

IN RESPONSE, PLEASE
REFER TO: M111222

December 22, 2011

MEMORANDUM FOR: R. W. Borchardt
Executive Director for Operations

Brooke Poole, Director
Office of Commission Appellate Adjudication

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 10:25 A.M.,
THURSDAY, DECEMBER 22, 2011, COMMISSIONERS'
CONFERENCE ROOM, ONE WHITE FLINT NORTH,
ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-11-0144 – Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 (July 29, 2011)

The Commission approved a Memorandum and Order responding to a petition for review of LBP-11-17 by Entergy Nuclear Operations, Inc. The Memorandum and Order denies the petition for review without prejudice and addresses related procedural motions. Commissioner Apostolakis did not participate in this matter.

(Subsequently, on December 22, 2011, the Secretary signed the Memorandum and Order.)

II. SECY-11-0145 - Final Rule: AP1000 Design Certification Amendment

The Commission approved a final rule amending Title 10 of the *Code of Federal Regulations* (10 CFR), Part 52, Appendix D, "Design Certification Rule for the AP1000 Design," with the attached changes. This amendment replaces certain combined license (COL) information items and design acceptance criteria (DAC) with specific design information, addresses the effects of the impact of a large commercial aircraft, incorporates design improvements, and increases standardization of the design.

III. SECY-11-0158 – U.S. Department of Energy (High-Level Waste Repository), Docket No. 63-001-HLW, Timbisha Shoshone Tribal Council Petition for Review of September 28, 2011, Board Decision

The Commission approved a Memorandum and Order responding to a petition for review by the Timbisha Shoshone Tribal Council (Tribal Council) of the Construction Authorization Board's decision dismissing the Tribal Council's motion to be recognized as the authorized representative of the Timbisha Shoshone Tribe in this case. The Memorandum and Order declines to decide the Tribal Council's petition in this suspended proceeding, and provides that the Tribal Council may seek to reinstate its petition should the proceeding be reactivated at a future time. Commissioner Apostolakis did not participate in this matter.

(Subsequently, on December 22, 2011, the Secretary signed the Memorandum and Order.)

Attachment:

1. Changes to the final rule in SECY-11-0145
2. Additional Changes to the final rule in SECY-11-0145

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
EDO
OGC
CFO
OCAA
OCA
OIG
OPA
Office Directors, Regions, ACRS, ASLBP (via E-Mail)
PDR

Changes to be Incorporated in the Final Rule Prior to Publication

1. On p. 1, in the paragraph labeled “Dates,” the statement “**insert date 30 days after publication in the *Federal Register***” should be changed to “**insert date of publication in the *Federal Register***” in two places.

2. On p.1, in the paragraph labeled “**DATES**,” after the existing text which ends, “The incorporation by reference of certain material specified in this regulation is approved by the Director of the Office of the Federal Register as of [**insert date 30 days after publication in the Federal Register**].” add the following text:

The applicability date of this rule for those entities who receive actual notice of this rule is the date of receipt of this rule.

3. On p. 3, in the Table of Contents, under “III. Discussion,” add a new “C. Immediate Effectiveness of Final Rule; Provision of Actual Notice.”

4. On p. 34, under “3. Applicable Regulations (Section V),” the statement “which is 30 days after the publication of this rule in the *Federal Register*” should be changed to “which is the date of publication of this rule in the *Federal Register*.”

5. On p. 43, add a new “C. Immediate Effectiveness of Final Rule; Provision of Actual Notice” and text to read as follows:

C. Immediate Effectiveness of Final Rule; Provision of Actual Notice to Southern Nuclear Operating Company

The NRC is making this final rule immediately effective, and is also providing notice of this final rule (including the NRC-approved DCD, Revision 19) to Southern Nuclear Operating Company (SNOC). Under a provision of the Administrative Procedure Act (APA), 5 U.S.C. 553(d), there ordinarily must be a 30-day waiting period before a new rule is effective, subject to certain exceptions, including “good cause:”

The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except: (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause

found and published with the rule.

Consistent with the APA, 10 CFR 2.807 provides that the NRC may make a rule effective in less than 30 days after publication in the *Federal Register* upon making the good cause finding as noted in the third exception listed in 5 U.S.C. 553(d). For the reasons noted below, the NRC has determined that good cause exists for making this design certification rulemaking immediately effective.

Good cause can be demonstrated by any number of circumstances. Here the circumstances demonstrate that the basis for the 30-day waiting period – to allow those regulated by a new rule time to conform their activities to it – is absent. Several sources of guidance on Section 553(d) support the NRC’s good cause finding for this rulemaking.

Specifically, in the legislative history of the 30-day provision, the final report of the House Committee on the Judiciary offered the following explanation of the “good cause” exception in 5 U.S.C. 553(d)(3):

[The purpose of the 30-day delay is to] afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt. . . . Many rules . . . may be made operative in less than 30 days . . . because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation.

S. Doc. 79-249, Administrative Procedure Act: Legislative History 259-60 (1946). Additional guidance is found in the Attorney General’s Manual on the APA, which provides:

The requirement of publication not less than thirty days prior to the effective date may be shortened by an agency ‘upon good cause found and published with the rule’. This discretionary exception was provided primarily to take care of the cases in which the public

interest requires the agency to act immediately or within a period less than thirty days. Senate Hearings (1941) pp. 70, 441, 588, 650, 812, 1506. *Where the persons concerned request that a rule be made effective within a shorter period, this circumstance would ordinarily constitute good cause.* Also, it is clear from the legislative history that for good cause an agency may put a substantive rule into effect immediately; in such event, the requirement of prior publication is altogether absent, and the rule will become effective upon issuance as to persons with actual notice, and as to others upon filing with the Division of the Federal Register in accordance with section 7 of the Federal Register Act. Senate Hearings (1941) pp. 594, 599, 1340, 1455.

U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 37 (1947) (*emphasis added*). In light of this background, the NRC believes that there is good cause for making this final rule amending the AP1000 design certification rule immediately effective.

On May 27, 2011, one of the first COL applicants to which this amended AP1000 design certification rule would potentially apply, SNOC, submitted a "white paper" that set forth alternatives to making the final AP1000 rule effective 30 days after publication. (ADAMS Accession No. ML11152A189). Thereafter, SNOC submitted a July 20, 2011 letter indicating that making the certified design rule immediately effective would serve important policy objectives.¹ (ADAMS Accession No. ML11210B421). SNOC's letter thus requested Commission action. During the *Vogtle* uncontested, or "mandatory," hearing held by the Commission on SNOC's applications for a COL and a limited work authorization (LWA), SNOC

¹ The letter by SNOC, requesting that the final rule amending the AP1000 design certification rule be made effective before 30 days after *Federal Register* publication, was filed on the docket for the Vogtle Electric Generating Plant, Units 3 and 4 (Docket Nos. 52-025-COL and 52-026-COL) (*Vogtle*). SNOC's request is more appropriately addressed in this rulemaking proceeding to amend the AP1000 design certification rule.

reiterated its request that the NRC issue the COL and LWA immediately upon Commission affirmation of the final rule amending the AP1000 design certification rule. Transcript of *Vogtle* COL Mandatory Hearing at 22-23, 350 (Sept. 27, 2011). (ADAMS Accession No. ML11305A228).

Here, SNOC, which is likely to use (and be bound by) the AP1000 design certification rule in the short term if the Commission otherwise authorizes issuance of the COL, wishes the rule be made immediately effective. Given SNOC's longstanding awareness of and participation in the AP1000 rulemaking, it does not need the 30-day waiting period to come into compliance with the final rule. Under the Attorney General's Manual, *supra*, at 37, SNOC's request that the rule be made effective in a shorter time period constitutes good cause to waive the 30-day waiting period. As noted above, the extensive process for consideration of this design certification rulemaking would clearly constitute a situation where "the parties subject to [the regulation] may during the usually protracted hearing and decision procedures anticipate the regulation." S. Doc. 79-249, Administrative Procedure Act: Legislative History 259-60 (1946). In fact, that "anticipation" is clearly manifested in SNOC's use of the design certification rulemaking, as well as use by other applicants for COLs referencing the AP1000 design certification rule, which would occur only after the completion of a public process that includes NRC adjudicatory processes for each COL application. The determination of good cause regarding the effective date of the final AP1000 rule is separate from, and does not prejudice, the licensing determinations that are otherwise required in the COL proceedings.

Finally, the NRC is providing actual service of the final AP1000 rule (including the NRC-approved DCD, Revision 19) to SNOC concurrently with the NRC's transmission of the final rule to the Office of the Federal Register for publication.² Thus, either before, or simultaneous with,

² The NRC would also provide actual notice of the final AP1000 rule to any other COL applicant upon request. On the date of the transmission of the final rule package to the Federal Register, the NRC will issue an announcement of its transmission and make the final rule package as transmitted to the Federal Register available on the NRC website.

any issuance of a COL for *Vogtle* (and any other COL application referencing the AP1000, upon request), SNOC (and any other COL applicant referencing the AP1000, upon request) will have actual notice of the requirements of the final AP1000 rule and Revision 19 of the DCD for which their NRC-licensed activities under the COL must conform.

The immediately effective rule cannot be used by anyone until the agency has made the necessary health and safety findings and completed the environmental review processes that necessarily precede the issuance of a COL relying on the design certification rulemaking. Each finding necessary under the Atomic Energy Act would have been made through public rulemaking and the NRC's adjudicatory processes that serve to allow consideration of public input before the agency issues its determination on an application referencing the AP1000. The rule itself does not force anyone to take action immediately based on its effective date because it does not compel, but rather permits, action. Therefore, from the standpoint of regulatory efficiency, delaying issuance of a licensing decision when the decision is ready to be issued is not in the public interest, whether the decision is to deny or grant the requested license.

On October 14, 2011, counsel for several organizations who were previously admitted as Joint Intervenors in the contested portion of the *Vogtle* COL proceeding indicated that they would be adversely affected by the issuance of an immediately effective rule. Letter from Mindy Goldstein, Counsel for Southern Alliance for Clean Energy, Georgia Women's Action for New Directions, and Center for a Sustainable Coast (Goldstein Letter) (ADAMS Accession No. ML11287A054).³ The Goldstein Letter states that SNOC has requested a waiver of 10 CFR 2.807 during the uncontested hearing, which the letter states is an improper forum, and that waiver of 10 CFR 2.807 would not afford them time to prepare for issuance of the *Vogtle* COL or LWA. The Goldstein Letter states that a waiver of Section 2.807 is required to be submitted

³ Because the Goldstein Letter was submitted in response to SNOC's request, which is being considered in this AP1000 design certification rulemaking, the NRC is, in its discretion, considering the Goldstein Letter here as well. Therefore, the NRC need not address the

under Section 2.335. The Goldstein Letter explains that when the design certification rule becomes effective, a COL and LWA will be issued, resulting in a nuclear power plant that will affect all persons located near the site. The *Vogtle* Joint Intervenors believe the 30-day effective period is necessary to determine whether they wish to appeal the rule and seek a stay of construction.

First, a waiver of Section 2.807 is not required to make a rule immediately effective; a rule can be made immediately effective pursuant to the requirements of Section 2.807. The Commission in this rulemaking has determined to use the good cause exception to the 30-day effective date for the rulemaking and thus, is acting consistently with the provisions of Section 2.807 rather than waiving its provisions.

Second, as noted above in the discussion of the legislative history of the 30-day effective date provision, the primary purpose of the 30-day requirement is to allow affected persons time to comply with the new rule. The final rule amending the AP1000 design certification is focused on the conduct of regulatory activities licensed by the NRC. But, the *Vogtle* Joint Intervenors are neither current NRC licensees who must comply with the final rule amending the AP1000 rule, nor applicants for NRC licenses referencing the final AP1000 rule. Thus, the final AP1000 rule imposes no substantive legal obligations on them. The NRC does not believe that the Goldstein Letter describes any legally-cognizable harm within the scope of protection afforded to third parties by the APA's 30-day waiting period provision. That an immediately effective AP1000 rule may facilitate issuance of a COL for the *Vogtle* plant does not appear to adversely affect the rights or capability of any public stakeholder to do what they would otherwise do if the AP1000 rule were made effective 30 days after publication in the Federal Register. Whether the AP1000 rule is immediately effective or not does not change any public stakeholder's legal rights or options; it merely affects the timing of asserting such rights or exercising those options.

Further, the Commission is not aware of any regulatory history indicating that the purpose of the 30-day effective date is tied to or affects appeal rights. Regardless of the immediate effectiveness of the rule, the *Vogtle* Joint Intervenors may seek legal action on the immediately effective rule in Federal court, or they may file an appropriate motion in the *Vogtle* COL proceeding if they satisfy the requirements in 10 CFR Part 2 to reopen the record and submit late-filed contentions. See 10 CFR 2.309, 2.326. Thus, an immediately effective AP1000 rule does not foreclose, or render moot, challenges to the rule, including stay remedies. For these reasons, the NRC concludes that making the final AP1000 rule immediately effective would not adversely affect these organizations or any other public stakeholders.

In sum, the NRC finds good cause for making the final rule amending the AP1000 design certification rule immediately effective upon publication in the *Federal Register*. Therefore, the NRC is making the final rule immediately effective. In addition, there is sufficient reason to provide prompt actual notice of this final rule (including the NRC-approved DCD, Revision 19) to SNOC (and potentially to any other combined license applicant referencing the amended AP1000 design certification rule in its application).

6. On p. 76, under “V. Applicable Regulations,” the statement “INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*” should be changed to “INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*.”

Additional Changes to be Incorporated in the Final Rule Prior to Publication

1. Federal Register page 1, "Summary," line 5, revise to read: "... incorporates..."
2. Federal Register page 5, line 7, revise to read: "... noted in part, that: ..."
3. Federal Register page 6, line 11, revise to read: "...focus to of..."
4. Federal Register page 9, lines 3 and 4, revise to read: "Although The NRC..."
5. Federal Register page 9, line 5, revise to read: "...comments, However, the..."
6. Federal Register page 9, line 20, revise to read: "... from the events, ..."
7. Federal Register page 10, line 7, revise to read: "Inasmuch as The ..."
8. Federal Register page 10, line 10, revise to read: "... (Recommendation 7), and The task force concluded that, by the nature..."
9. Federal Register page 10, line 11, revise to read: "... capability, the AP1000 designs have has many of the designs..."
10. Federal Register page 10, line 12, revise to read: "... recommendations, and the ..."
11. Federal Register page 10, line 14, revise to read: "concludes that at a later..."
12. Federal Register page 10, lines 16 and 17, revise to read: "... ensure that holders of COLs, which reference the AP1000, also..."
13. Federal Register page 10, line 20, revise to read: "... AP1000 topics, and general..."
14. Federal Register page 11, line 7, revise to read: "...features that were commented on, and a summary..."
15. Federal Register page 11, line 13, revise to read: "...communications equipment. ..."
16. Federal Register page 12, line 2, revise to read: "...For the inside interior..."
17. Federal Register page 12, line 4, revise to read: "... debris); to facilitate..."
18. Federal Register page 12, line 24, revise to read: "...post-accident..."
19. Federal Register page 13, line 14, revise to read: "...cooling storage water storage..."
20. Federal Register page 13, line 17, revise to read: "... building, and gratings..."
21. Federal Register page 13, lines 23 to 24, revise to read: "...structure, that is housed in the auxiliary building, that which provides..."

22. Federal Register page 13, lines 25 to 26, revise to read: “For the first 72 hours, ~~the spent fuel pool~~ **after loss of normal SFP cooling**, including response to a station blackout (SBO) event, **the spent fuel pool** relies...”
23. Federal Register page 14, lines 6 to 7, revise to read: “~~In modes with~~ **During** high heat load **conditions** in the pool, two sources of ac power are ~~specified in the availability controls~~ **required to be available.**”
24. Federal Register page 14, line 17, delete extra space after “Comments”
25. Federal Register page 14, line 22, revise to read: “...has **mechanisms** in place ~~mechanisms...~~”
26. Federal Register page 15, line 6, revise to read: “...include **a** rationale...”
27. Federal Register page 15, line 21, revise to read: “...~~lost~~ **loss** of cooling...”
28. Federal Register page 17, line 14, revise to read: “*NRC Response: The NRC disagrees with this comment.* The NRC...”
29. Federal Register page 17, line 20, revise to read: “...(~~available in~~ ADAMS **Accession No. ML11280A309** legacy library)...”
30. Federal Register page 19, lines 14 to 15, revise to read: “... cooled in ~~conditions similar to those at Fukushima~~ **an extended SBO**...”
31. Federal Register page 22, line 8, revise to read: “...Inspection**s**, Test**s**, Analysis**es**,...”
32. Federal Register page 23, line 1, delete extra comma after “Finality”
33. Federal Register page 23, line 2 to 3, delete “e” before “10 CFR”
34. Federal Register page 23, line 26, revise to read: “...and **this** is the version...”
35. Federal Register page 24, line 19, delete the comma after “DCD”
36. Federal Register page 24, lines 24 to 25, revise to read: “...to be made Tier 2* (~~those aspects that were also proprietary~~), in addition to the DCD information **separately** added...”
37. Federal Register page 27, line 6, revise to read: “...(ADAMS**S**...”
38. Federal Register page 27, line 7, revise to read: “...analysis with ~~this~~ **the equivalent static** method...”
39. Federal Register page 28, line 13, revise to read: “...Section VIII.B.6.b.(7), **s**Screen design criteria,**”...**”
40. Federal Register page 28, line 22, revise to read: “...ACRS letter, **the** staff response, and **the** Westinghouse letter, ...”

41. Federal Register page 28, line 23, add a comma after “comment period”
42. Federal Register page 29, line 20, add a comma after “published”
43. Federal Register page 31, line 1, delete comma after “calculation”
44. Federal Register page 32, line 21, add a comma after “then” and “process”
45. Federal Register page 34, line 23, change “AFSER” to “FSER”
46. Federal Register page 34, line 24, revise to read: “...~~ML103260072~~ **ML112061231**...”
47. Federal Register page 35, lines 4 to 5, revise to read: “...NRC’s FSER (**Supplement No.2**), Appendix 1B of Revision 19 (~~Supplement No.2~~) **of the generic DCD**, and...”
48. Federal Register page 35, line 8, revise to read: “...alternatives **s** (SAMDA**s**)...”
49. Federal Register page 38, line 20, add a comma after “changing”
50. Federal Register page 40, line 15, revise to read: “...VIII.B.6.b.(7), entitled **general s**Screen design criteria,”...”
51. Federal Register page 43, line 9, revise to read: “...DCD **are is** identified...”
52. Federal Register page 48, line 24, revise to read: “SECY-11-~~XXXX~~ **0145**”
53. Federal Register page 52, line 9, delete extra space and extra comma after “Order”
54. Federal Register page 53, line 35, revise to read: “...1995 **does** not...”
55. Federal Register page 54, line 5, delete comma after “DCR”
56. Federal Register page 55, line 9, change period to comma after “Section IV”
57. Federal Register page 56, add extra blank line before Section “**XII**”
58. Federal Register page 58, line 18, revise to read: “...HFE ~~is~~ **are** in...”
59. Federal Register page 61, line 11, revise to read: “...pursue ~~of~~ plant-specific...”
60. Federal Register page 61, lines 19 and 24, delete extra space in “10 CFR 20.1406(b)”
61. Federal Register page 67, line 25, revise to read: “...~~DBEs~~ **design basis events**...”
62. Federal Register page 70, line 3, revise to read: “... bottom of **the** RPV’s...”
63. Federal Register page 70, line 5, revise to read: “...four ~~RV~~ **RPV** support...”
64. Federal Register page 73, line 5, add a space after “NRC”

65. Federal Register page 75, line 19 revise to read: "...examination and ~~copied for a fee,~~ publicly available documents **copying** at..."
66. Federal Register page 76, lines 15 to 16 revise to read: "...the ~~SUNSI~~ **sensitive unclassified non-safeguards information** (including ~~PI~~ **proprietary information**) and ~~SGI~~ **safeguards information** referenced..."
67. Federal Register page 77, lines 13 to 14 revise to read: "...referenced ~~SUNSI~~ **sensitive unclassified non-safeguards information** (including ~~PI~~ **proprietary information**) and ~~SGI~~ **safeguards information** which..."
68. Federal Register page 77, line 25 revise to read: "...review ~~SUNSI~~ **sensitive unclassified non-safeguards information** (including ~~PI~~ **proprietary information**, such as..."
69. Federal Register page 78, line 1 revise to read: "...or ~~SGI~~ **safeguards information** for..."
70. Federal Register page 79, lines 8 and 9, delete the hyphen in "full-power"
71. Federal Register page 80, line 14 revise to read: "...maintain ~~SUNSI~~ **sensitive unclassified non-safeguards information** (including ~~PI~~ **proprietary information**) and ~~SGI~~ **safeguards information** referenced..."
72. Environmental Assessment (Enclosure 2), page 3, line 23, add a space after "proposed"
73. Comment Resolution Document (Enclosure 3), page 15, last paragraph, line 5, revise to read: "...~~AP1000 designs have~~ **has** many..."
74. Comment Resolution Document, page 15, last line, revise to read: "...concludes ~~that~~ at a later..."
75. Comment Resolution Document, page 17, 2nd paragraph of NRC Response, line 9, revise to read: "...issued ~~an~~ **two SRMs** on..."
76. Comment Resolution Document, page 19, 2nd paragraph of NRC Response, line 9, revise to read: "...~~meets~~ **s** current regulations..."
77. Comment Resolution Document, page 20, 1st paragraph of NRC Response, line 4, delete comma after "ice"
78. Comment Resolution Document, page 22, line 3, revise to read: "**In response to the Fukushima Daiichi accident,** ~~T~~the Commission established..."
79. Comment Resolution Document, page 22, 1st full paragraph second to last sentence, revise to read: "...reactors, ~~existing~~..."
80. Comment Resolution Document, page 25, 4th paragraph 1st sentence, revise to read: "The NRC, ~~therefore,~~ concluded..."
81. Comment Resolution Document, page 46, 3rd paragraph 1st sentence, revise to read: "For the first 72 hours **after loss of normal SFP cooling**, ..."

82. Comment Resolution Document, page 47, line 2, revise to read: "... Daiichi reactors..."
83. Comment Resolution Document, page 48, add an extra line after line 2, to separate paragraphs.
84. Comment Resolution Document, page 49, 1st sentence of NRC Response, revise to read: "For the AP1000 design ~~certification in the proposed rulemaking~~, the SFP..."
85. Comment Resolution Document, page 54, 1st NRC Response, lines 8 to 9, revise to read: "... on ~~December 28, 2010~~ August 5, 2011 (ADAMS Accession No. ML103260072 ML112061231)..."
86. Comment Resolution Document, page 58, 1st full paragraph, line 5, revise read: "...10 CFR ~~Part~~ 52.79(d)..."
87. Comment Resolution Document, page 62, 3rd NRC Response, line 3, delete the comma after, "conditions"
88. Comment Resolution Document, page 76, 2nd NRC Response, line 4, delete the comma after, "ice"