RULEMAKING ISSUE
AFFIRMATION

October 31, 2006 SECY-06-0220

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: FINAL RULE TO UPDATE 10 CFR PART 52, "LICENSES, CERTIFICATIONS, AND APPROVALS FOR NUCLEAR POWER PLANTS" (RIN AG24)

PURPOSE:

To obtain Commission approval to publish in the *Federal Register* final amendments to Title 10, Part 52, "Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Plants," of the *Code of Federal Regulations* (10 CFR Part 52) which would also retitle 10 CFR Part 52 and make conforming changes to related sections of the regulations in Title 10, Chapter 1.

SUMMARY:

The Nuclear Regulatory Commission (NRC) staff (the staff) is seeking Commission approval of final amendments to its regulations at 10 CFR Part 52 concerning the licensing and approval processes for nuclear power plants. The final rule rewrites 10 CFR Part 52, modifies other NRC regulations to enhance the Agency's effectiveness and efficiency in implementing the 10 CFR Part 52 licensing and approval processes, and clarifies the applicability of various requirements to each of these processes (*i.e.*, early site permit (ESP), standard design approval, standard design certification, combined license (COL), and manufacturing license).

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The enhancements to 10 CFR Part 52 are the result of lessons learned during design certification and ESP reviews and stakeholder discussions about the ESP, design certification, and COL review processes.

On July 3, 2003 (68 FR 40026), the NRC published in the *Federal Register* a proposed rule to clarify regulations related to nuclear power plant licensing under 10 CFR Part 52. After further consideration, the NRC published a revised proposal of these rule amendments on March 13, 2006 (71 FR 12781). The public comment period for the March 2006 revised proposed rule closed on May 30, 2006. The NRC received 19 comment letters from industry stakeholders, other Federal agencies, and individuals during the public comment period. The NRC staff has considered and resolved all of the public comments received during the comment period and has modified the rule language, as appropriate. The staff has prepared a separate report, entitled *Comment Summary Report: 10 CFR Part 52, Licenses, Certifications, and Approvals for Nuclear Power Plants*, in which it summarizes the public comments received during the comment period and discusses the staff's disposition of each comment (Enclosure 3). The resolution of significant public comments is also discussed in Section IV, "Responses to Specific Requests for Comments" and, Section V, "Discussion of Substantive Changes and Responses to Significant Comments" of the enclosed *Federal Register* notice. The staff believes that this final rulemaking will improve the effectiveness and efficiency of the licensing and approval processes in 10 CFR Part 52 for future applicants. In SECY-06-0180, "Supplemental Proposed Rulemaking on Limited Work Authorizations," dated August 14, 2006, the staff and the Office of the General Counsel (OGC) separately transmitted a proposed supplement to the 10 CFR Part 52 rule amending the Commission's regulations concerning limited work authorizations (LWAs) under 10 CFR 50.10, "License Required." The Commission approved publication of the supplemental proposed rule on October 2, 2006, and the rule was published for comment in the *Federal Register* on October 17, 2006 (71 FR 61330). The public comment period for the supplemental proposed rule closes on November 16, 2006. The objective of the staff and OGC is that the Commission would approve the LWA changes in a manner such that the LWA provisions could be published in the *Federal Register* as part of the final Part 52 rule.

BACKGROUND:

The NRC staff planned to update 10 CFR Part 52 after the first standard design certification reviews. The proposed rulemaking action began with the issuance of SECY-98-282, "Part 52 Rulemaking Plan," on December 4, 1998 (Agencywide Documents Access and Management Systems (ADAMS) Accession No. ML032801416). The Commission issued a staff requirements memorandum (SRM) on January 14, 1999 (ADAMS Accession No. ML032801439), approving the staff's plan for revising 10 CFR Part 52. Subsequently, the NRC staff obtained considerable stakeholder comment on its planned action. On July 3, 2003, the NRC published a proposed rule to clarify miscellaneous parts of the NRC's regulations, update 10 CFR Part 52 in its entirety, and incorporate stakeholder comments.

Following the close of the public comment period on the July 2003 proposed rule, a number of factors led the staff to question whether this proposed rule would meet the Commission's objective of improving the effectiveness of NRC processes for licensing future nuclear power plants. Public comments identified several concerns about whether the proposed rule adequately addressed the relationship between 10 CFR Part 50, "Domestic Licensing of

Production and Utilization Facilities," and 10 CFR Part 52. Some commenters also questioned whether the proposed rule clearly specified the applicable regulatory requirements for each of the licensing and approval processes in 10 CFR Part 52.

In addition, through its review of the first three ESP applications, the staff gained additional insights into the ESP process. The staff also benefitted from public meetings with external stakeholders on the development of staff guidance on the ESP and COL processes. As a result, the staff decided that, to more effectively and efficiently implement the licensing and approval processes for nuclear power plants in 10 CFR Part 52, a substantial rewrite and expansion of the original proposed rulemaking to include changes throughout the entire body of NRC regulations in Title 10, Chapter 1, was necessary. The staff again considered previously submitted comments in developing the most recent proposed rule. On August 25, 2005, the Agency posted draft rule language on the NRC rulemaking Web site and, on September 6, 2005 (70 FR 52942), published a notice of the availability of the draft rule language in the *Federal Register*. On March 13, 2006, the NRC published a revised proposed rule superseding the July 2003 proposed rule.

On March 14, 2006, the NRC staff convened a public workshop to facilitate discussion on the rulemaking and to answer stakeholder questions regarding the revised proposed rule. A summary of that workshop and the transcript are available on the NRC's Web site (ADAMS Accession Nos. ML060970324 and ML060810669, respectively). In response to stakeholder requests, the staff convened a public meeting on April 18, 2006, to discuss specific questions about the requirements of the revised proposed rule pertaining to LWAs and the severe accident design features necessary for design certification. A summary of that meeting is available on the NRC Web site (ADAMS Accession No. ML061140433).

DISCUSSION:

As discussed in the *Federal Register* notice (Enclosure 1) and in SECY-05-0203, "Revised Proposed Rule to Update 10 CFR Part 52, 'Licenses, Certifications, and Approvals for Nuclear Power Plants,'" dated November 3, 2005 (ADAMS Accession No. ML052300372), this rulemaking rewrites 10 CFR Part 52 to improve the organization, format, and language. The final rule also contains changes to other NRC regulations to clarify the applicability of various technical and regulatory requirements throughout Title 10, Chapter 1, to each of the processes in 10 CFR Part 52.

Rule changes necessary to implement the objectives of the Part 52 rulemaking have been conformed to refer to the Director of the Office of New Reactors. This should minimize the need for conforming reviews of the Part 52 rulemaking before final publication in the *Federal Register*. However, this does not eliminate the need for a general review of, and conforming administrative changes to, existing Title10, Chapter 1, regulations.

The staff has redesignated former Appendices O and M of 10 CFR Part 52 on standard design approvals and manufacturing licenses, respectively, as new subparts in the revised 10 CFR Part 52. Redesignating these appendices as subparts results in a consistent format and organization of the requirements applicable to the main licensing and approval processes in 10 CFR Part 52. In addition, the redesignation clarifies that each of these licensing processes are available to potential applicants as an alternative to the licensing and approval processes in

10 CFR Part 50 (construction permit and operating license). Consistent with the broad scope of 10 CFR Part 52, the final rule is retitled, "Licenses, Certifications, and Approvals for Nuclear Power Plants." The revised 10 CFR Part 52 contains five subparts—ESPs (Subpart A), design certifications (Subpart B), COLs (Subpart C), design approvals (Subpart E), and manufacturing licenses (Subpart F). The staff proposes to reserve Subpart D for possible future use.

The staff retained Appendices N and Q of 10 CFR Part 52 in the final rule, but had proposed to remove them in the proposed rule. Appendix N to 10 CFR Part 52, which addresses duplicate design licenses, is discussed later in this paper. The staff has also chosen to retain Appendix Q to 10 CFR Part 52, which addresses early staff review of site suitability issues. Appendix Q allows the NRC staff to issue a report on site suitability issues for a specific site for which a potential applicant seeks the NRC staff's input. This process is separate from the ESP process discussed in Subpart A of 10 CFR Part 52. Although there is some redundancy between the early review of site suitability issues and the ESP process, to allow ESP and COL applicants maximum flexibility in seeking early review of issues, the staff has retained Appendix Q to 10 CFR Part 52 in the final rule. This change from the proposed rule is based largely on public comments.

The staff also reorganized and expanded the scope of the administrative and general regulatory provisions that precede the 10 CFR Part 52 subparts by adding new sections analogous to 10 CFR 50.4, "Written Communications," 10 CFR 50.7, "Employee Protection," 10 CFR 50.9, "Completeness and Accuracy of Information," 10 CFR 50.12, "Exemptions," 10 CFR 50.13, "Attacks and Destructive Acts," 10 CFR 50.52, "Combining Licenses," and 10 CFR 50.53, "Jurisdictional Limits." Adding the new sections to 10 CFR Part 52 rather than revising the comparable sections in 10 CFR Part 50 is more consistent with the general format and content of the Commission's regulations.

The staff reviewed the existing regulations in Title 10, Chapter 1, to determine whether they require modification to reflect the licensing and approval processes in 10 CFR Part 52. This review had two aspects. First, the staff determined whether an existing regulatory provision must, by virtue of a statutory requirement or regulatory necessity, be extended to address a 10 CFR Part 52 process and, if so, how the regulatory provision should apply. Second, in situations in which the Commission has some discretion, the staff determined whether there were policy or regulatory reasons to extend the existing regulations to each of the 10 CFR Part 52 processes. Most of the staff's conforming changes occur in 10 CFR Part 50. In making changes involving the 10 CFR Part 50 provisions, the staff adopted the general principle of retaining the technical requirements in 10 CFR Part 50 and maintaining all applicable procedural requirements in 10 CFR Part 52. However, because of the complexity of some provisions in 10 CFR Part 50 (*e.g.*, 10 CFR 50.34, "Contents of Applications; Technical Information"), the staff could not universally follow this principle. The enclosed *Federal Register* notice provides a description of, and bases for, the conforming changes for each affected part.

The staff has revised the regulatory analysis prepared for the proposed rule based on the changes made to the final rule. Enclosure 2 to this paper provides the revised regulatory analysis.

The following discussion highlights for Commission consideration several new staff proposals in the final rulemaking:

- ESP Finality on Environmental Issues
- Design Certification Amendments
- Completion of Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) under a COL
- Changes to Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders"
- COLs of Identical Design at Multiple Sites

ESP Finality on Environmental Issues

The staff made several changes in the final rule based on public comments regarding the requirements for a COL application referencing an ESP and based on further consideration of the NRC's obligations under the National Environmental Policy Act (NEPA) for such actions. In the proposed rule, 10 CFR Part 51 would have required the preparation of an environmental impact statement (EIS) for all COLs referencing an ESP. Several commenters believed that an ESP and COL met the Council on Environmental Quality (CEQ) regulation definition of "connected actions," and should therefore not require the preparation of a new EIS for the second of the two connected actions, or a revalidation of previous findings if neither the applicant nor others identify new and significant information. Commenters stated that under NEPA case law, there was no requirement to prepare a new EIS for the latter of the two connected actions that were previously evaluated together in a single EIS. The commenters stated that the EIS prepared at the ESP stage serves as the EIS for issuance of both the ESP and COL. Commenters stated that the ESP EIS included an evaluation of the environmental impacts related to issuance of a COL inasmuch as it considered the environmental impact of plant construction and operation.

The staff continues to believe that it is not necessary to require that all topics be covered in a single EIS at the ESP stage, and that topics such as alternative energy sources and need for power may be treated in an EIS supplement at the COL stage when the detailed planning for the project is completed. As the commenters note, new and significant information may also prompt the preparation of a supplement to the ESP EIS in connection with the COL application. The staff has modified the final rule to limit the preparation of a supplementary EIS to those situations. In view of this resolution of the ESP finality issue, which addresses much of stakeholders' concerns in this area, the staff and OGC believe that the final rule need not state a position on whether the granting of an ESP and the granting of a COL referencing that ESP are connected actions. Nonetheless, if detailed planning and associated environmental information is in fact complete when an ESP application is filed, there is no bar to the staff to prepare, at the ESP stage, an EIS that resolves all environmental matters associated with construction and operation of a power reactor at the ESP site, including the benefits of such construction and operation (*e.g.*, need for power), and alternative energy sources. The staff may then rely on that EIS at the COL stage, provided that new and significant information has

not been identified. The staff need not label the ESP and COL as connected actions to adopt this procedure. Accordingly, the staff has modified the final rule to allow for an ESP EIS to serve as the EIS for a COL application referencing the ESP without supplementation under such circumstances. In those cases, the staff is proposing to issue an environmental assessment (EA) with a finding of no new and significant information. The final rule provides that the staff will prepare a draft EA with a proposed finding of no new and significant information for a COL application referencing an ESP only if: (1) the final environmental impact statement prepared in connection with the ESP discloses the economic, technical, or other benefits (*e.g.*, need for power) and costs of the proposed action, contains an evaluation of alternative energy sources and resolves all environmental issues related to the impacts of construction and operation of the facility; and (2) there is no new and significant information identified with respect to issues related to the impacts of construction and operation of the facility that were resolved in the ESP proceeding. The draft EA and proposed finding would be issued for public comment. Following the close of the public comment period, the staff would prepare a recommended final EA and finding of no new and significant information to be issued by the Commission itself. Thus, the Commission itself would act as the presiding officer with respect to NEPA matters in this situation. OGC believes that these changes may meet the "logical outgrowth" test inasmuch as the Commission posed specific questions on how the NRC would address its NEPA obligations where a combined license application references an ESP. In addition, the Part 51 changes constitute changes to the NRC's rules of practice and procedure, inasmuch as Part 51 describes the manner in which the NRC will fulfill its NEPA obligations. NEPA is a procedural statute, and does not impose substantive obligations on a Federal agency. Therefore, the changes to Part 51 may be adopted in final form without further notice of opportunity for public comment.

Some members of the Office of Nuclear Reactor Regulation (NRR) staff believe that the change allowing preparation of an EA with a finding of no new and significant information for a COL application referencing an ESP is a significant departure from the approach in the 1989 rule. These staff members believe that the new approach warrants consideration by external stakeholders, such as other Federal agencies that have traditionally been interested in the EISs prepared in support of authorization of construction permits and operating licenses. Furthermore, these staff members believe that the approach proposed for the final rule represents a significant departure from the draft proposed rule and are concerned that external stakeholders have not had an opportunity to comment on the specifics of this alternative approach. In addition, the same staff members believe that an Agency position on the "connected actions" issue is a policy matter that the Commission should resolve to preclude ambiguity in light of the fact that some comments on the proposed rule reflected the view that issuance of an ESP and issuance of a COL referencing that ESP are connected actions. These staff members believe that an agency may take a major Federal action (such as issuing a COL) without preparing an EIS only if the action is connected to a previous agency action with a supporting EIS that covers the same purpose and need as the follow on action. The staff and OGC have considered these matters and continue to support the final rule as presented in Enclosure 1.

Another area of significant public comment was concern about the perceived loss of finality previously awarded to environmental issues addressed in an ESP. Commenters were concerned that, under the proposed rule, interveners could litigate a previously evaluated environmental issue simply by alleging that new information existed which altered the prior

conclusions. The staff agreed with the commenters that the rule language should be modified in the final rule to reflect more clearly the finality of environmental issues resolved in an ESP.

Therefore, the final rule limits environmental contentions that may be litigated to "any significant environmental issue related to the impacts of construction and operation of the facility that was not previously resolved in the proceeding on the ESP application, or any issue involving the impacts of construction and operation of the facility that was previously resolved in the proceeding on the ESP application for which new and significant information has been identified." The staff believes that the regulations and the applicable case law interpreting NEPA allow the staff to incorporate the ESP EIS by reference in the COL EIS. However, the staff must address any new and significant information for issues that were resolved in the ESP EIS.

Another issue raised by commenters was the definition of "new and significant" information in the proposed rule as it applies in the context of a COL application referencing an ESP. Commenters were opposed to wording in the text of the proposed rule that would require COL applications to include, "any new and significant information on the site or design to the extent that it differs from, or is in addition to, that discussed in the early site permit environmental impact statement." Commenters stated that a COL applicant should only provide information about a previously considered environmental issue if it is both new and significant, not simply different from or in addition to previously presented information.

The staff agrees with the commenters and has modified 10 CFR Part 51 in the final rule to require that COL applicants referencing an ESP include any new and significant information for issues related to the impacts of construction and operation of the facility that were resolved in the ESP proceeding. Conversely, matters related strictly to siting (*i.e.*, evaluation of alternative sites and a determination of whether there is an obviously superior alternative site), are finally resolved at the ESP stage and there is no need to provide new and significant information on those matters. The staff, in the context of a combined license application that references an ESP, has defined the term "new" in the phrase "new and significant information" as any information that was both (1) not considered in preparing the ESP environmental report or EIS (as may be evidenced by references in these documents, applicant responses to NRC requests for additional information, comment letters, etc.) and (2) not generally known or publicly available during the preparation of the EIS (such as information in reports, studies, and treatises). This new information may or may not be significant. For an issue to be significant, it must be material to the issue being considered, *i.e.*, it must have the potential to affect the finding or conclusions of the NRC staff's evaluation of the issue. The COL applicant need only provide information about a previously resolved environmental issue if it is both new and significant. The NRC staff will verify that the applicant's process for identifying new and significant information is effective.

Design Certification Amendments

In Section V of the proposed rule (Question #14), the Commission stated that it was considering adopting an additional provision in 10 CFR 52.63(a)(1) that would allow amendments of design certification rules (DCRs) to incorporate generic resolutions of design acceptance criteria (DAC) or other design information without meeting the special backfit requirement in the former 10 CFR 52.63(a)(1). By allowing for a DCR amendment to

generically resolve DAC, the Commission would resolve additional design issues, would achieve finality for those issue resolutions, and would avoid repetitive consideration of those design issues in individual COL proceedings.

In response to Question #14, many commenters encouraged the NRC to include a process that would allow for amendments to the DCR to incorporate "beneficial" changes resulting from first-of-a-kind engineering, would apply the amendment to all plants referencing the certified design, and would only allow amendments before issuance of the first COL that referenced the DCR. Some commenters also proposed that the amendment process allow for generic resolutions of errors in the certification information or design changes that result from lack of availability of components specified in the original DCR.

The staff's deliberations on these proposals considered the Commission's goal for design certification, which is to achieve and maintain the benefits of standardization. The Commission stated in the original 10 CFR Part 52 (April 18, 1989; 54 FR 15372) that achievement of the enhanced safety, made possible by standardization will be frustrated if changes to either a certified design or the plants referencing it are permitted too frequently. As a result, the former 10 CFR 52.63(a)(1) contained a special backfit requirement to restrict changes and to require that everyone meet the same backfit standard for generic changes, thereby ensuring that all plants built under a referenced DCR would be standardized. The staff is still determined to achieve the benefits of standardization, but recommends allowing amendments of certification information provided the amendment will be applied to all plants that reference the DCR. In determining whether to codify a proposed amendment, the NRC will give special consideration to comments from applicants or licensees who reference the DCR regarding whether they want to backfit their plants with these additional design changes.

Therefore, the staff has included in the final rule a DCR amendment process in 10 CFR 52.63(a)(1) for Commission consideration. The process allows for: (1) generic resolutions of DAC; (2) correction of errors; or (3) increasing standardization, without meeting the special backfit requirement. These amendments will apply to all plants that have referenced or will reference the DCR. The staff believes that these amendments will enhance standardization by further completing or correcting the certification information. A detailed discussion of the comments on the amendment process is provided in Section V.C.7.g of the final rule.

Completion of ITAAC Under a COL

After consideration of the tasks that must be completed to support a Commission finding that the acceptance criteria in the COL are met (under 10 CFR 52.103(g)), the staff has made several changes to the regulations governing ITAAC. The staff has added a new § 52.99(a) in the final rule to require that a licensee submit to the NRC, no later than 1 year after issuance of the COL, its detailed schedule for completing the inspections, tests, or analyses in the ITAAC. This provision also requires the licensee to submit updates to the ITAAC schedule every 6 months thereafter. Within 1 year of its scheduled date for initial loading of fuel, the licensee must submit updates to the ITAAC schedule every 30 days. In the proposed rule, the NRC sought stakeholder feedback on whether the final rule should include such a provision. Although commenters did not believe that a regulatory requirement for submission of a schedule was necessary, the staff disagrees. An ITAAC schedule is necessary to ensure that the NRC has sufficient information to plan all of the activities required for the staff to support the

Commission's timely determination as to whether all of the ITAAC were met before the licensee's scheduled date for fuel load.

The staff has made further changes in the final rule to the proposed 10 CFR 52.99(c), which requires the licensee to notify the NRC that the required inspections, tests, and analyses in the ITAAC were completed and the acceptance criteria met. The staff has modified 10 CFR 52.99(c) in the final rule to clarify, in paragraph (c)(1), that the notification must contain sufficient information to demonstrate that the acceptance criteria for the ITAAC were met. The staff is adding this clarification to ensure that COL applicants and holders are aware that the NRC expects the notification of ITAAC completion to contain more information than just a simple statement that the licensee believes the ITAAC were completed and the acceptance criteria met. The NRC plans to prepare regulatory guidance providing further explanation of what constitutes "sufficient information" for such a demonstration. In addition, the staff has added a new paragraph (c)(2) requiring that, if the licensee has not provided, by the date 225 days before the scheduled date for initial loading of fuel, the notification required by paragraph (c)(1) for all ITAAC, then the licensee must notify the NRC that the inspections, tests, or analyses for all uncompleted ITAAC will be successfully completed and all acceptance criteria will be met prior to initial operation (consistent with the Atomic Energy Act (AEA), Section 185.b, requirement that the Commission, "prior to operation," find that the acceptance criteria in the combined license are met). The notification must be provided no later than the date 225 days before the scheduled date for initial loading of fuel, and must provide sufficient information to demonstrate that the inspections, tests, or analyses will be successfully completed and the acceptance criteria for the uncompleted ITAAC will be met, including, but not limited to, a description of the specific procedures and analytical methods to be used for performing the inspections, tests, and analyses and determining that the acceptance criteria have been met. Paragraph (e) has been revised to require that the NRC make available to the public the notifications to be submitted under § 52.99(c)(1) and (c)(2), no later than the *Federal Register* notice of intended operation and opportunity for hearing on ITAAC under § 52.103(a). A conforming change is included in § 2.105(b)(3) to require that the § 52.103(a) notice reference the public availability of the § 52.99(c)(1) and (2) notifications. The staff is proposing that the paragraph (c)(2) notification be set at 225 days before the date scheduled for initial loading of fuel, in order to ensure that the licensee notifications are publicly available through the NRC document room and online through the NRC Web site at the same time that the § 52.103(a) notice is published in the *Federal Register*. The staff's goal is to publish that notice 210 days before the date scheduled for fuel loading, but in all cases the § 52.103(a) notice would be published no later than 180 days before scheduled fuel load, as required by Section 189.a(1)(B) of the AEA.

In the proposed rule, the NRC requested stakeholder feedback on whether a provision on completion of ITAAC in a set time period prior to fuel load should be added to the final rule. Commenters did not support addition of such a requirement, and the staff has not included a provision requiring the completion of all ITAAC by a certain time prior to the licensee's scheduled fuel load date. Instead, the staff has decided to modify the concept slightly by requiring the licensee to submit, with respect to ITAAC which have not yet been completed 225 days before the scheduled date for initial loading of fuel, additional information addressing whether those inspections, tests, and analyses will be successfully completed and the acceptance criteria met before initial operation. The staff believes it is necessary to add the new provision in § 52.99(c)(2) to ensure it has sufficient information to complete all of the

activities necessary for the Commission to make a determination as to whether all of the ITAAC have been or will be met prior initial operation. In the case where the licensee has not completed all ITAAC by 225 days prior to its scheduled fuel load date, the staff expects the information that the licensee submits related to uncompleted ITAAC to be sufficiently detailed such that it can determine what activities it will need to undertake to determine if the acceptance criteria for each of the uncompleted ITAAC have been met, once the licensee notifies the staff that those ITAAC have been successfully completed and their acceptance criteria met. In addition, the staff is adding the requirements in paragraphs (c)(1) and (c)(2) to ensure that interested persons will be able to meet the AEA, Section 189.a(1), threshold for a hearing with respect to both completed and as-yet uncompleted ITAAC. The staff therefore expects that the information submitted by licensees in the § 52.99(c)(2) notification will be sufficiently complete and detailed such that any licensee response to a contention on either completed or uncompleted ITAAC would ordinarily be answered solely by reference to information contained in the notification. Furthermore, the staff expects that any contentions submitted by prospective interveners regarding uncompleted ITAAC would focus on the inadequacies of the procedures and analytical methods described by the licensee for completing those ITAAC in the context of the reasonable assurance finding under 10 CFR 52.103(b)(2). Therefore, the level of detail provided by the licensee should be sufficient to allow a prospective intervener to form such judgments by reference to that information. The staff plans to prepare regulatory guidance providing further explanation of what constitutes "sufficient information" to demonstrate that the inspections, tests, or analyses for uncompleted ITAAC will be successfully completed and the acceptance criteria for the uncompleted ITAAC will be met.

The staff notes that, even though it did not include a provision requiring the completion of all ITAAC by a certain time prior to the licensee's scheduled fuel load date, the staff will require some period of time to perform its review of the last ITAAC once the licensee submits its notification that the ITAAC has been successfully completed and the acceptance criteria met. In addition, the Commission will require some period of time to perform its review of the staff's conclusions regarding all of the ITAAC and the staff's recommendations regarding the Commission finding under 10 CFR 52.103(g). The staff notes in the "Supplementary Information" section of the attached *Federal Register* notice that licensees should structure their construction schedules to take into account these time periods. The staff intends to develop regulatory guidance on the licensee's completion and NRC verification of ITAAC and will provide estimates of the time it expects to take to verify successful completion of various types of ITAAC. The staff expects that such guidance, along with frequent communication with licensees during construction, will provide licensees with adequate information to plan initial fuel loading and related activities.

Changes to 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders"

In the March 2006 proposed rule, changes to 10 CFR Part 2 were largely limited to conforming changes to address Part 52 processes, including design certifications in Subpart H. However, in response to public comments, the staff is proposing additional changes to 10 CFR Part 2 regarding the NRC's rules of practice and procedure. Such changes can be made in the final 10 CFR Part 52 rule without renoticing under the Administrative Procedures Act (APA) (552 U.S.C. 553(b)(A)).

The staff revised 10 CFR 2.101(a-1) and Subpart F of 10 CFR Part 2 to provide for early consideration and a partial early decision on site suitability issues associated with an application for a COL. Currently, 10 CFR 2.101(a-1) and Subpart F may be used only in connection with applications for construction permits.

The staff is revising 10 CFR 2.101(a)(5) to allow COL applications to be submitted in two parts, with the environmental information submitted in one part and the remaining information submitted in a second part. Currently, 10 CFR 2.101(a)(5) may only be used in connection with applications for construction permits.

The staff is revising 10 CFR 2.340, "Initial Decision in Contested Proceedings on Applications for Facility Operating Licenses; Immediate Effectiveness of Initial Decision Directing Issuance of Amendment of Construction permit or Operating License," and making conforming changes throughout Part 2, to remove the restrictions currently in 10 CFR 2.340(f) and (g) regarding the immediate effectiveness of initial decisions in contested proceedings for nuclear power plants, as well as initial decisions in all other contested proceedings, such as specifically-licensed independent spent fuel storage installations, monitored retrievable storage, a high-level waste repository, and enforcement proceedings. The final rule also removes the "automatic stay for Commission review" provisions with respect to issuances of facility construction permits and operating licenses in the current rule, and does not include the March 2006 proposals to extend the "automatic stay" provisions to issuances of ESPs, combined licenses, manufacturing licenses, and to issuance of § 52.103(g) findings.

These restrictions, which were adopted after the 1979 accident at Three Mile Island, provide that the presiding officer's decision on a construction permit is not effective until the Commission reviews and acts on the decision. Consequently, there is an "automatic stay" of a presiding officer's decision on an operating license (other than a low-power license) pending Commission review. Under the final rule, the Director of either NRR or the Office of New Reactors (NRO), as appropriate, in a contested proceeding shall issue an LWA, construction permit, or license within 10 days of the issuance of a presiding officer's initial decision (1) if the Commission or the Director has otherwise made all necessary findings for issuance of the authorization, permit, or license; and (2) notwithstanding the pendency of a petition for reconsideration under 10 CFR 2.345 "Petition for Reconsideration," a petition for review under 10 CFR 2.341, "Review of Decision and Action of Presiding Officer," a motion for stay under 10 CFR 2.342, "Stays of Decisions," or a petition under 10 CFR 2.206, "Requests for Action under this Subpart." The final rule also authorizes the Commission or the appropriate Director in a contested proceeding to make the finding on ITAAC under 10 CFR 52.103(g) within 10 days of the issuance of a presiding officer's initial decision (1) if the Commission or the Director has made findings for all ITAAC which are not within the scope of the initial decision of the presiding officer; and (2) notwithstanding the pendency of a petition for reconsideration under 10 CFR 2.345, a petition for review under 10 CFR 2.241, a motion for stay under 10 CFR 2.342, or a petition under 10 CFR 2.206.

Finally, 10 CFR 2.104 is further revised from the proposed rule to add provisions addressing the nature of the Agency's adjudicatory inquiry in a COL hearing. First, the final rule makes clear that in a contested COL hearing, the Agency's adjudicatory review with respect to the *uncontested* matters is limited to those matters which must otherwise be addressed in an uncontested construction permit proceeding. Similarly, the final rule provides that in an

uncontested COL hearing, the overall Agency adjudicatory review is limited to those matters which must otherwise be addressed in an uncontested construction permit proceeding. Third, the final rule provides that where the COL references an ESP, the overall Agency adjudicatory review is further limited to those matters which must otherwise be addressed in an uncontested construction permit proceeding, but have not been addressed in the ESP. This represents a change from the March 2006 proposed rule, which essentially made no distinction with respect to the nature of the adjudicatory review in either an uncontested or contested COL hearing, or a COL hearing referencing an ESP.

COLs of Identical Design at Multiple Sites

Appendix N to 10 CFR Part 50 and 10 CFR Part 52 affords procedural benefits with respect to the application and hearing process for construction permit or operating license applicants who reference a common, "duplicate" design for their reactors. The March 2006 proposed rule would have removed Appendix N from 10 CFR Part 52. Upon reconsideration, the staff concluded that the Appendix N to 10 CFR Part 52 procedures would extend the "design-centered" review approach into the conduct of hearings on COLs referencing the same design. Therefore, the staff has restored Appendix N to 10 CFR Part 52, revised its title to reflect that it applies to applications referencing an "identical design," and made conforming changes to allow COL applicants to use its procedural provisions. The staff did make conforming changes to Subpart D of 10 CFR Part 2 to reflect the expanded scope of Appendix N to 10 CFR Part 52. The NRC may make these changes to the Agency's rules and practice and procedures in the final 10 CFR Part 52 rule without renoticing under the APA.

Resolution of Additional Issues

The resolution of the issues discussed in SECY-05-0203 can be found in the enclosed *Federal Register* notice. In addition, SECY-02-0180, "Legal and Financial Policy Issues Associated with Licensing New Nuclear Power Plants," dated October 7, 2002, identified two issues for future resolution that are related to the issuance of COLs. These issues are the delayed use of COLs, which includes banking of COLs, and the testing of new design features before issuance of a COL.

The staff has addressed all of the issues associated with requirements for testing of new design features in Section V.B of the final rule. The requirements for testing that are necessary to demonstrate the performance of new safety systems and components are set forth in the new 10 CFR 50.43(e). These new requirements also provide an option for an applicant to request approval to demonstrate the performance of new design features with a licensed prototype plant.

The issue of the delayed use of a COL was initially identified during discussions on licensing of multiple, modular (small) reactors. The Nuclear Energy Institute proposed that the NRC issue COLs for all of the modular reactors addressed in the application simultaneously even though construction may be delayed for many of the reactors for an indefinite time. As the staff stated in SECY-02-0180, this delayed use of COLs would be inconsistent with the Commission's policy on the duration of design approvals.

As a result of the Energy Policy Act of 2005, the 40-year period of operation under a COL will begin when the Commission makes its finding under 10 CFR 52.103(g) and the duration of the construction period, or the effective design approval for custom plants, would not be specified. Some of the prospective COL applicants have stated that they do not have definite plans to begin construction of their plant(s). Allowing a licensee to hold a COL for an indefinite time before beginning construction, would conflict with NRC's concept of the COL process and application of the backfit rule. NRC developed the COL process with the understanding that the licensee would begin construction upon receipt of the COL, which is consistent with past practice on issuance of construction permits. Also, in the past, NRC did not apply the backfit rule (10 CFR 50.109) until the operating license was issued. Under the revised 10 CFR 50.109, the backfit rule becomes applicable upon issuance of the COL. This change was made based on our understanding that design issues would be resolved before issuance of the COL and the licensee would begin construction upon receipt of the COL. With this understanding, 10 CFR 50.109 would protect the licensee during construction and during operation. The changes to the backfit rule were not intended to protect a licensee from new requirements during some indefinite time before the start of substantial construction.

The staff did not provide regulations in the final rule to address concerns with proposals to delay use of a COL. If the Commission is concerned about delays in initiation of construction by a particular applicant, it could either withhold issuance of the COL until the applicant is prepared to begin substantial construction or condition the COL to delay application of the backfit rule until the licensee has begun substantial construction.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the enclosed notice of final rulemaking (Enclosure 1).

2. Certify that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

3. Note that:

    a. That staff has prepared a final regulatory analysis for this rulemaking (Enclosure 2).

    b. The staff has determined that this action is not a "major rule," as defined in the Congressional Review Act of 1996 (5 U.S.C 804(2)) and has confirmed this determination with the Office of Management and Budget.

    c. The proposed LWA rule, which has been provided to the Commission would, if adopted, further modify the final 10 CFR Part 52 rule.

    d. The appropriate Congressional committees will be informed.

e. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register.

f. The final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq*.). The Office of Management and Budget (OMB) has withheld approval of the information collection requirements until such time that public comments on these requirements and any changes made in response to those comments are submitted to the OMB. OMB review and approval must occur before publication of the final rule in the *Federal Register*.

RESOURCES:

To complete the rulemaking, 0.8 full-time equivalent (FTE) (.5 FTE for NRR and .3 FTE for OGC) is needed in the Fiscal Year (FY) 2007 and is included in the FY 2007 budget.

COORDINATION:

The Commission's January 30, 2006 SRM (ADAMS Accession No. ML060300640) directed the staff to provide the proposed final rule without review by the Committee to Review Generic Requirements (CRGR) and to seek feedback from the Advisory Committee on Reactor Safeguards (ACRS) on technical issues during the public comment period. Accordingly, the staff has provided an information copy of the final rule to the CRGR. The staff briefed the ACRS on the revised proposed rule for 10 CFR Part 52 on May 5, 2006, and received its feedback by letter on May 22, 2006 (ADAMS Accession No. ML061450310). OGC has no legal objection to this paper. The Office of the Chief Financial Officer has also reviewed this paper for resource implications and has no objections. In addition, the Office of Nuclear Security and Incident Response coordinated the changes related to offsite emergency preparedness with the Department of Homeland Security.

/RA William F. Kane Acting for/

Luis A. Reyes
Executive Director
for Operations

Enclosures:
1. *Federal Register* Notice
2. Regulatory Analysis
3. *Comment Summary Report: 10 CFR Part 52, Licenses, Certifications, and Approvals for Nuclear Power Plants*

e. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register.

f. The final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq*.). The Office of Management and Budget (OMB) has withheld approval of the information collection requirements until such time that public comments on these requirements and any changes made in response to those comments are submitted to the OMB. OMB review and approval must occur before publication of the final rule in the *Federal Register*.

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Package ML062910203 SECY ML062610267 ENCLOSURE 1 ML061030367 ENCLOSURE 2 ML062650391 ENCLOSURE 3 ML062920405 concurrence: * via email ** via memo **WITS 200600062**

OFC	NGDB/DNRL/NRR	NGDB/DNRL/NRR	NGDB/DNRL/NRR	Tech Ed*	DPR/NRR	DIRS/NRR	DE/NRR
NAME	NGilles	JWilson	PMagnanelli	CBladey	EMcKenna	MJCase	NChokshi for MMayfield
DATE	9/25/06	9/25/06	9 /25/06	9/20/06	9/25/06	10/10/06	10/12/06
OFC	OGC	PMAS/NRR	DRA/NRR	DSS/NRR*	DPR/NRR	DNRL/NRR	NMSS
NAME	TRothschild	TBoyce for JDavis	JLyons	TMartin	JClifford for HNieh	DMatthews	JStrosnider
DATE	9/29/06	10/11/06	10/18/06	10/16/06	10/17/06	10/18/06	10/05/06
OFC	RES	OE	OIS**	NSIR	OCFO*	RDB/ADM**	FSME*
NAME	JWiggins for BSheron	CCarpenter	MJanney	RZimmerman	LBarnett for JFunches	MLesar	CMaupin for CMiller
DATE	10/06/06	10/4/06	10/19/06	10/10/06	10/2/06	10/11/06	10/12/06
OFC	OGC-NLO	D/NRR	D/NRO	EDO			
NAME	JGray	GHolahan for JDyer	GHolahan for RBorchardt	LReyes /WFKane for/			
DATE	10/25/06	10/19/06	10/19/06	10/31/06			

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