

Non-Concurrence Process Record for NCP-2011-100

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Individuals are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, individuals have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP). <http://pbadupws.nrc.gov/docs/ML0706/ML070660506.pdf>

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to, and attach them to proposed documents moving through the management approval chain.

NRC Form 757, Non-Concurrence Process is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of an NRC employee.

Section B of the form includes the personal opinions and views of the NRC employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

The agency's official position (i.e., the document that was the subject of the non-concurrence) is included in ADAMS Accession Number ML11251A230.

This record has been redacted prior to discretionary release to the public.

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER

NCP-2011-100

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF SUBJECT DOCUMENT
EGM- DISPOSITIONING BWR OPDRV NON-COMPLIANCE

ADAMS ACCESSION NO.

ML11251A230

DOCUMENT SIGNER
Roy Zimmerman

SIGNER PHONE NO.

TITLE
Director

ORGANIZATION
Office of Enforcement

NAME OF NON-CONCURRING INDIVIDUAL
James L. Cameron

PHONE NO.
(630) 829-9833

TITLE
Chief, Reactor Projects Branch 6

ORGANIZATION
Division of Reactor Projects/Region III

DOCUMENT AUTHOR DOCUMENT CONTRIBUTOR DOCUMENT REVIEWER ON CONCURRENCE

REASONS FOR NON-CONCURRENCE AND PROPOSED ALTERNATIVES

The NRC staff intends to use enforcement discretion described in this EGM, integrated with the license amendment process, to resolve TSs compliance issues created by: 1) the lack of clear regulatory guidance on the meaning of OPDRV, and 2) licensee interpretations of the plain language meaning of the term OPDRV. The EGM argues that enforcement discretion related to secondary containment operability during OPDRVs is appropriate because the actions required to receive the discretion ensure an adequate level of safety by requiring licensee immediate actions to: (1) adhere to plain language meaning of OPDRV activities; (2) address water inventory requirements during OPDRVs; (3) limit OPDRV activities to those with long drain down times; (4) ensure adequate defense-in-depth is maintained to minimize the potential for release of fission products; and (5) ensure that licensees follow all other TSs requirements for OPDRVs. During the time period of enforcement discretion, the staff will work with the BWROG to develop an improvement to the Standard TSs which will be made available for adoption by licensees through the license amendment process.

I disagree with this approach. There currently is no safety basis to grant the proposed enforcement discretion. There is nothing unreasonable about requiring licensees to follow their technical specifications and set secondary containment when conducting operations with the potential to drain the reactor vessel. Licensees and the BWROG have argued that requiring licensees to modify their outage schedules at this late period in time so close to the scheduled refueling outages could cause human performance and safety issues for the plants. Inconvenient regulatory requirements are not an acceptable excuse for non-compliance. Furthermore, allowing licensees to establish compensatory measures to avoid TS applicability statements (which is what OPDRVs are) is inappropriate. We have told licensees this in public meetings and to say otherwise by issuing this EGM would be hypocritical, and would give the NRC a "black eye" if we had to defend this EGM to external stakeholders, including congressional oversight.

The alternative that I propose is the status quo - require BWRs to follow their TS requirements with regard to OPDRVs while the staff works with external stakeholders to develop a clearer definition of what constitutes OPDRV operations. This alternative would be clear and consistent with the current application of our understanding and expectations concerning OPDRVs. The alternative is the easiest to defend publicly, while at the same time we foster our position as a learning organization by working with the industry to develop clear guidance.

CONTINUED IN SECTION D

SIGNATURE



DATE

9/15/2011

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

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SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR

NAME
Gary L. Shear

TITLE
Deputy Director

PHONE NO.
(630) 829-9601

ORGANIZATION
Division Of Reactor Projects, Region III

COMMENTS FOR THE NCP REVIEWER TO CONSIDER

I believe that the points and positions that Mr. Cameron raises have merit. I also believe there could be several approaches taken to address the issues related to Technical Specification compliance and the Agency's and industry's struggle with the definition of OPDRV and its applicability in Tech. Specs., and one approach is that suggested by Mr. Cameron, to communicate to licensees purely that they need to follow their Tech Specs. while we work with stakeholders to develop a clearer definition of OPDRV. Another is the issuance of the EGM and enforcement discretion, which was the tool chosen to address this issue on a short term basis. I believe that this is a step in the right direction and one which will provide some clarity to NRC inspectors and industry stakeholders while we work to better define OPDRV and its applicability to BWR Tech. Specs. The actions outlined in the draft EGM, in my opinion, provide some increase in safety in that it clearly articulates the criteria that must be met when conducting an OPDRV without containment requirements met. Therefore, while I acknowledge there are other tools, I support the issuance of the EGM describing enforcement discretion with it being, again in my opinion, a step in the right direction which may have some safety benefit.

CONTINUED IN SECTION D

SIGNATURE
Gary L. Shear

DATE
9/21/11

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

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SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR

NAME

Robert B. Elliott

TITLE

Chief, Technical Specifications Branch

PHONE NO.

301-415-85

ORGANIZATION

Nuclear Reactor Regulation/ Division of Inspection and Regional Support

SUMMARY OF ISSUES

The NRR staff is proposing enforcement discretion to provide guidance on how to disposition BWR licensee noncompliance with Technical Specification requirements for secondary containment to be operable or have operability during Mode 5 OPDRV activities when OPDRV activities are defined by the plain language meaning of the term. To the NRR staff, an OPDRV is any activity that could potentially result in draining or siphoning the RPV water level below the top of the fuel, without taking credit for mitigating measures. To the industry an OPDRV is any operation that licensees can mitigate before uncovering irradiated fuel should not be considered an OPDRV activity. Mr. Cameron agrees with the NRR staff meaning of OPDRV activities. Mr. Cameron and the NRR staff also agree that conducting OPDRV activities with secondary containment operable ensures safe operation of facilities. Mr. Cameron does not agree with the issuance of enforcement discretion to allow licensees to conduct OPDRV activities without secondary containment established because: 1) there is no safety reason preventing licensees from complying with their technical specifications, (see Section D)

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

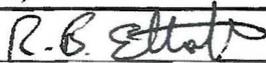
II. ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

The NRR staff reviewed the comments provided by Mr. Cameron, including the basis for his non-concurrence and his recommended alternative approach. Based on our review, we have concluded that proceeding with the EGM is both acceptable, and the preferred approach in this case. The following addresses each of the issues in Mr. Cameron's non-concurrence:

1) Issue: There is no safety basis to grant enforcement discretion.

Response: According to the NRC Enforcement Policy, "The NRC also has the authority to exercise discretion to permit continued operations—despite the existence of a noncompliance—where the noncompliance is not significant from a risk perspective and does not, in the particular circumstances, pose an undue risk to public health and safety." The EGM has been reviewed by multiple technical branches in NRR, all four regional offices, and by members of the NRR staff who are former Senior Reactor Operators at Boiling Water Reactor plants. No safety concerns have been identified with allowing licensees to operate in accordance with the EGM. In our discussions with Mr. Cameron, he has stated that he did not see any safety concern with OPDRV activities being conducted in accordance with the EGM. Accordingly, based on the staff's review of the EGM, we conclude that allowing temporary non-compliance with the secondary containment technical specification requirement for OPDRVs does not pose an undue risk to public health and safety. (see Section D)

SIGNATURE--DOCUMENT SPONSOR
Robert B. Elliott



TITLE Chief

ORGANIZATION NRR/DIRS/ITSB

DATE 9/29/11

SIGNATURE--NCP REVIEWER



TITLE Director

ORGANIZATION OE

DATE 10/4/11

NCP OUTCOME

Non-Concurring Individual: CONCURS NON-CONCURS WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

AVAILABILITY OF NCP FORM

Non-Concurring Individual: WANTS NCP FORM PUBLIC WANTS NCP FORM NON-PUBLIC

CONTINUED IN SECTION D

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SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION

A B C

I. SUMMARY OF ISSUES (continued)

2) giving discretion simply because licensees find their technical specification requirements to be inconvenient is inappropriate, and 3) it will send the wrong message to licensees implying that the use of compensatory measures to avoid a technical specification Applicability is acceptable to the staff.

II. ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

2) Issue: There is nothing unreasonable about requiring licensees to follow their technical specifications and set secondary containment when conducting operations with the potential to drain the reactor vessel.

Response: The NRR staff agrees with Mr. Cameron's statement. However, there are many ways to provide adequate protection of public health and safety. The existing technical specification requirements are one way, and as indicated in the EGM, licensees can certainly choose to follow their technical specifications. They are not required to utilize the discretion allowed by the EGM. The allowance provided by the EGM to open secondary containment also requires that secondary containment can be reestablished before it is needed to prevent a radioactive release that would result from damaged fuel if a drain down event is not mitigated and fuel is uncovered. In addition, to qualify for the discretion, licensees may not conduct OPDRV activities without the refueling cavity flooded up approximately 23 feet above the reactor pressure vessel flange, and they must have a make up source of water continuously available to help mitigate a drain down event before the event reaches a stage where the licensee would have to rely on secondary containment to prevent a release. These requirements go beyond what is required by technical specifications. In our view, these requirements and others in the EGM enhance safety by requiring the licensee to be able to return secondary containment to operable status and mitigate a drain down event before the inventory reaches the RPV flange.

3) Issue: Inconvenient regulatory requirements are not an acceptable excuse for non-compliance.

Response: We agree with Mr. Cameron's statement; however, the inconvenience of the Technical Specification requirements is not the reason for exercising discretion in this case. As noted above, first and foremost, we believe that the EGM enhances safety. In addition, it restores a common understanding between the industry and the NRC on the definition of an OPDRV, and provides greater clarity for OPDRV technical specification requirements. This is a significant benefit to both our inspection staff and licensees. And finally, the staff bears some responsibility for the confusion surrounding this issue. The staff was inconsistent in its interactions with licensees in the past, when it comes to understanding the definition of the term OPDRV. The staff promised, but failed to provide, clear regulatory guidance on OPDRVs. Inconsistency by the staff, and lack of regulatory guidance, are significant contributing factors to the confusion surrounding the definition of the term OPDRV. Had there been clear regulatory guidance issued by the staff on the meaning of OPDRV, individual licensees may have had an opportunity to seek individual license amendments, or a generic resolution to their concerns prior to this point. Therefore, we believe that it is appropriate to grant licensees an alternative for complying with the secondary containment TS's during OPDRVs.

4) Issue: Allowing licensees to establish compensatory measures to avoid TS applicability statements is inappropriate. We have told licensees this in public meetings and to say otherwise by issuing this EGM would be hypocritical, and would give the NRC a "black eye" if we had to defend this EGM to external stakeholders, including congressional oversight.

Response: We are not allowing licensees to establish compensatory measures to avoid TS Applicability requirements. On the contrary, the EGM makes it clear as to when licensees are in the Applicability by restoring a common understanding between the industry and the NRC on the definition of an OPDRV. The EGM only grants discretion with regards to one requirement that must be met when in the Applicability. All other OPDRV requirements must still be met. Allowing compensatory measures in lieu of having to keep the secondary containment doors closed is, in our view, similar to allowing remedial actions when the secondary containment LCO is not met. 10CFR50.36 specifically allows that technical specifications may permit remedial actions in lieu of shutting down. Technical specifications do not allow licensees to use compensatory measures to avoid entry into either an Applicability or LCO Required Actions. This EGM does not change licensee technical specifications to allow the use of compensatory measures to avoid technical specification requirements. (see Section D)

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SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION

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B

C

II. ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

5) Proposed Alternative: Require BWRs to follow their technical specifications with regard to OPDRVs while the staff works with external stakeholders to develop a clearer definition of what constitutes OPDRV operations.

Response: We believe that we have provided some clarity to the definition of OPDRV already in a public meeting with the BWROG on July 27, 2011. The EGM, and the associated Regulatory Information Summary on OPDRV requirements, will reiterate the definition of OPDRV as discussed in that meeting, and provide clear guidance in the interim until a final resolution to this issue is developed. The definition of OPDRV is only one part of the issue. It became clear to the NRC staff during the discussions at the July 27th meeting, that not all OPDRVs represent the same level of risk to public health and safety. Yet, all OPDRVs currently have the same technical specification requirements regardless of the level of risk associated with a given OPDRV activity. As a result, where licensees can provide an equivalent or enhanced level of safety by taking alternative actions in lieu of those required by technical specifications, they are prevented by technical specifications from doing so. This may cause an undue burden in the licensee's outage management. Accordingly, the staff will consider improvements to STS for BWRs that will not only provide clarity to the OPDRV requirements in a durable form but allow a graded approach to OPDRV requirements. We also believe that if we do not issue the EGM, then licensees will likely seek individual remedies through license amendments to change their OPDRV requirements. This would divert staff resources from working on the generic issue, and may ultimately make it very difficult to achieve a generic solution. As a result, we strongly feel that issuance of the EGM is the most sensible approach to developing a resolution to the OPDRV issue.