or otherwise) must be balanced against the need for agency efficiency and other factors. One may thus infer that the Commission, in citing the other methods available for public participation, intended to reserve hearings for those items that enlarge the licensee’s operating authority or otherwise change the specific terms of the license and, *therefore*, trigger the requirement for a license amendment and the concomitant opportunity for a hearing under ABA Section 189a.

The analysis derived from *Perry* can be reduced to determining whether a particular action changes a term of the license itself or permits a licensee to have “greater operating authority” or to “operate in any greater capacity” than under its current license. Staff review and approval does not trigger a license amendment and even a requirement for staff review and approval in a regulation (e.g., Appendix H) or program does not somehow magically transform that which was not part of the license previously into a term of the license.

¹⁴ Id. at 328-329.

¹⁵ Id. at 330.

IV. CURRENT EXAMPLES

A. Boiling Water Reactor Vessel Integrated Surveillance Program

On April 8, 2002, the NRC issued Regulatory Issue Summary 2002-05, informing addressees¹⁶ of the Staff's approval of the Boiling Water Reactor (BWR) integrated surveillance program (ISP)¹⁷ and to specify the conditions for participation in the ISP. In sum, the NRC concluded that the proposed ISP was acceptable for implementation provided that all participating licensees use one or more compatible neutron fluence methodologies *acceptable to the staff* for determining capsule and Reactor Pressure Vessel (RPV) neutron fluences.¹⁸ The RIS specified, however, that the NRC would review the direct use of surveillance data from the ISP program as part of plant-specific RPV evaluations.

The RIS makes the following pronouncements:

*“[T]he proposed ISP, “if implemented in accordance with the conditions specified in the NRC staff’s [safety evaluation] of February 1, 2002, is an acceptable alternative to all existing BWR plant-specific RPV surveillance programs for the purpose of maintaining compliance with the requirements of 10 CFR Part 50, Appendix H, until the end of the 40 year term of a BWR’s current operating license. However, since implementation of the ISP may directly affect the licensing basis of every operating BWR in the United States, licensees who wish to participate in the program shall submit a license amendment (see Commission Memorandum and Order CLI-96-13) to incorporate the ISP into the licensing basis for their BWR facility.”*¹⁹

According to the Staff's reasoning, a license amendment is required *because* adoption of the ISP may “directly affect the licensing basis of every operating BWR in the United States.”²⁰ Although *Perry* is cited as the basis for this reasoning, *Perry* does not support the proposition for which it is cited. In fact, *Perry* yielded exactly the opposite result on very similar facts.

Perry also involved compliance with 10 CFR 50, Appendix H. In concluding that no license amendment was required to revise the material specimen withdrawal schedule called for in Appendix H, the Commission implicitly addressed whether

¹⁶ All licensees of BWRs except those who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

¹⁷ The ISP was submitted by the BWR Vessel and Internal Project, an association of owners of BWRs.

¹⁸ According to the RIS, “compatible” in this instance means “neutron fluence methodologies that provide results that are within acceptable levels of uncertainty for each calculation.”

¹⁹ RIS 2002-05 at 2 (emphasis added).

²⁰ *Id.*

“affect[ing] the licensing basis” necessarily requires a license amendment. The Commission concluded that it did not: “As we have already noted, *not* every change that occurs at a nuclear plant, even if significant, represents a license amendment.”²¹ The Commission identified as the “key consideration” whether the agency action would “supplement’ the existing operating authority prescribed in the license.”²²

With respect to the ISP, the NRC itself admits that, with staff oversight to ensure implementation in accordance with the Safety Evaluation, the ISP will satisfy the pertinent portions of Appendix H. This is exactly the kind of agency action, “ensuring that required technical standards are met,” that the Commission referred to in the policy discussion in *Perry*.²³ In fact, the ISP RIS fits squarely into the instructive analysis contained in *Perry* because the RIS represents only another staff-approved method of complying with Appendix H—nothing more. Like the material specimen withdrawal schedule at issue in *Perry*, the changes to the ISP program are not prohibited by a specific license term and do not affect *whether* the licensee is complying with the terms of its license (compliance with Appendix H), only how it does so. As such, application of the principles enunciated in *Perry* do not mandate a license amendment simply because a particular action would modify the plant’s licensing basis. The ISP does not grant the licensee any greater operating authority and, therefore, a license amendment is not required.

B. Revisions to Special Treatment Requirements

The NRC is considering promulgating “Risk-Informed Treatment of Structures, Systems and Components (see 66 Fed. Reg. 59,546; November 29, 2001), to be designated 10 CFR 50.69. Special treatment requirements are to provide assurance of the capability of safety significant structures, systems, and components (SSCs) to perform their intended functions. The proposed regulation would permit power reactor licensees to implement an alternative regulatory framework to meet special treatment requirements. Under the alternative framework contemplated by proposed Section 50.69, licensees will be allowed to apply a risk-informed process to categorize SSCs into four groups. The principal effect of this categorization is to move SSCs that had been considered to be safety-related but have been determined to be of low safety-significance (RISC-3) out of the scope of special treatment requirements delineated in the rule to the alternative treatment requirements contained in the rule.

Although licensees adopting Section 50.69 would need to reflect the election in their current licensing basis (CLB), the change to the CLB would primarily consist of eliminating the special treatment provisions applied to safety-related SSCs

²¹ *Perry* at 329 (emphasis added).

²² *Id.*

²³ *Supra* at 4-5.

categorized as of low safety significance. The fact that § 50.69 provides alternative treatment requirements for a certain group of SSCs in lieu of other treatment requirements does not increase the licensee's operating authority, i.e., the licensee's authority is still governed by compliance with the regulations. In essence, § 50.69 offers a different means of complying with the existing regulations commensurate with the safety significance of the SSC.

Special treatment provisions for safety-related SSCs are typically described in a licensee's quality assurance (QA) topical report, which is referenced in the updated safety analysis report. A summary description of the alternative treatment practices for RISC-3 SSCs would need to be added to the QA topical report. This change would be equivalent to a change to the QA program description that reduces commitments and, per 10 C.F.R. § 50.54(a)(4), would require NRC Staff notification and approval through the process specified in 10 C.F.R. § 50.4, but *not* the license amendment procedures of 10 C.F.R. § 50.90.

The need to review and approve the licensee's categorization process prior to implementation of alternative treatment for RISC-3 SSCs does not necessitate a license amendment. The NRC staff's review is to confirm that the licensee's process meets the process requirements in the rule, and that the process is consistent with the methods endorsed in the regulatory guide, with or without exceptions. As was found in *Perry*, where staff review and approval verifies conformance with an existing standard or method, that action does not in itself grant greater operating authority to the license.

Assuming any license in question does not contain a specific provision to the contrary, adopting a different method of complying with treatment requirements would not change the terms of the original license and would not allow the licensee to operate "in any greater capacity" than originally prescribed.

Moreover, implementation of the substantive provisions of § 50.69 would allow a licensee to continue to meet ongoing treatment requirements in a manner expressly considered through notice and comment rulemaking. The rulemaking process for promulgating § 50.69 has afforded ample opportunity for public participation. Several versions of draft rule language have been made publicly available in advance of the formal proposed rule with the objective of enhancing stakeholder involvement. In addition, if a regulatory guide is used to endorse the industry guidance on implementation of § 50.69, it will also be subjected to formal public comment. Thus, as is confirmed in *Perry*, here, the rulemaking procedures are adequate to ensure reasonable opportunity for public participation.

Subsection (e) of the draft rule language requires a licensee to apply for a licensee amendment if it wishes to adopt alternative treatment requirements.²⁴ Nothing in

²⁴ This requirement is preserved in later versions of draft rule language, at least as of April 3, 2002.

current Commission regulations would require that the NRC prescribe that a license amendment be sought to implement the substantive provisions of § 50.69. Given that there is no legal basis for such a requirement, it should be deleted from the draft rule.

C. Proposed Steam Generator Licensing Package

The Steam Generator Program Generic Licensee Change Package (GLCP) would allow licensees to implement changes to steam generator repair criteria, repair methods, performance criteria, and inspection intervals without prior NRC approval under certain conditions. The conditions are (1) the NRC had generically approved the change; (2) the licensee had demonstrated that the limitations in the Staff's SER enveloped their plant's design; and (3) the requirements of 10 CFR 50.59 do not require further NRC review of the changes.

The NRC recently informed the industry that it would not accept that part of the proposed Steam Generator Program GLCP (administrative technical specification) that would have allowed changing certain steam generator program parameters (repair criteria, repair methods, performance criteria, and inspection intervals) without prior NRC approval, even when the Staff had approved generically the new parameter in question.

On June 10, 2002, NRC Staff issued a letter to articulate its position in response to the industry's proposal to locate the parameters in the technical specification bases, a document that is not part of the license.²⁵ The letter states the NRC's objection to that approach because it would make the technical specification bases "appear as though it were part of the technical specifications since revision to the aforementioned parameters would be prohibited by the technical specification without prior NRC review and approval." The Letter further states that

"[t]he Perry decision provides that opportunity for requesting a hearing must be afforded in cases requiring NRC approval when such approval would grant the licensee greater operating authority or would otherwise alter the original terms of the license. The staff's concern is that, for the proposed administrative technical specification, changes to the subject parameters *may be reasonably construed* as crossing one or both of these thresholds."

²⁵ The technical specification improvement effort provides significant precedent for removing certain items from technical specifications and permitting them to be controlled by the licensee (e.g., Core Operating Limits Report, Pressure Temperature Limits Report, Reactor Trip System Response Time Testing Acceptance Criteria, and Engineered Safety Feature (ESF) Response Time Testing Acceptance Criteria). Changes to any of these items require NRC notification, but do not require Staff approval as long as NRC approved methodologies are used.

Neither of these explanations is, in fact, supported by the *Perry* decision. Of the steam generator program parameters, only the performance criteria define the operating authority for steam generators. The other parameters--repair criteria, repair methods, and inspection intervals--are developed and managed to ensure that the performance criteria are met. Under the proposed GLCP, because the performance criteria would define the operating authority for steam generators, it would be necessary to request NRC approval through the license amendment process. However, as long as changes to repair criteria, repair methods, and inspection intervals maintain the NRC approved performance criteria, such changes would not require a license amendment.

This approach is consistent with the facts of and the Commission's determination in *Perry*. The Commission in *Perry* agreed that changes to the sample withdrawal schedule would not require a license amendment and that Staff's review to confirm that the change conformed to the applicable ASTM standard was part of staff's inspection and enforcement role. The Commission, in *Perry*, recognized conformance with the approved ASTM standard was sufficient to demonstrate that the change to the sample withdrawal schedule did not enlarge the licensee's operating authority. In the case of the proposed GLCP, if operating authority were analogous to operability per the technical specifications, then the approved performance criteria would ensure steam generator tube integrity and therefore ensure steam generator operability. In fact, the NRC's Draft Regulatory Guide DG-1074, Steam Generator Tube Integrity; Section C.2, states "*Satisfaction of these criteria ensures tube integrity; namely that the SG tubes are capable of performing their safety functions consistent with the licensing basis.*" (DG-1074) (emphasis added). Review of changes to the repair criteria, repair methods, and inspection intervals need only be performed by the Staff to the extent necessary to ascertain that these items continue to provide reasonable assurance that the performance criteria will be met.

Thus, the GLCP performance criteria are analogous to the ASTM standard because the performance criteria define the licensee's operating authority for its steam generators. NRC approval of changes to repair criteria, repair methods, and inspection intervals should be analyzed in the same manner as were Staff review of the changes to the sample withdrawal schedule in *Perry*:

That the staff may wish to verify in advance that a proposed revision conforms to the required technical standard does not make Staff approval a license amendment. By merely ensuring that required technical standards are met, the Staff approval does not alter the terms of the license and does not grant the Licensee greater operating authority.²⁶

²⁶ *Perry* at 328.

In other words, the GLCP is designed to include performance criteria as part of the steam generator program administrative technical specification. Changes to repair criteria, repair methods, and inspection intervals would not be included in the technical specifications. The changes therefore would not require NRC approval (or a license amendment) under the following conditions.

- the NRC has generically approved each one;
- the licensee seeking to implement the change has shown that the limitations in the SER envelopes its plant design; and
- the changes do not otherwise require NRC review in accordance with the 10 CFR 50.59 requirements.

To reiterate, the Staff would review first time changes to these items to ensure that they continue to provide reasonable assurance that the performance criteria will be met. The 50.59 process would control adoption of generically approved changes to repair criteria, repair methods, and inspection intervals thereafter.

D. Performance Based Fire Protection Standards

The current draft of the proposed fire protection rule would require licensees to seek a license amendment when the licensee (1) initially seeks to adopt NFPA standard 805 as its licensing basis and (2) seeks to use alternative methods and analytical approaches, as provided for in NFPA 805, in lieu of specific provisions of NFPA 805.

The proposed rule's provisions on compliance with NFPA 805 state:

- (i) A licensee may maintain a fire protection program that complies with NFPA 805 as an alternative to complying with paragraph (b) of this section for plants licensed to operate before January 1, 1979; the fire protection license conditions for plants licensed to operate after January 1, 1979; or paragraph (f) of this section for plants for which licensees have submitted the certifications required under 10 CFR 50.82(a)(1). *The licensee shall submit a request to comply with NFPA 805 in the form of an application for license amendment under § 50.90. The application must identify any orders and license conditions that must be revised or superseded, and contain any necessary revisions to the plant's technical specifications and the bases therefore. The Director of the NRC's Office of Nuclear Reactor Regulation, or a designee of the Director, may approve the application if the Director or designee determines that the licensee has identified orders, license conditions, and the technical specifications that must be revised or superseded, and that any necessary revisions are adequate. The Director or designee of the Director shall issue a license amendment*

approving the use of NFPA 805 and any necessary revisions to the technical specifications.

In this instance, a license amendment would be appropriate if the adoption of the new standard would revise or supersede a license condition in such a way as to enlarge the plant's operating authority or to modify the plant's technical specifications. However, the proposed fire protection rule also calls for a request for a license amendment when a licensee chooses to use an alternative methods and analytical approaches. The proposed regulation would allow the Director of Nuclear Reactor Regulation or a designee of the Director to approve the application if the alternative methods and analytical approaches meet the following criteria:

- (i) Satisfy the goals, performance objectives, and performance criteria specified in NFPA 805 related to nuclear safety and radiological release;
- (ii) Maintain safety margins; and
- (iii) Maintain fire protection defense-in-depth (fire prevention, fire suppression, and post-fire safe shutdown capability).

In light of the *Perry* decision, there is no legal basis for requiring a license amendment to implement proposed alternatives to NFPA 805. Using alternate methods to meet the objectives of NFPA 805 would not modify the terms of the license; it would simply implement the provisions of the license through different means. While prior NRC approval and a Safety Evaluation Report may be pre-conditions to using alternative methods, there is no legal basis for requiring a license amendment in order to use NRC-approved alternate methods if such action does not provide additional operating authority or otherwise modify the terms of the license.

V. CONCLUSION

The Commission provided guidance in *Perry* as to what constitutes a license amendment: whether the action in question would grant the licensee greater operating authority or otherwise alter the original terms of the license. No Commission decision subsequent to *Perry* has modified the criteria set out in that decision. To address the issues identified herein, the Commission should consider issuing a Staff Requirements Memorandum to ensure correct application of the criteria set out in *Perry* and, thus, for the Staff to reconsider its position in each of the areas enumerated above.