

NON-CONCURRENCE PROCESS

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF DOCUMENT Regulatory Issue Summary 2005-02, Revision 1	ADAMS ACCESSION NO. ML100340563
DOCUMENT SPONSOR Brian J. McDermott	SPONSOR PHONE NO. 301-415-2334
NAME OF NON-CONCURRING INDIVIDUAL Richard B. Ennis	PHONE NO. 301-415-1420

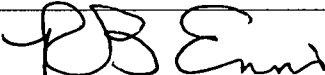
DOCUMENT AUTHOR DOCUMENT CONTRIBUTOR DOCUMENT REVIEWER ON CONCURRENCE

TITLE Senior Project Manager	ORGANIZATION NRR/DORL
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REASONS FOR NON-CONCURRENCE

See Attachment 1

CONTINUED IN SECTION D

SIGNATURE 	DATE 4/12/11
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NON-CONCURRENCE PROCESS

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**SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR
(THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)**

NAME
Harold K. Chernoff

TITLE Branch Chief	PHONE NO. 301-415-2330
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ORGANIZATION
NRR/DORL

COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER

- I HAVE NO COMMENTS
- I HAVE THE FOLLOWING COMMENTS

CONTINUED IN SECTION D

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NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT Regulatory Issue Summary 2005-02, Revision 1	ADAMS ACCESSION NO. ML100340563
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SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR

NAME Brian J. McDermott

TITLE Director, Division of Preparedness and Response	PHONE NO. 301-415-2334
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ORGANIZATION NSIR/DPR

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

The non-concurrence raises two issues related to the proposed issuance of the Regulatory Issue Summary (RIS).

The first issue is that the RIS public comment document is not consistent with the NRC's principles of good regulation, NRC's organizational values, and Federal law and regulations as delineated in Management Directive 3.53. Specifically, the non-concurrence states that the public comment resolution document is misleading and fails to adequately address the decision making process associated with why the license amendment process discussion was removed from the RIS. Additionally, the non-concurrence states that the NRC staff has not met its legal obligations to properly document the decision making associated with the revisions to the RIS and the disposition of the public comments on the draft RIS.

NSIR Response

The CRGR expressed concern that the RIS may not be the most appropriate vehicle for implementing a new position given that the pending Emergency Preparedness rulemaking is scheduled for Commission review in early spring 2011 and Final Rule publication in late summer 2011. The CRGR recommended removing reference to the 10 CFR 50.90 process from the RIS or making use of the 10 CFR 50.90 process voluntary. The CRGR had no other comments on the remainder of the issues presented in the RIS. The NSIR staff removed the reference to the license amendment process in the RIS at the recommendation from the CRGR and revised the public comment resolution document to reflect the changes to the RIS. The CRGR meeting minutes provide the documentation of the decision making process. It is important to note that the CRGR decision was only a recommendation to the staff.

The second issue raised in the non-concurrence is the NRC staff has not met its obligations as described in the CRGR charter.


The non-concurrence states that even though the RIS was revised to make it look like the CRGR's recommendations were being addresses, it is a mere illusion. The NRC staff is simply using internal memos rather than the RIS as the vehicles to implement this de facto rulemaking. It further states that in the spirit of the CRGR Charter, a memo needs to be sent to the EDO documenting the staff's decision to not follow the CRGR recommendations.

NSIR Response

The purpose of the CRGR is to review proposed generic backfits that are to be imposed on all power reactors and/or selected nuclear materials facilities. The NSIR staff had determined the RIS was not a backfit and provided this in a presentation to the CRGR. The CRGR determined that the change to require the use of 10 CFR 50.90 for emergency plan changes needing prior approval in accordance with 10 CFR 50.54(q) is not a backfit. The NSIR staff does not disagree with this determination by the CRGR and therefore has met its obligations with respect to the CRGR Charter. The discussion in the non-concurrence regarding the draft of propose internal memo is irrelevant to a non-concurrence on the information provided in the RIS.

RIS 2005-02, Revision 1 will be revised to reflect this non-concurrence. Based on the above analysis, the NSIR staff will make no other changes as a result of this non-concurrence.

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NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):

- | | |
|---|---|
| <input type="checkbox"/> CONCURS | <input checked="" type="checkbox"/> WANTS NCP FORM PUBLIC |
| <input checked="" type="checkbox"/> NON-CONCURS | <input type="checkbox"/> WANTS NCP FORM NON-PUBLIC |
| <input type="checkbox"/> WITHDRAWS NON-CONCURRENCE (i.e., discontinues process) | |

ATTACHMENT 1

NON-CONCURRENCE BY RICHARD ENNIS ON REGULATORY ISSUE SUMMARY 2005-02, REVISION 1, "CLARIFYING THE PROCESS FOR MAKING EMERGENCY PLAN CHANGES"

1.0 PURPOSE

The purpose of this document is provide information supporting my non-concurrence on the final version of Regulatory Issue Summary (RIS) 2005-02, Revision 1, "Clarifying the Process for Making Emergency Plan Changes," (Agencywide Documents Access and Management System (ADAMS) Package Accession No. ML100340563) being prepared by the Office of Nuclear Security and Incident Response (NSIR). The intent of providing this information is to allow NRC management to make a fully-informed decision on the path going forward.

2.0 RELEVANT HISTORY

The following is a discussion of the relevant history of the issues associated with the regulatory process for review of emergency plan changes needing prior NRC approval. This information is provided to put into context the current issues (discussed in Section 3.0 below) associated with the proposed issuance of RIS 2005-02, Revision 1.

SECY 08-0024 dated February 25, 2008

In SECY-08-0024 (ADAMS Accession No. ML072900547), the NRC staff stated that it intended to pursue a change to 10 CFR 50.54(q), **through the planned rulemaking**, to require that proposed emergency plan (EP) changes that would represent a decrease in effectiveness be submitted pursuant to 10 CFR 50.90 (i.e., via license amendment). **The SECY stated that "Pursuing this change to 10 CFR 50.54(q) through the rulemaking process will provide an appropriate venue for seeking stakeholder comments."** The Staff Requirements Memorandum (SRM) for the SECY dated May 19, 2008 (ADAMS Accession No. ML081400510), approved the staff's recommendation.

Internal NRC Staff Discussions - May 2008

Following issuance of the SRM, **the Office of General Counsel (OGC) expressed concerns about the timeframe for completion of rulemaking.** As a result; OGC, NSIR and the Office of Nuclear Reactor Regulation (NRR) management decided to develop a RIS to implement the license amendment process, **prior to rulemaking**, for EP changes that represented a decrease in effectiveness.

Emergency Preparedness Rulemaking

The proposed rulemaking, "Enhancements to Emergency Preparedness Regulations," was issued for public comment in the *Federal Register* on May 18, 2009 (74 FR 23254), and includes the proposed use of the license amendment process (i.e., 10 CFR 50.90) for EP

changes needing prior NRC approval in accordance with 10 CFR 50.54(q) (i.e., changes that represent a decrease in effectiveness). The final rule would also require that emergency action level (EAL) scheme changes be submitted in accordance with 10 CFR 50.90 (the proposed rule did not change the current letter approval process for EAL scheme changes). **The SECY paper requesting Commission approval of the final rule was approved by the Executive Director for Operations on April 8, 2011 (ADAMS Accession No. ML102150182).**

Draft RIS 2005-02, Rev. 1 dated August 24, 2009

Draft RIS 2005-02, Revision 1, "Clarifying the Process for Making Emergency Plan Changes," was issued for public comment in the *Federal Register* on August 24, 2009 (74 FR 42699). Consistent with the proposed rulemaking, the RIS included the proposed use of the license amendment process for EP changes needing prior NRC approval in accordance with 10 CFR 50.54(q). **The RIS indicates that due to the timeframe associated with rulemaking, the change in process will be implemented before the rulemaking is completed.**

Memo from Joseph G. Giitter to Melvyn N. Leach, dated August 26, 2009

The above memo (hereinafter referred to as the "Giitter memo,") titled, "Processing Emergency Plan Reviews" (ADAMS Accession No. ML091370012), changed the NRC's internal procedures for processing EP changes consistent with the change in process dictated to licensees in the draft RIS (i.e., use of license amendment process for 10 CFR 50.54(q) changes). This memo was distributed to NRR/Division of Operating Reactor Licensing (DORL) staff via an email from Robert Nelson (NRR/DORL Deputy Director) on August 27, 2009, that stated "These procedures are effective with the issuance of the memo." **The memo is non-public; however, NRC management informed the industry at the Nuclear Energy Institute (NEI) Licensing Forum on October 6, 2009, that changes requiring prior NRC approval pursuant to 10 CFR 50.54(q) must henceforth be submitted as license amendment requests.**

Non-concurrences on Draft RIS 2005-02, Rev. 1 and Giitter memo

The plain language interpretation of 10 CFR 50.54(q) clearly indicates submittal of emergency plan changes as reports in accordance with 10 CFR 50.4, not as license amendments pursuant to 10 CFR 50.90. In addition, the history of the process used by the staff, consistent with the plain language interpretation of the rule, had remained unchanged since promulgation of 10 CFR 50.54(q) in 1980, up until issuance of the Giitter memo. That history shows that changes needing prior approval in accordance with 10 CFR 50.54(q) have always been approved by letter, not via the license amendment (i.e., 10 CFR 50.90) process. Concerns regarding use of the license amendment process, for changes needing prior NRC approval pursuant to 10 CFR 50.54(q), prior to completion of the emergency preparedness rulemaking, were addressed in my non-concurrences on the draft RIS (ADAMS Accession No. ML092250622) and on the Giitter memo (ADAMS Accession No. ML091671101). In both non-concurrences (which are publicly available), I raised concerns that requiring licensees to submit

emergency plan changes, needing prior NRC approval in accordance with 10 CFR 50.54(q), as license amendment requests, prior to any rulemaking, would be:

- Contrary to the current regulations
- Contrary to current NRR procedures
- Contrary to prior direction from the Commission
- De facto rulemaking
- Contrary to the *Perry* decision
- A backfit
- Unenforceable
- Contrary to the "NRC Principles of Good Regulation"

Letter from NEI dated October 23, 2009

In a letter dated October 23, 2009, the General Counsel for the Nuclear Energy Institute (NEI) submitted comments to the NRC on the draft RIS (ADAMS Accession No. ML093030242). The positions stated by NEI express many of the same concerns addressed in the two non-concurrences. **NEI requested that the NRC withdraw the draft RIS immediately pending completion of the emergency preparedness rulemaking. NEI also requested that the Commission direct the NRC staff to discontinue immediately its ongoing informal efforts (through the non-public Giitter memo) to direct licensees to submit amendment requests for EP changes. As far as I know, no response was ever sent to NEI regarding their requests.**

Review of Final RIS 2005-02, Rev. 1, by Committee to Review Generic Requirements (CRGR)

On September 22, 2010, NSIR staff discussed the proposed issuance of the final version of RIS 2005-02, Revision 1, "Clarifying the Process for Making Emergency Plan Changes," with the Committee to Review Generic Requirements (CRGR). Harold Chernoff and I presented our concerns that use of the license amendment process to approve EP changes (needing prior approval per 10 CFR 50.54(q)), as proposed in the RIS, was a backfit and de facto rulemaking since historically these changes have been approved by letter with an attached safety evaluation, not by amendment. Information detailing our concerns was provided to CRGR in my memo dated September 16, 2010 (ADAMS Accession No. ML102420260).

During the meeting, **the CRGR concluded that using the license amendment process (i.e., 10 CFR 50.90) to approve changes to emergency plans involving a decrease in effectiveness is a clear change in staff practice.** As discussed in the CRGR meeting minutes dated October 29, 2010 (ADAMS Accession No. ML102710054), **CRGR recommended removing use of the license amendment process from the RIS or making use of the license amendment process voluntary. This recommendation was based on CRGR members indicating in the meeting that requiring the use of the license amendment process would amount to de facto rulemaking.**

Actions Taken Subsequent to CRGR Meeting

In response to the CRGR recommendations, NSIR has removed all reference to the license amendment process from the RIS (ADAMS Accession No. ML100340545). On the surface, it looks like the staff followed the CRGR recommendations. However, a proposed new EP guidance memo from NRR (Joseph G. Giitter) to NSIR (Brian J. McDermott) (ADAMS Accession No. ML103050287) was prepared after the CRGR meeting. This proposed new Giitter memo not only would require licensees to submit 10 CFR 50.54(q) changes needing prior NRC approval pursuant to 10 CFR 50.90 but would also require EAL scheme changes to be submitted pursuant to 10 CFR 50.90 (which even goes beyond the draft proposed emergency preparedness rulemaking "Enhancements to Emergency Preparedness Regulations," that was issued for public comment in the *Federal Register* on May 18, 2009 (74 FR 23254)). The new memo would supersede the Giitter memo dated August 26, 2009.

3.0 CURRENT ISSUES

Sections 3.1 and 3.2 discuss the issues raised by the proposed issuance of a RIS 2005-02, Revision 1.

3.1 The RIS Public Comment Resolution Document is not Consistent with the NRC's Principles of Good Regulation, NRC's Organization Values, and Federal Law and Regulations as Delineated in Management Directive 3.53

As discussed above, the CRGR concluded that using the license amendment process (i.e., 10 CFR 50.90) to approve changes to emergency plans involving a decrease in effectiveness (as discussed in draft RIS 2005-02, Revision 1), is a clear change in staff practice and de facto rulemaking. The CRGR recommended removing use of the license amendment process from the RIS or making use of the license amendment process voluntary. It was clear from the discussion during the CRGR meeting that the CRGR's concern was that the staff not force licensee's to use the license amendment process for EP changes prior to completion of the emergency preparedness rulemaking.

Although the RIS has been revised to remove references regarding use of the license amendment process, the August 26, 2009, Giitter memo (ADAMS Accession No. ML091370012), which implemented the license amendment process for 10 CFR 50.54(q) changes needing prior NRC approval, is currently still in effect. In addition, the proposed new Giitter memo (ADAMS Accession No. ML103050287) not only would require licensees to submit 10 CFR 50.54(q) changes needing prior NRC approval pursuant to 10 CFR 50.90 but would also require EAL scheme changes to be submitted pursuant to 10 CFR 50.90. My discussions with NRR management following the CRGR meeting indicates that, based on OGC's insistence, EP and EAL changes, needing prior NRC approval, will only be processed by the NRC staff if

they are submitted by licensees pursuant to 10 CFR 50.90 (i.e., as license amendment requests).

The bottom line is that the CRGR concerns are being ignored. As such, I have some serious concerns regarding the openness, transparency and clarity of the discussion in the public comment resolution document (ADAMS Accession No. ML100341087) that is part of the RIS package. The public comment resolution document is written in an evasive manner and avoids directly addressing concerns about de facto rulemaking (and related issues) on the basis that the license amendment discussion has been removed from the RIS. The RIS public comment resolution document needs to be revised consistent with the NRC's Principles of Good Regulation and NRC's Organization Values to tell the whole story in an open, transparent and forthright manner.

Due to the significant changes between the draft and final versions of the RIS and the discussion in the public comment resolution document, external stakeholders could easily interpret that licensee's would not need to submit EP and EAL changes, needing prior NRC approval, as license amendment requests prior to completion of the emergency preparedness rulemaking. The public comment resolution document is misleading and fails to adequately address the decision making process associated with the revisions to the RIS (e.g., does not address why the license amendment process discussion was deleted and does not address staff expectations regarding submittal of EP and EAL changes needing prior NRC approval). The NRC staff is obligated to document significant decisions in accordance with applicable federal law and regulations as delineated in Management Directive (MD) 3.53¹, "NRC Records and Document Management Program," Handbook 1, Part I, "Recordkeeping Requirements." Specifically, MD 3.53 requires that in order to provide adequate documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the NRC, records shall be created and maintained that are sufficient to document the formulation and execution of basic policies and decisions and necessary actions taken, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference). Currently, the NRC staff has not met its legal obligations to properly document the decision making associated with the revisions to the RIS and the disposition of the public comments on the draft RIS. The RIS public comment resolution document should be revised accordingly.

¹ Note, as discussed in Commission Memorandum and Order CLI-08-23 dated October 6, 2008 (ADAMS Accession No. ML082800440), MD 3.53 provides the Commission's interpretation of its obligations under the Federal Records Act of 1950, as amended (which is codified in Title 44 of the United States Code, Chapters 21, 29, 31 and 33) and regulations promulgated by the National Archives and Records Administration (36 CFR Part 1220).

3.2 The NRC Staff has not met its Obligations as Described in the CRGR Charter

Revision 8 of the CRGR Charter dated March 2011 (ADAMS Accession No. ML110620618), states in Section IV that:

In the event that the staff disagrees with the CRGR recommendations, the sponsoring division director will submit a closeout memorandum indicating the disagreement to the EDO for resolution. The EDO will report to the Commission in writing regarding the disposition of the CRGR recommendations when major differences exist.

As noted above, it was clear from the discussion during the CRGR meeting that the CRGR's concern was that the staff not force licensee's to use the license amendment process for EP changes prior to completion of the emergency preparedness rulemaking. Even though the RIS was revised to make it look like the CRGR's recommendations were being addressed, it is a mere illusion. The NRC staff is simply using internal memos rather than the RIS as the vehicles to implement this de facto rulemaking. In the spirit of the CRGR Charter, a memo needs to be sent to the EDO documenting the staff's decision to not follow the CRGR's recommendations.