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Marvin S. Fertel
Nuclear Energy Institute (NEI)

TO:

Chairman Klein

FOR SIGNATURE OF :

** GRN **

CRC NO: 06-0610

DESC:

10 CFR Part 52 Rulemaking/NRC New Plant Related
Regulations

ROUTING:

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DATE: 12/04/06

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SPECIAL INSTRUCTIONS OR REMARKS:

For Appropriate Action.

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NUCLEAR ENERGY INSTITUTE

Marvin S. Fertel
SENIOR VICE PRESIDENT AND
CHIEF NUCLEAR OFFICER

December 1, 2006

The Honorable Dale E. Klein
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: 10 CFR Part 52 Rulemaking

PROJECT NUMBER: 689

Dear Chairman Klein:

Thank you for the opportunity to brief the Commission on November 9, 2006, to discuss key issues concerning the draft final rule language for 10 CFR Part 52 and other NRC new plant-related regulations presented in SECY-06-0220. This letter provides additional amplification and clarification of our statements in the briefing.

We commend the NRC staff for completing a large and complex rulemaking in a short period of time and resolving the majority of the industry's comments. A small but important number of issues warrant further attention to assure the clarity and workability of the final rules. The significant issues are summarized below. More detailed comments and recommended rule language are provided in the enclosure.

Proposed Section 52.99

The draft reporting requirements for the final period of construction have a new requirement to provide additional information on how an ITAAC scheduled to be performed in the future will be met. As used in this provision, the term "sufficient information" is vague and could result in the submittal of an impractical and unnecessary volume of information.

In the public NRC meeting following the November 9 Commission briefing, there was general agreement that the proposed language in Section 52.99(c)(1) and (c)(2) is unnecessarily burdensome on both licensees and NRC staff. The industry recommends alternative language for paragraphs (c)(1) and (c)(2) that requires licensees to provide a summary description of the bases for ITAAC conclusions to the NRC. This will assure that the public is provided similar information about licensee ITAAC conclusions both for ITAAC that "have been met" and "will be met."

Clarification of the expanded design certification change process

We support the concept proposed in the draft final rule to expand the Section 52.63 design certification change process allowing additional types of changes to be implemented via rulemaking. However, we have concerns in three areas.

First, we are concerned that the “correct errors” provision in Section 52.63(a)(1)(v) could have the unintended consequence of resulting in an open-ended re-review of previously certified designs. Such a result would undermine the finality intended by the design certification rule.

Second, we are concerned that Section 52.63(a)(1)(vi) may preclude the implementation of necessary changes that have been identified through first-of-a-kind engineering and construction because they are merely maintaining standardization not increasing or contributing to standardization. In this instance, we believe a more appropriate provision would be one that allows changes that contribute to increased safety, reliability and/or efficiency in plant design, construction or operation.

Third, the backfit provisions of Section 50.109 should be imposed on changes being implemented under Section 52.63(a)(1)(vi) to ensure that the principle of design certification finality is not undermined.

Ensuring the finality of environmental issues previously approved in an Early Site Permit

The finality at the combined operating license stage of safety and environmental issues previously resolved in a design certification or an early site permit is a fundamental principle of Part 52. We are concerned that the draft final rule’s clarifications regarding the finality of previously resolved environmental issues do not sufficiently protect this principle, and could permit duplicative re-litigation of issues.

Under the draft final rule, COL applicants referencing an ESP that does not resolve all environmental issues (including issues concerning need for power) would still be subject to such re-litigation risk based only on assertions of new and significant information in the COL hearing. To address this concern, we recommend that the NRC use its existing environmental scoping process to provide for more disciplined, efficient and timely determination of whether new and significant information exists regarding previously resolved environmental issues.

Inappropriate and duplicative requirements to address operating experience

Draft Sections 52.47(a)(22) and 52.79(a)(37) would require applicants to demonstrate how insights from NRC generic letters and bulletins and comparable international operating experience have been incorporated into the plant design. We believe these requirements are inappropriate and should be deleted. Generic letters and bulletins may or may not be technically relevant, and in any event, are not NRC requirements. Moreover, insights from generic letters and bulletins and comparable international operating experience should be incorporated into the Standard Review Plan (SRP). Applicants are already required to evaluate the facility against the SRP, and it would be redundant and an unnecessary burden to separately require them to consider insights from generic letters and bulletins.

Regarding international operating experience, the NRC staff is responsible to evaluate such experience as it applies to domestic regulation, and applicants should not be required to duplicate or potentially substitute their judgement for this regulator to regulator function.

Severe accident provisions

The draft rule language and Supplementary Information should be clarified to reflect that severe accident design features are not design basis information as defined in 10 CFR 50.2. This guidance is necessary to make clear that severe accident design features are not subject to the same requirements pertaining to systems, structures and components (SSCs) that perform design basis functions.

Section VIII.B.5.c should be modified to reflect the intended focus of the severe accident change process on ex-vessel severe accident design features. In addition to clarifying the rule language, we recommend that the focus on ex-vessel severe accident design features be described in the Supplementary Information for the final rule.

There are other beyond design bases mitigation features and evaluations that are the subject of other ongoing rulemakings (e.g. 10 CFR 73.62). The industry's senior executive New Plant Oversight Committee is completing an evaluation of whether regulatory effectiveness would be improved if the Part 52 severe accident provisions included a more complete set of beyond design bases events. In this regard, we will forward the Commission specific comments on this topic by December 8, 2006.

The Honorable Dale E. Klein
December 1, 2006
Page 4

Grandfathering pending ESP applications

Early site permit applications currently under review should not be required to be modified because the new requirements in this area are process improvements. The draft rule already includes language grandfathering pending ESP applicants from new requirements to submit a quality assurance program description. The final rule should also grandfather pending ESP applicants from new requirements to evaluate the site against applicable NRC application and review guidance. Alternatively, as recommended in the enclosure, the Commission could include a more general grandfathering provision for pending ESP applicants in 52.17(a).

In closing, we appreciate the constructive interactions we have had with the NRC staff and other stakeholders on the Part 52 rulemaking. We appreciate the attention and commitment the Commission has given to this important rulemaking, and we encourage the Commission to incorporate the changes to Part 52 articulated in this letter and its enclosure. Also, we encourage the Commission to issue for public comment its draft policy statement identifying a number of licensing and hearing process enhancements. The draft released for information on October 20, 2006, contains several positive enhancements. We look forward to sharing our additional ideas with the Commission.

If you have any questions about the recommendations provided in this letter, please contact me or Mr. Adrian Heymer at (202) 739-8094; aph@nei.org.

Sincerely,



Marvin S. Fertel

Enclosure

c: The Honorable Edward McGaffigan, Jr., Commissioner, NRC
The Honorable Jeffrey S. Merrifield, Commissioner, NRC
The Honorable Peter B. Lyons, Commissioner, NRC
The Honorable Gregory B. Jaczko, Commissioner, NRC
Ms. Karen D. Cyr, General Counsel, NRC
Mr. Luis A. Reyes, Executive Director for Operations, NRC
Mr. William F. Kane, Deputy Executive Director, Reactor and Preparedness Programs, NRC
Mr. R. William Borchardt, Director, Office of New Reactors, NRC
Mr. James E. Dyer, Director, Office of Nuclear Reactor Regulation, NRC

10 CFR Part 52 Rulemaking Issues

This enclosure provides detailed comments and recommendations on the remaining issues in the 10 CFR Part 52 rulemaking.

1. 10 CFR 52.99 – Inspection During Construction

As proposed, Section 52.99 describes the ITAAC completion notifications to be submitted by the licensee to support the conclusion that inspections, tests, and analyses have been or will be performed and that acceptance criteria have been or will be met. The information to be included in the licensee's Section 52.99 submittals serves several purposes. First, it informs the NRC staff and the public that the inspections, tests and analyses have been performed and that the acceptance criteria have been met and provides a summary description of the basis for the decision that the acceptance criteria have been met. Based on this information the NRC staff will conduct NRC staff inspections to verify that specified ITAAC were successfully completed.

NRC and industry representatives discussed these proposed modifications in a November 17, 2006, NRC public workshop. We support the NRC's objectives in revising Section 52.99 but have serious concerns about some aspects of the revisions. The proposed changes to the language will serve the objectives described above, are consistent with applicable legal requirements and do not impose an undue burden on the NRC staff, affected licensees, or the hearing process.

Our section-by-section comments and proposed mark-up (reflecting additions and strike-throughs) are below.

Proposed Section 52.99(a)

The industry agrees that a schedule for ITAAC activities should be submitted.

The proposed Section 52.99(a) requires COL holders to submit a schedule to the NRC "no later than 1 year after issuance of the combined license." This is unnecessarily restrictive. This language is appropriate when construction (e.g., pouring of safety-related concrete) begins immediately after approval of the license and associated construction schedules are available. However, there are project scenarios where safety-related construction, and development of associated schedules, may be delayed for a year or more after the license is granted. For example, an applicant may choose to defer all site clearing and preparation until after the license is granted. Depending on the site, this could cause up to a two year delay in safety-related construction.

Accordingly, we recommend that the Commission modify proposed Section 52.99(a) as follows in the final rule:

(a) No later than 1 year after issuance of the combined license or at the start of construction as defined in 10 CFR 50.10(b), whichever is later, the licensee shall submit to the NRC its ~~detailed~~ schedule for completing the inspections, tests, or analyses in the ITAAC. The licensee shall submit updates to the ITAAC schedule every 6 months thereafter and, within 1 year of its scheduled date for initial loading of fuel, the licensee shall submit updates to the ITAAC schedule every 30 days until the final notification is provided to the NRC under paragraph (c)(1) of this section.

Proposed Section 52.99(b)

As proposed, Section 52.99(b) contains the phrase “even though the NRC may not have found that any particular *ITAAC* has been met.” We recommend that the term “ITAAC” in this context be replaced with the term “acceptance criteria for the ITAAC.” We further suggest that this provision not refer to an NRC “finding,” which has a specific connotation which is not applicable in this instance, but instead refer to an NRC “determination.”

Accordingly, we recommend that the Commission modify proposed Section 52.99(b) as follows in the final rule:

(b) With respect to activities subject to an ITAAC, an applicant for a combined license may proceed at its own risk with design and procurement activities, and a licensee may proceed at its own risk with design, procurement, construction, and pre-operational activities, even though the NRC may not have determined that any particular acceptance criterion of the ITAAC has been met.

Proposed Section 52.99(c)(1)

This provision would require ITAAC completion notifications to “contain sufficient information to demonstrate that the inspections, tests or analyses have been successfully completed and that acceptance criteria have been met.”

In the first sentence of proposed Section 52.99(c)(1), the phrase “successfully completed” should be deleted and replaced with “performed.” This revision would eliminate an unintended ambiguity: that is, the proposed language implies that “successfully” completing an ITAAC is somehow different from meeting the acceptance criteria. The proposed revision would make the language of this provision consistent with that in Section 185.b of the Atomic Energy Act and in existing Section 52.103 (which remains unchanged in the draft final rule). In

particular, Sections 52.103(b)(1) and 52.103(g) refer to the inspections, tests and analyses being “performed” and the acceptance criteria in the combined license being “met.” The language of Section 52.99 should parallel that in Section 52.103, rather than injecting a different and subjective regulatory criterion.

In the second sentence in proposed Section 52.99(c)(1), we recommend modifying the requirement that licensee notifications “contain sufficient information to demonstrate that the inspections, tests, or analyses have been successfully completed.” This language is vague and is susceptible to misinterpretation and changing interpretations over time. The notification should contain a summary description of the bases for the licensee’s conclusion that the inspections, tests, or analyses have been performed and that the prescribed acceptance criteria have been met.

The rule needs to define the framework for closing out the ITAAC, with a degree of clarification in the supporting information. Following the issuance of the rule the industry and the NRC staff need to develop clear guidance and examples as to what quantum of information will be necessary regarding ITAAC completion notifications based on the language in the rule.

We recommend the Supplementary Information for the final rule include the useful standard proposed by the staff at the November 17 meeting that the licensee’s ITAAC completion notifications under Section 52.99 should contain the same level of detail as the ITAAC itself – not more. Such detail was sufficient for the certification rules and for the issuance of the license. For example, in the workshop discussions on three ITAAC examples, the specific conditions under which ITAAC tests are to be performed, e.g., system line-up, test pressures and temperatures, are identified in the ITAAC themselves when those conditions are considered important to demonstrating the design feature or function under test. ITAAC completion letters would be expected to identify that required acceptance criteria were met under the conditions specified in the ITAAC. As discussed during the workshop, ITAAC completion notifications may include a listing of the publicly available documents on which licensee ITAAC conclusions are based.

Accordingly, based on these considerations, we recommend that the Commission modify proposed Section 52.99(c)(1) as follows in the final rule:

(c)(1) The licensee shall notify the NRC that the inspections, tests, or analyses in the ITAAC have been performed and that the corresponding acceptance criteria have been met. The notification must contain a summary description of the bases for the licensee’s conclusion ~~sufficient information to demonstrate~~ that the inspections, tests, or analyses have been ~~successfully completed~~ performed and that the prescribed acceptance criteria have been met.

Proposed Section 52.99(c)(2)

We agree that a 225-day report on uncompleted ITAAC as envisioned in Section 52.99(c)(2) to support public participation in the Section 52.103(a) hearing opportunity should be submitted. However, for reasons similar to those discussed above concerning paragraph (c)(1), we have significant concerns with the language: “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.”

The information that should be provided in a 225-day report concerning uncompleted ITAAC should be analogous to that provided in the Section 52.99(c)(1) notification: a summary description of the bases for the licensee’s anticipated conclusions. In this way, the public will have similar information on all ITAAC concerning the basis for the licensee’s conclusions that specified acceptance criteria have been met, or, in the case of uncompleted ITAAC, will be met.

We disagree that it is necessary to provide more information, or information of a different nature, in the 225-day report concerning uncompleted ITAAC than would be provided with ITAAC completion notifications about those same ITAAC. No clear basis for the need for additional information has been provided to the industry.

The summary descriptions of the bases for concluding that an ITAAC will be met should be generally consistent with the summary descriptions of the bases for ITAAC that have been completed. We believe that the rule language describing the 225-day report on ITAAC that have yet to be completed should mirror that recommended in our comments on Section 52.99(c)(2).

We recommend the following language:

(c)(2) 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) of this section for all ITAAC, then the licensee shall notify the NRC that the inspections, tests, or analyses for all uncompleted ITAAC will be performed and all acceptance criteria will be met prior to operation. The notification must be provided no later than the date 225 days before the scheduled date for initial loading of fuel and must provide a summary description of the bases for the licensee’s conclusion that the inspections, tests, or analyses will be performed and the prescribed 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.”~~

Requirements for Notice to the Public

The November 17 NRC workshop included considerable discussion of whether the broad-based notification requirements reflected in proposed 52.99(c)(1) and (c)(2) are necessary, given the purposes that these notifications serve. For an informal adjudication such as a Section 52.103 hearing, the Administrative Procedure Act (APA) does not include any specific requirements related to the information that must be available to the public or the extent of the *Federal Register* notice. Section 189a.(1)(B) of the Atomic Energy Act (AEA) (42 U.S.C. § 2239a.(1)(B)) does not explicitly require the ITAAC hearing contemplated under 10 CFR 52.103 to be conducted “on the record,” and that hearing is thus an “informal adjudication” for purposes of the APA.¹ This conclusion is buttressed by AEA Section 189a.(1)(B)(i) and 10 CFR 52.103(d) (NRC has discretion to determine the appropriate hearing procedures, whether formal or informal, for the ITAAC hearing). The APA imposes only a minimum of process for informal adjudications. See APA Section 555(e). For informal adjudications, an agency is free to craft any constitutionally permissible set of procedures that it wishes, so long as the agency’s governing statute contains no specific procedural mandates.

Notably, to satisfy the notice requirements of the APA for informal adjudications, and “due process” requirements of the Constitution, the agency need only give an affected party a reasonable opportunity to know and meet the legal claims asserted.² Absent a requirement to conduct a formal adjudication, the agency need not even inform an affected party of “the issues on which the decision will turn” or “[apprise them] of the factual material on which the agency relies for decision so

¹ The Section 52.103 notice and opportunity to request a hearing implement AEA Section 189a.(1)(B), which does not explicitly require the hearing to be conducted “on the record.” Thus, the Section 52.103 hearing is not required to be conducted under the more formal requirements of the APA. See *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989); see also, *Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12 (1st Cir. 2006). In *Citizens Awareness Network v. NRC*, the 1st Circuit declined to specifically address whether the APA’s formal adjudication procedures applied to NRC licensing hearings, but found that the NRC’s rules of practice would, in any event, satisfy the APA. 391 F.3d 388 (1st Cir. 2004). As a result, *Seacoast Anti-Pollution League v. Costle*, which suggested that the APA’s adjudication procedures would apply to NRC hearings, remained intact. 572 F.2d 872 (1st Cir. 1978). However, the 1st Circuit subsequently overruled *Seacoast* in *Dominion Energy*.

² *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-351 (1938); *Avnet, Inc. v. FTC*, 511 F.2d 70, 77 & n.18 (7th Cir.), cert. denied 423 U.S. 833 (1975); *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885-886 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); *Bendix Corp. v. FTC*, 450 F.2d 534, 539-542 (6th Cir. 1971); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971).

that he may rebut it.”³ In short, the notice requirement for informal adjudications leaves an agency with considerable leeway to develop notice procedures. The Supreme Court has ruled that the NRC’s broad regulatory latitude is especially appropriate when the Commission is structuring its “own rules of procedure and ... methods of inquiry.”⁴

Accordingly, in the ITAAC close-out process the NRC need only provide a reasonable opportunity for the public to know the issues and to meet the pleading requirements. The NRC need not inform an affected party of the issues on which the decision will turn nor inform them of the factual material on which the agency intends to rely for its decision. It is enough that an affected party understands the issue and has an opportunity to justify his position. The alternative rule language proposed for Sections 52.99(c)(1) and (c)(2) clearly meets (or exceeds) these notice requirements.

The threshold requirements for granting a 52.103 hearing are particularly strict.⁵ The original Part 52 rulemaking also provides ample support for the proposition that the rule is intended to be stringent to avoid delays in plant operation and to circumscribe the hearing opportunity. Consistent with this intent, it would not be reasonable to *expand* the scope of information that must be provided and made available under proposed Section 52.99 beyond that which is currently available in the hearing process (*e.g.*, for an initial license or for a license amendment). Certainly, the minimal notice requirements of the APA and due process do not suggest that information such as that which might be available on discovery need be available at the time of the *Federal Register* notice.

Further, a petitioner has the burden of bringing contentions that meet the threshold requirements. NRC licensing boards (and presumably the NRC Staff) may not supply missing information or draw inferences on behalf of the petitioner.⁶

³ *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 655 (1990). According to other Courts, “[t]he purpose of the notice requirement in the APA is satisfied, and there is no due process violation, if the party proceeded against ‘understood the issue’ and ‘was afforded full opportunity’ to justify his conduct.” *FTC v. Southwest Sunsites, Inc.*, 785 F.2d 1431, 1435(5th Cir. 1986).

⁴ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 513, 543 (1978); *see also, Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 (D.C.Cir.1990) (“The [Atomic Energy] Act itself nowhere describes the *content of a hearing or prescribes the manner in which this “hearing” is to be run.* ... We are, of course, obliged to defer to the operating procedures employed by the agency when the governing statute requires only that a ‘hearing’ be held.”).

⁵ Procedural requirements that raise the threshold for admitting some contentions as an incidental effect of regulations designed to prevent unnecessary delay in the hearing process are reasonable. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983).

⁶ *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

Even the absence of licensing documents does not justify admission of contentions which do not otherwise meet the requirements for admissibility — that is, non-specific contentions should not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable.⁷ At the very least, a potential intervenor cannot expect — and has no right to — discovery prior to filing a petition to intervene.⁸

The Section 52.103 hearing is not a hearing on a license application, nor is there a question of the adequacy of the Staff's review. The issues are limited to the specific question of whether the acceptance criteria in the COL have been or will be met. The Section 52.103 hearing is not a forum for litigating whether the inspections, tests, and analyses are appropriate; that issue will be resolved before the COL is issued. Indeed, to the extent licensee-controlled documents detailing the inspections, tests, and analyses bring any value to a Section 52.103 hearing, they will seemingly *support* the licensee's position.

2. Expanded Design Certification Process

The industry has long recognized the potential for first-of-a-kind engineering, plant construction, and operating experience to identify needed changes and enhancements to previously certified designs. The most effective way to address needed changes while preserving standardization is to incorporate the changes directly into the certified design.

Current regulations allow a change to a design certification only to assure adequate protection of the public health and safety or common defense and security, or to assure compliance with regulations in effect at the time of the original certification. We support the concept proposed in the rule to expand the Section 52.63 design certification change process allowing additional types of changes to be implemented via rulemaking. The rule expands Section 52.63(a)(1) to allow changes that:

- (iii) reduce unnecessary regulatory burden while maintaining adequate protection
- (iv) provide the detailed design information to close design acceptance criteria,
- (v) correct errors in the certification information, and
- (vi) contribute to increased standardization of the certification information

⁷ *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

⁸ *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1263 (1982).

We believe alternative language is needed for new criteria (v) and (vi) so that the principle of design certification finality is not undermined.

Section 52.63(a)(1)(v)

We share the concerns expressed by Westinghouse in its November 7 letter to the Commission about proposed Section 52.63(a)(1)(v) that would allow changes to “correct errors in the design certification information.” The proposed Supplementary Information states that this provision will be used not only to correct design errors, but to correct any perceived errors in the NRC staff’s review of the design. We are very concerned that the expansive view of the “correct errors” provision could result in an open-ended re-review of previously certified designs. Such a result would undermine the finality intended by the design certification rule.

We recommend that Section 52.63(a)(1)(v) be modified to make it clear that the provision is to be used only to correct material errors in the design certification. The Supplementary Information for the final rule should explain that a “material” error in the design certification is one that significantly and adversely affects a design function or analysis conclusion described in the design control document. Alternative rule language is provided below for Commission consideration.

In addition, the final rule and Supplementary Information should make clear that rulemakings under Section 52.63(a)(1) to consider specific changes or additions to the design certification should be focused solely on the changes proposed (including effects on associated SSCs or analyses). Such rulemakings should not open unaffected portions of the design certification to reconsideration by the NRC staff or the public.

Section 52.63(a)(1)(vi)

We do not believe a criterion providing for changes that contribute to “standardization” is necessary or meaningful. Any change implemented under Section 52.63(a)(1) would be applied to all plants referencing the affected design certification (per Section 52.63(a)(3)). Essentially, proposed Section 52.63(a)(1)(vi) is no different than a provision that allows for consideration of *any* change that does not fall under paragraphs (i) – (v). It is redundant to include a criterion allowing consideration of changes that contribute to “standardization” because Section 52.63(a)(3) requires all plants to incorporate design certification changes implemented under Section 52.63(a)(1).

Section 52.63(a)(1)(vi) would allow design certification changes that contribute to increased standardization. A significant concern with this provision is that while it would allow for consideration of additional detail proposed for incorporation into the standard design, it does not appear to allow changes that would merely maintain

the level of standardization in a design certification. For example, consider the case of a COL applicant that determines during first-of-a-kind engineering that for reasons of improved constructability, reliability or maintainability, an air operated valve is needed in place of a motor operated valve approved as part of the certified design. This change would not “contribute to *increased* standardization” and so would not qualify for consideration under paragraph (vi). However, changes of this sort, i.e., changes to incorporate alternative – but not additional – design information, are being identified by design centered working groups. We do not believe the NRC staff intended to exclude such changes from consideration. It is important that Section 52.63(a)(1) clearly allow for such changes to be implemented via the rulemaking process.

We recommend an alternative provision that allows for consideration of changes that contribute to increased safety, reliability and/or efficiency in plant design, construction or operation. Any such change will also automatically contribute to standardization because it will be applied to all plants referencing the affected design certification. Recommended rule language is identified below for Commission consideration.

Need for to Apply Section 50.109 Backfit Criteria – Preserving Design Certification Finality

This comment relates to criterion (v) and (vi) of Section 52.63 (a)(1). We share the concern expressed by Westinghouse in its November 7 letter regarding potential loss of design certification finality because the backfit provisions of Section 50.109 are not applicable. We are concerned because of the wide range of changes that could be proposed – by anyone – under either criterion.

We agree that changes necessary under Section 52.63(a)(1)(i-ii) to assure adequate protection or compliance would not be subject to Section 50.109 backfit requirements. Changes considered under proposed criteria 52.63(a)(1)(iii) and (iv) do not present a substantial backfit concern because they are sufficiently clear in terms of their intent and scope. The same applies to criterion (v) types of changes if the language is modified as proposed in these comments.

However, changes proposed under Section 52.63(a)(1)(vi) should be required to meet Section 50.109 backfit requirements. Applying the backfit rule to this category of proposed changes is consistent with current practice under the backfit rule and is important to the principle of design certification finality. Consistent with current practice, changes proposed by the design certification vendor or a COL applicant or holder are voluntary and would not be subject to 50.109.

The following specific alternative rule language for Section 52.63 is provided for the Commission's consideration:⁹

(a)(1) Notwithstanding any provision in 10 CFR 50.109, while a standard design certification rule is in effect under §§ 52.55 or 52.61, the Commission may not modify, rescind, or impose new requirements on the design certification information, whether on its own motion, or in response to a petition from any person, unless the Commission determines in a rulemaking that the change:

- (i) Is necessary either to bring the design certification information or the referencing plants into compliance with the Commission's regulations applicable and in effect at the time the certification was issued;
- (ii) Is necessary to provide adequate protection of the public health and safety or the common defense and security;
- (iii) Reduces unnecessary regulatory burden and maintains protection to public health and safety and the common defense and security;
- (iv) Provides the detailed design information to be verified under those inspections, tests, analyses, and acceptance criteria (ITAAC) in the design certification which are directed at certification information (i.e., design acceptance criteria);
- (v) Is necessary to correct material errors in the design certification.

(a)(2) Subject to the provisions of 10 CFR 50.109, while a standard design certification rule is in effect under §§ 52.55 or 52.61, the Commission may modify, rescind, or impose new requirements on the design certification, whether on its own motion, or in response to a petition from any person, only if the Commission determines in a rulemaking that the change contributes to increased safety, reliability and/or efficiency in plant design, construction or operation.

To ensure the principle of finality is preserved, we believe the Commission, in its Supplementary Information, should emphasize the following points:

- The principal objective of the expanded change process is to further standardization based on industry experience in engineering, building and operating NRC-certified designs. This experience may include the identification of material errors in the design certification.
- The expanded change process is not to be used as a vehicle for re-review of the approved standard design; rulemaking to consider specific changes or

⁹ We note that the staff has proposed to modify Section 52.63(a)(1) so it reads "the Commission may not modify, rescind or impose new requirements on the certification *information*...." While it is well understood what constitutes the design certification, the term certification *information* is vague and uncertain, and the basis for the proposed change is not explained. We agree with Westinghouse that 52.63(a)(1) should refer to the design certification, not certification *information*.

additions to the design certification should focus solely on the changes proposed.

- The intent of the new criterion 52.63(a)(2) is to facilitate implementation of necessary changes to a design certification in a standardized way via rulemaking, including changes that contribute to increased safety, reliability and/or efficiency in plant design, construction or operation.

3. The Part 52 Final Rule Should Preserve the Finality of Environmental Issues Previously Resolved in an ESP

The Part 52 final rule should provide finality in COL proceedings for all issues resolved in a previous Early Site Permit (ESP) proceeding. In our May 16, 2006, letter, we recommended that the waiver process in 10 CFR 2.335 be used to provide a mechanism for reconsideration of previously resolved issues when warranted by the existence of significant new information.¹⁰ This process has been used successfully in license renewal.

We continue to believe that a well defined process is necessary for determining when previously resolved issues should be reconsidered. An alternative to the waiver process would be to use the NRC's well defined scoping process to determine when previously resolved issues should be reconsidered. This alternative recommendation can be implemented by minor changes to the final rule language and accompanying Supplementary Information.

The proposed final rule (PFR) precludes litigation of previously resolved environmental issues only if no environmental issue is left open at the ESP stage and the NRC has made a finding of no new and significant information. (PFR 51.107(c), 51.75(e)). It is illogical (as well as extremely inefficient) for the licensing process to allow the existence of any environmental issue left open from the ESP proceeding to effectively subject all environmental issues to potential litigation in

¹⁰ NEI's May 16, 2006, comments recommended that the Part 52 amendments continue to accord finality to environmental issues resolved in an ESP by requiring that any requests for exceptions to the finality rule be processed by means of the established procedures in 10 CFR 2.335. This provision requires persons who seek to challenge an NRC rule in an adjudicatory proceeding to make a *prima facie* showing of special circumstances, supported by affidavits, that the rule should be waived. Such waiver petitions are considered by the Atomic Safety and Licensing Board, which then refers the petition to the Commission only if the Board determines that the requisite showing has been made. If the waiver is not granted, the rule (or previously resolved issue) is deemed to be beyond the scope of the proceeding and therefore inadmissible in any hearing. This approach, which has worked well in NRC license renewal proceedings, balances the interest in according finality to previously resolved issues against the need to supplement an analysis under NEPA in appropriate cases. In the context of the current Part 52 rulemaking, use of this existing NRC process would appropriately allow previously resolved ESP environmental issues to be reopened when the existence of significant new information is demonstrated, but would ensure that such issues cannot be re-litigated merely on the basis of assertions in pleadings.

the COL proceeding. Based on discussions with the NRC staff, we do not believe that this is the intent, but this appears to be the result of the PFR language.

If the NRC can make a finding of no new and significant information that precludes re-litigation when an ESP resolves all environmental issues, it follows that the NRC could also make such a threshold determination of what issues require supplementation. That would then define the scope of the hearing. That is, the NRC could also make a finding of “no new and significant information” on those issues that were resolved in the ESP. If issues such as need for power and alternative energy sources are not resolved in the ESP, those unresolved issues would not be subject to this finding and would be subject to litigation in the COL proceeding.

Accordingly, NEI proposes that the Commission consider adopting the following process for addressing environmental issues in a COL proceeding in which an ESP is referenced:

- The initial scope of the COL proceeding on environmental issues would be limited to those issues addressed in the COL environmental report (“ER”) – i.e., issues previously deferred or for which the ESP is not bounding, and any environmental issues that the applicant has chosen to supplement based on its determination that new and significant information exists.
- When an ESP that does not resolve all environmental issues is referenced in a COL application, the NRC Staff would conduct a scoping process as is typically performed under the NRC rules.¹¹
- As part of the scoping process, members of the public may put forward new and significant information believed to warrant reconsideration of a previously resolved environmental issue, along with appropriate justification.
- The NRC Staff would evaluate the scoping comments. If the Staff determines that significant new information on a previously resolved issue has been identified in the scoping process, it would issue a notice,¹² approved by the Commission, expanding the scope of the proceeding to include these issues.

¹¹ The draft final rule does not require a scoping process if the NRC publishes a draft finding of no new and significant information and later decides to prepare an EIS supplement based on the comments received on the draft finding. This is essentially the equivalent of scoping, and would not be changed by NEI’s proposal.

¹² In the enclosed mark-up, we propose that this notice would be a new or supplemental notice of intent. The notice, however, could also be a revised notice of hearing, or an order in the proceeding, or any other appropriate issuance by the Commission expanding the scope of the proceeding.

The notice would provide that all other issues remain resolved and beyond the scope of the proceeding.¹³

- If, based on the scoping process, a notice is sent expanding the COL proceeding to include additional environmental issues, there would be an additional opportunity to file contentions on those issues.

This approach would continue to treat previously resolved environmental issues as outside the scope of the COL proceeding, unless: (1) the applicant includes the issue in its ER (in which case the applicant has injected the issue into the proceeding and waived finality), or (2) the NRC expands the scope of its proceeding based on the scoping process. This approach meets industry's objective of preventing opponents from litigating previously resolved environmental issues simply by alleging significant new information in a pleading. It uses the normal NEPA scoping process as the means for the agency to consider whether the scope of the COL-phase environmental review should be expanded beyond the issues addressed in the ER, and, if so, to define the scope of the proceeding. Indeed, as reflected in the NRC's existing regulations at 10 CFR § 51.29, this is essentially the purpose of the scoping process.

Further, this approach affords sufficient procedural protections to persons or agencies whose interests may be affected. The normal NRC scoping process includes public meetings and the opportunity for public comments; these procedures meet Administrative Procedure Act standards for a hearing.¹⁴ Moreover, under this approach, the NRC Staff evaluates the scoping comments and makes the recommendation to the Commission, and thus does not overly burden the Commission or Licensing Boards with adjudicatory filings and decisions.¹⁵

¹³ PFR 51.38 requires the Commission to approve a final finding of no new and significant information. This NEI proposal for Commission approval of any notice expanding the scope of environmental review parallels, and is consistent with, the PFR provision for Commission approval of any final finding of no new and significant information.

¹⁴ Unless a particular procedure is stated in the plain language of the Act, the National Environmental Policy Act (NEPA) does not require any procedure above that required by the Administrative Procedure Act. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548 (1978).

¹⁵ Because the NRC Staff's recommendation would not relate to an issue at dispute in the COL proceeding (because previously resolved matters would not be within the scope of the proceeding unless and until the Commission approves the expanded scope), the recommendation on whether to expand the scope of the proceeding would not violate NRC rules on the separation of functions, or require members of the NRC staff to act as adjudicatory employees. Alternatively, the Commission could require the NRC Staff's recommendation to be provided on the record, and served on any parties in the COL proceeding. See 10 CFR § 2.348(a)(2).

Use of the scoping process in this way provides for disciplined assessment early in the COL process to determine whether new and significant information exists concerning a previously resolved environmental issue. The NRC staff, which originally evaluated the environmental issues, can most efficiently determine whether new and significant information exists. Absent this approach, these determinations would be delayed until the start of the hearing and would unnecessarily add to the burden of the ASLB and/or Commission at that time.

Proposed mark-up language to effect these change is provided in an attachment to this enclosure.

4. Inappropriate and duplicative requirements for applicants to incorporate insights from NRC generic letters and bulletins and comparable international operating experience

- A. New requirements to incorporate insights from NRC generic letters and bulletins should be eliminated

Proposed Section 52.79(a)(37) requires that COL applications provide information to demonstrate how insights from generic letters and bulletins have been incorporated into the plant design. This is not appropriate because NRC bulletins and generic letters may or may not be technically relevant and are not regulatory requirements.

Insights from generic letters and bulletins should be incorporated into the Standard Review Plan (SRP) and Regulatory Guides, as appropriate, as the issues associated with these generic communications are resolved. Where necessary, it may also be appropriate to initiate rulemaking. The SRP is intended to be the yardstick against which the facility is measured, and evaluation of the facility against the SRP is required by Section 52.79(a)(41). The proposed 52.79(a)(37) requirement is not necessary and should be deleted from the final rule. The analogous provision concerning design certifications (Section 52.47(a)(22)) should also be deleted.

- B. Requirement for applicants to evaluate international operating experience should be eliminated

The proposed rule continues to require COL applicants to evaluate international operating experience comparable to NRC generic letters and bulletins (Section 52.79(a)(37)). Design certification applicants are subject to a similar requirement (52.47(a)(22)).

COL applicants are not well positioned to monitor and evaluate operating experience generated by regulatory agencies in other countries, or determine

which international operating experience is “comparable” to NRC bulletins and generic letters. NRC’s own procedures (LIC-400) require the staff to factor international operating experience into its own generic operating experience program. It is through this mechanism that COL applicants will consider “comparable” international operating experience. COL applicants should not be required to duplicate the NRC regulator-to-regulator function in this regard.

5. New requirement to evaluate the facility against COL application guidance in addition to the Standard Review Plan

NRC has recently modified proposed Sections 52.17(a)(xii), 52.47(a)(9), and 52.79(a)(41) to require an evaluation of the facility against “NRC’s application and review guidance” instead of an evaluation against the SRP alone. In a public meeting on Oct. 25, the NRC staff explained that this change is intended to require evaluation against both the updated SRP and the final form of DG-1145, *Combined License Applications for Nuclear Power Plants (LWR Edition)*, future Regulatory Guide 1.206.

The change would alter historical NRC practice that requires evaluation against the SRP only. Moreover, the expanded evaluation requirement would be problematic because, while the SRP contains explicit acceptance criteria against which to evaluate conformance, Regulatory Guide 1.206 will not.

Evaluation against guidance, in the absence of acceptance criteria, would be a subjective and unduly burdensome exercise. Given the staff’s emphasis on assuring consistency between the SRP and COL Application Guide, a substantial evaluation against the regulatory guide would be duplicative of the required evaluation against the SRP. In addition, it is not clear how to perform an evaluation of the *facility* against guidance for *applications*.

Lastly, these new requirements were not included in the Part 52 amendments set forth in the March 2006 proposed rule. Thus, these proposed requirements appear to be legally deficient because the public has not had an opportunity to provide formal comments on these new substantive provisions.

The Commission should reject the proposal in Section 52.79(a)(41) to require a conformance evaluation against COL application form and content guidance.

Docket date vs. Application date

An additional issue concerning Section 52.79(a)(41) was identified after the public comment period closed on the March 13 Part 52 notice of proposed rulemaking. The proposed requirement, as well as Section 50.34(h) on which it is based, require

applicants to evaluate the facility against the SRP in effect six months before the docket date of the application. However, “six months before the docket date” is not a fixed date known by either the NRC or applicant. The NRC staff has stated that it has been and will continue to be the NRC practice to implement this requirement as “six months before application date.” To avoid confusion and conform the regulation to reflect NRC practice and intent going forward, we recommend Section 52.79(a)(41) be modified to read “6 months before the submittal date of the application.” Similar conforming changes should be made to Sections 52.17(a)(xii), 52.17(a)(9), 52.47(a)(21), 52.79(a)(20), and if retained by the NRC (see previous comment), Sections 52.47(a)(22) and 52.79(a)(37). All of these refer incorrectly to information available “6 months before the docket date of the application.”

6. Severe Accidents

A. Clarification that severe accident design features are not design basis information as defined in 10 CFR 50.2

The proposed Supplementary Information states that severe accidents are not design basis accidents and that severe accident design features do not have to meet the requirements for design basis accidents. This language should be incorporated in the final rule to give it legal effect and avoid the risk of misinterpretation.

The Supplementary Information needs further clarification in regard to statements that severe accident design features are part of a plant’s design basis information as defined in Section 50.2. This is not correct, because severe accidents are not design basis accidents within the meaning on Section 50.2, as discussed in RG 1.186. The rule should be clear that the severe accident design features are not design basis information. This is important to clarify that severe accident design features are not subject to the requirements pertaining to SSCs that perform design basis functions.

B. Clarification of the scope of the defined set of severe accidents in Section 52.47 and Section 52.79

Section 52.47(a)(23) and Section 52.79(a)(38) state that a combined license application and a design certification application shall include a description and analysis of design features for the prevention and mitigation of severe accidents. The language then provides five examples of severe accidents that could challenge containment. The policy statements, SECY 90-16 and 93-087, and the Supplementary Information state that these features are for a specific set of five severe accidents. The language implies that there are other severe accidents: could be one could be fifty. The language is unbounded and ambiguous, and does not reflect the intent of the policy statements or the SECY documents that are the bases for the requirement.

We recommend the following change: "...prevention and mitigation of severe accidents, e.g., i.e...."

C. Clarification of criteria for determining when a change that affects a severe accident issue requires prior NRC approval

The industry has significant concerns on the criteria in Section VIII.B.5.c of the design certification rules for determining when a change affecting a severe accident issue requires prior NRC approval. Neither the proposed final rule nor the Supplementary Information have addressed strong industry concerns that the existing criteria contain undefined terms and do not reflect the intended NRC focus on ex-vessel severe accident design features. Also, the proposed language is not consistent with current language and practice under Section 50.59.

This is a case where the rule needs to say what is meant, so that key elements are not left to guidance and subject to potential re-interpretation in the future.

As discussed in our May 30, 2006, comments on the proposed draft rule, we recommend the following changes to Section VIII.B.5.c:

A proposed departure from Tier 2 affecting resolution of an ex-vessel severe accident issue identified in the plant-specific DCD, requires a license amendment if:

- (1) There is a substantial increase in the ~~probability~~ likelihood of an ex-vessel severe accident design feature malfunction such that a particular ex-vessel severe accident previously reviewed and determined to be not credible could become credible; or
- (2) There is a substantial increase in the consequences to the public of a particular ex-vessel severe accident previously reviewed.

In addition to modifying the proposed rule language, appropriate implementation guidance is needed, and we look forward to working with the NRC staff in this regard.

7. Grandfathering of Pending ESP Applications

As mentioned during the Nov. 9 briefing, the final rule and Supplementary Information should make clear that ESP applicants should not have to modify their pending applications or have their ESPs delayed or modified based on the new requirements in the rule. For example, 10 CFR 52.17(a)(xii) of the proposed rule requires that ESP applicants evaluate the site against applicable sections of the SRP revision in effect 6 months before the docket date of the application. This is a new provision not required for previous applicants. Thus, this creates a possible

new condition that current applicants may be required to meet. A grandfathering provision is already in place for 10 CFR 52.17(a)(xi) regarding the new QA requirements. We recommend that a general grandfathering provision be created to assure that the scope of new changes does not create new conditions for the current applicants. This provision could be added to the start of 10 CFR 52.17(a) with the following language:

“For applications submitted before the [Insert Final Date of Rule], the rule provisions in effect at the date of docketing applies unless otherwise requested by the applicant in writing.”

Attachment to Enclosure from NEI December 1, 2006 Letter

Mark-Up of Draft Final Rule to Address Environmental Finality Concerns

§ 51.26 Requirement to publish notice and conduct scoping process.

(d)(1) Whenever the appropriate NRC staff director determines that a supplement to an early site permit environmental impact statement will be prepared by NRC for a combined license referencing that early site permit, a notice of intent will be prepared as provided in § 51.27, and will be published in the *Federal Register* as provided in § 51.116. The NRC Staff ~~may~~ shall conduct a scoping process (see §§ 51.27, 51.28, and 51.29) ~~, provided, however, that scoping must be directed at matters to be addressed in the supplement as described in § 51.92, unless such scoping process has already been conducted under paragraph (d)(2) of this section, or unless the determination to prepare the supplement has been made after consideration of comments on a draft finding of no new and significant information under § 51.37.~~

(2) The appropriate NRC staff director may prepare a notice of intent as provided in § 51.27 before determining whether a supplement to an early site permit environmental impact statement will be prepared by NRC or whether an environmental assessment with a finding of no new and significant information will be prepared by NRC for a combined license referencing that early site permit, and publish the notice in the *Federal Register* as provided in § 51.116. ~~The NRC staff may conduct a and an appropriate~~ scoping process (see §§ 51.27, 51.28, and 51.29); ~~provided, however, that scoping must be directed at matters that may be addressed in a supplement as described in § 51.92 will be conducted.~~

§ 51.27 Notice of intent.

(b)(1) The notice of intent required by § 51.26(d)(1) shall:

(i) State that a supplement to an early site permit final environmental impact statement will be prepared for a combined license application in accordance with § 51.92;

(ii) Identify the proposed action as the issuance of a combined license for the construction and operation of a nuclear power plant as described in the combined license application at the site described in the early site permit referenced in the combined license application;

(iii) Identify the environmental report prepared by the applicant under § 51.50(b), and information on where copies are available for public inspection;

(iv) Describe the matters to be addressed in the supplement to an early site permit final environmental impact statement, in a manner consistent with section 51.92(e), which shall define the scope of environmental review in the proceeding;

(v) If required by § 51.21(d)(1), ~~D~~describe any proposed the scoping process that the NRC staff ~~may~~will conduct, including the role of participants, whether written comments will be accepted, the last date for submitting comments and where comments should be sent, whether a public scoping meeting will be held, the time and place of any scoping meeting or when the time and place of the meeting will be announced; and

(vi) State the name, address, and telephone number of an individual in NRC who can provide information about the proposed action, the scoping process, and the supplement to the early site permit environmental impact statement.

(2) The notice of intent allowed by § 51.26(d)(2) shall:

(i) State that a supplement to an early site permit final environmental impact statement may be prepared for a combined license application in accordance with § 51.92;

(ii) Identify the proposed action as the issuance of a combined license for the construction and operation of a nuclear power plant as described in the combined license application at the site described in the early site permit referenced in the combined license application;

(iii) Identify the environmental report prepared by the applicant under § 51.50(b), and information on where copies are available for public inspection;

(iv) Describe in a manner consistent with section 51.92(e) the matters that may be addressed in a supplement to an early site permit final environmental impact statement;

(v) Describe ~~any~~the proposed scoping process that the NRC staff ~~may~~will conduct, including the role of participants, whether written comments will be accepted, the last date for submitting comments and where comments should be sent, whether a public scoping meeting will be held, the time and place of any scoping meeting or when the time and place of the meeting will be announced; and

(vi) State the name, address, and telephone number of an individual in NRC who can provide information about the proposed action, the scoping process, and a possible supplement to the early site permit environmental impact statement.

§ 51.29 Scoping - environmental impact statement and supplement to environmental impact statement.

(a) * * *

(1) Define the proposed action which is to be the subject of the statement or supplement. For environmental impact statements other than a supplement to an early site permit final environmental impact statement prepared for a combined license application, the provisions of 40 CFR 1502.4 will be used for this purpose. For a supplement to an early site permit final environmental impact statement prepared for a combined license application, the purpose of the proposed action shall be as set forth in the relevant provisions of § 51.92(e).

* * * * *

(c) At the conclusion of the scoping process for a combined license application referencing an early site permit, if the NRC staff director determines that new and significant information exists with respect issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding, the director shall, subject to the Commission's approval, issue a notice of intent, or if such notice has already been issued, amend such notice to identify the previously resolved issues that will be addressed in the supplement to the early site permit environmental impact statement. This notice of intent will define the scope of environmental review in the combined license proceeding.

(d) At any time prior to the issuance of the draft environmental impact statement, the appropriate staff director may revise the determination made under paragraphs (b) and (c) of this section, as appropriate, if substantial changes are made in the proposed action, or if significant new circumstances or information arise that bear on the proposed action or its impacts.

§ 51.36 Finding of no new and significant information.

A finding of no new and significant information required by § 51.75(e) for a combined license under subpart C of part 52 of this chapter referencing an early site permit must:

(a) Identify the proposed action as the issuance of a combined license for the construction and operation of a nuclear power plant as described in the combined license application at the site described in the early site permit referenced in the combined license application;

(b) Reference the final environmental impact statement prepared for the early site permit;

(c) Include a discussion of the bases for the NRC's conclusion that there is no new and significant information with respect to the issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding;

(d) List the agencies and persons consulted, and identify the sources used;

(e) List any other related environmental documents; and

(f) State that the finding and any related environmental documents are available for public inspection and where the documents may be inspected.

§ 51.37 Draft finding of no new and significant information.

(a) The appropriate NRC staff director will prepare and issue a draft finding of no new and significant information for public review and comment before making a final determination whether to prepare an environmental impact statement or a final finding of no new and significant information on the proposed action.

(b) A draft finding of no new and significant information will (1) be marked "Draft," (2) contain the information specified in § 51.36, (3) be accompanied by or include a request for comments on the draft finding within 30 days, or such longer period as may be specified in the notice of the draft finding, and (4) be published in the *Federal Register* as required by §§ 51.39 and 51.119.

(c) A draft finding will be distributed as provided in § 51.74(a). Additional copies will be made available in accordance with § 51.123.

(d) When a draft finding of no new and significant information is issued for a proposed action, a final determination to prepare a supplementary environmental impact statement under § 51.75(d), or a final finding of no new and significant information for the combined license under § 51.38, shall not be made until the last day of the public comment period has expired.

(e) Based upon public comments, the appropriate director will obtain the Commission's approval either to prepare a supplement to the early site permit environmental impact statement, or ~~prepare a proposed~~ to make a final finding of no new and significant information. If the director prepares Commission approves preparation of a supplement to the environmental impact statement, the director shall publish a notice of intent in the *Federal Register* as provided in §§ 51.26 and

51.27, ~~unless or an amended~~ notice of intent if one was previously published under § 51.26(d), and shall specify those previously resolved issues that will be addressed in the supplement. If the director prepares a supplement to the environmental impact statement, the director need not conduct scoping.

§ 51.38 Final finding of no new and significant information.

(a) No later than ~~180~~30 days after the close of the public comment period, the appropriate NRC staff director shall transmit to the Commission for its consideration ~~either publish in the *Federal Register*, in accordance with § 51.23, a the proposed~~ notice of intent to prepare a supplement to the early site permit environmental impact statement or ~~transmit the proposed final finding of no new and significant information to the Commission for its consideration.~~ The ~~180~~30 day period for publication or transmittal may be extended by the Commission.

(b) The Commission, upon review of the proposed final finding, may either:

(1) Direct that the NRC staff prepare a supplement to the early site permit environmental impact statement; or

(2) Issue a final finding of no new and significant information.

(c) If the Commission directs that the staff prepare a supplement to the environmental impact statement, the appropriate director shall publish a notice of intent in the *Federal Register* as provided in §§ 51.26 and 51.27, ~~unless or an amended~~ notice of intent if one was previously published under § 51.26(d), and shall specify those previously resolved issues that will be addressed in the supplement. If the director prepares a supplement to the environmental impact statement, the director need not conduct scoping.

§ 51.39 Publication of draft and final finding of no new and significant information; limitation on NRC action.

(a) Whenever the Commission makes a draft or final finding of no new and significant information, the finding will be published in the *Federal Register* as provided in § 51.119.

(b) Except as provided in § 51.13, appropriate NRC staff director, may not issue the combined license under 10 CFR 2.340(g) until after the final finding has been published in the *Federal Register*.

§ 51.75 Draft environmental impact statement – construction permit, early site permit, or combined license.

* * * * *

(d) *Combined license application referencing an early site permit with EIS with unresolved environmental issues.*

(1) The NRC staff shall prepare a supplement to the early site permit environmental impact statement for the combined license application if:

(A) The final environmental impact statement prepared in connection with the early site permit does not disclose the economic, technical or other benefits (for example, need for power) and costs of the proposed action or does not set forth an evaluation of alternative energy sources;

(B) There is a significant environmental issue related to the impacts of construction or operation of the facility that was not previously resolved in the proceeding on the early site permit; ~~or~~

(C) The applicant's Environmental Report identifies~~There is significant new information identified~~ with respect to issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding; ~~or~~

(D) With the Commission's approval, the NRC Staff determines, either through its scoping process or in determining whether to make a finding under section 51.38, that significant new information exists with respect to issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding.

(2) The supplement must be prepared in accordance with § 51.92.

(e) *Combined license application referencing an early site permit with EIS resolving all environmental issues.*

(1) The NRC staff shall prepare a finding of no new and significant information for a combined license application referencing an early site permit only if:

(A) The final environmental impact statement prepared in connection with the early site permit discloses the economic, technical or other benefits (for example, 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

(B) There is no significant new information identified with respect to issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding.

(2) The finding of no new and significant information must be prepared in accordance with § 51.36.

* * * * *

§ 51.92 Supplement to the final environmental impact statement.

(a) If the proposed action has not been taken, the NRC staff will prepare a supplement to a final environmental impact statement for which a notice of availability has been published in the *Federal Register* as provided in §51.118, if:

(1) There are substantial changes in the proposed action that are relevant to environmental concerns; or

(2) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(b) In a proceeding for a combined license application under 10 CFR part 52 referencing an early site permit under part 52, the NRC staff shall prepare a supplement to the final environmental impact statement for the referenced early site permit when required by § 51.75(d).

(c) The NRC staff may prepare a supplement to a final environmental impact statement when, in its opinion, preparation of a supplement will further the purposes of NEPA.

(d) The supplement to a final environmental impact statement will be prepared in the same manner as the final environmental impact statement except that a scoping process need not be used.

(e) The supplement to an early site permit final environmental impact statement which is prepared for combined license application in accordance with § 51.75(d) and paragraph (b) of this section must:

(1) Identify the proposed action as the issuance of a combined license for the construction and operation of a nuclear power plant as described in the combined

license application at the site described in the early site permit referenced in the combined license application;

(2) Incorporate by reference the final environmental impact statement prepared for the early site permit;

(3) Contain no separate discussion of alternative sites;

(4) Include an analysis of the economic, technical, and other benefits and costs of the proposed action, to the extent that the final environmental impact statement prepared for the early site permit did not include an assessment of these benefits and costs;

(5) Include an analysis of other energy alternatives, to the extent that the final environmental impact statement prepared for the early site permit did not include an assessment of energy alternatives;

(6) Include an analysis of any environmental issue related to the impacts of construction or operation of the facility that was not previously resolved in the proceeding on the early site permit; and

(7) Include an analysis of the issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding

(i) for which significant new information has been identified in the applicant's Environmental Report, including, but not limited to, significant new information demonstrating that the design of the facility falls outside the site characteristics and design parameters specified in the early site permit, or

(ii) that are otherwise specified in the Notice of Intent, as a result of the scoping process or determination whether to make a finding under section 51.38.

(f)(1) A supplement to a final environmental impact statement will be accompanied by or will include a request for comments as provided in § 51.73 and a notice of availability will be published in the *Federal Register* as provided in § 51.117 if the conditions described in paragraph (a) of this section apply.

(2) If comments are not requested, a notice of availability of a supplement to a final environmental impact statement will be published in the *Federal Register* as provided in § 51.118.

§ 51.107 Public hearings in proceedings for issuance of combined licenses.

(a) In addition to complying with applicable requirements of § 51.104, in a proceeding for the issuance of a combined license for a nuclear power reactor, the presiding officer will:

(1) Determine whether the requirements of Section 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the combined license should be issued as proposed by the appropriate NRC staff director.

(b) If a combined license application references an early site permit, and a supplement to the early site permit environmental impact statement is prepared in accordance with § 51.75(d) and § 51.92(e), then the presiding officer in the combined license hearing shall not admit any contention proffered by any party on environmental issues which have been accorded finality under § 52.39 of this chapter, unless the contention:

(1) Demonstrates that the nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit;

(2) Raises any significant environmental issue that was not resolved in the early site permit proceeding; or

(3) Raises any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which significant new information has been identified in the applicant's Environmental Report; or

(4) Raises any other previously resolved environmental issue that the Notice of Intent specifically identifies as requiring supplemental analysis based on significant new information. Any such issue will be considered within the scope of the proceeding when specified in the Notice of Intent, and subject to compliance with the standards in § 2.309(f)(1) may be raised as a contention pursuant to § 2.309(f)(2) within 30 days after such issue is addressed either in an amendment to the applicant's environmental report or in the NRC's draft supplement to the early site permit environmental impact statement, whichever occurs first.

(c) If a combined license application references an early site permit, and a finding of no new and significant information is prepared in accordance with § 51.75(e) and § 51.36, then the presiding officer in the combined license hearing shall not admit any contention proffered by any party on environmental issues which have been accorded finality under § 52.39 of this chapter, and shall not make any findings with respect to the adequacy of the environmental assessment or the finding of no new and significant information.

(d) If the combined license application references a standard design certification, or proposes to use a manufactured reactor, then the presiding officer in a combined license hearing shall not admit contentions proffered by any party concerning severe accident mitigation design alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification or underlying manufacturing license for the manufactured reactor.

§ 52.39 Finality of early site permit determinations.

(a) *Commission finality.* (1) Notwithstanding any provision in 10 CFR 50.109, while an early site permit is in effect under §§ 52.27 or 52.33, the Commission may not change or impose new site characteristics, design parameters, or terms and conditions, including emergency planning requirements, on the early site permit unless the Commission:

(i) Determines that a modification is necessary to bring the permit or the site into Compliance with the Commission's regulations and orders applicable and in effect at the time the permit was issued;

(ii) Determines the modification is necessary to assure adequate protection of the public health and safety or the common defense and security;

(iii) Determines that a modification is necessary based on an update under paragraph (b) of this section; or

(iv) Issues a variance requested under paragraph (d) of this section.

(2) In making the findings required for issuance of a construction permit or combined license, or the findings required by § 52.103, or in any enforcement hearing other than one initiated by the Commission under paragraph (a)(1) of this section, if the application for the construction permit or combined license references an early site permit, the Commission shall treat as resolved those matters resolved in the proceeding on the application for issuance or renewal of the early site permit, except as provided for in paragraphs (b), (c), and (d) of this section.

(i) If the early site permit approved an emergency plan (or major features thereof) that is in use by a licensee of a nuclear power plant, the Commission shall treat as resolved changes to the early site permit emergency plan (or major features thereof) that are identical to changes made to the licensee's emergency plans in compliance with § 50.54(q) of this chapter occurring after issuance of the early site permit.

(ii) If the early site permit approved an emergency plan (or major features thereof) that is not in use by a licensee of a nuclear power plant, the Commission shall treat as resolved changes that are equivalent to those that could be made under § 50.54(q) of this chapter without prior NRC approval had the emergency plan been in use by a licensee.

(b) *Updating of early site permit-emergency preparedness.* An applicant for a construction permit, operating license, or combined license who has filed an application referencing an early site permit issued under this subpart shall update the emergency preparedness information that was provided under § 52.17(b), and discuss whether the updated information materially changes the bases for compliance with applicable NRC requirements.

(c) *Hearings and petitions.* (1) In any proceeding for the issuance of a construction permit, operating license, or combined license referencing an early site permit, contentions on the following matters may be litigated in the same manner as other issues material to the proceeding:

(i) The nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit;

(ii) One or more of the terms and conditions of the early site permit have not been met;

(iii) A variance requested under paragraph (d) of this section is unwarranted or should be modified;

(iv) New or additional information is provided in the application that substantially alters the bases for a previous NRC conclusion or constitutes a sufficient basis for the Commission to modify or impose new terms and conditions related to emergency preparedness; or

(v) Any significant environmental issue that was not resolved in the early site permit proceeding; ~~or~~

(vi) Any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which significant new information has been identified in applicant's Environmental Report; or

(vii) Any other previously resolved environmental issue that the Notice of Intent specifically identifies as requiring supplemental analysis based on significant new information. Subject to compliance with the standards in § 2.309(f)(1), any such issue may be raised as a contention pursuant to § 2.309(f)(2) within 30 days after it is addressed either in an amendment to applicant's environmental report or in the NRC's draft supplement to the early site permit environmental impact statement, whichever occurs first.

(2) Any person may file a petition requesting that the site characteristics, design parameters, or terms and conditions of the early site permit should be modified, or that the permit should be suspended or revoked. The petition will be considered in accordance with § 2.206 of this chapter. Before construction commences, the Commission shall consider the petition and determine whether any immediate action is required. If the petition is granted, an appropriate order will be issued. Construction under the construction permit or combined license will not be affected by the granting of the petition unless the order is made immediately effective. Any change required by the Commission in response to the petition must meet the requirements of paragraph (a)(1) of this section.

(d) *Variances.* An applicant for a construction permit, operating license, or combined license referencing an early site permit may include in its application a request for a variance from one or more site characteristics, design parameters, or terms and conditions of the early site permit, or from the site safety analysis report. In determining whether to grant the variance, the Commission shall apply the same technically relevant criteria applicable to the application for the original or renewed early site permit. Once a construction permit or combined license referencing an early site permit is issued, variances from the early site permit will not be granted for that construction permit or combined license.

(e) The holder of an early site permit may not make changes to the early site permit, including the site safety analysis report, without prior Commission

approval. The request for a change to the early site permit must be in the form of an application for a license amendment, and must meet the requirements of 10 CFR 50.90 and 50.92.

(f) *Information requests.* Except for information requests seeking to verify compliance with the current licensing basis of the early site permit, information requests to the holder of an early site permit must be evaluated before issuance to ensure that the burden to be imposed on respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information. Each evaluation performed by the NRC staff must be in accordance with 10 CFR 50.54(f), and must be approved by the Executive Director for Operations or his or her designee before issuance of the request.