

POLICY ISSUE NOTATION VOTE

April 4, 2013

SECY-13-0033

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: ALLOWING INTERIM OPERATION UNDER TITLE 10 OF THE CODE
OF FEDERAL REGULATIONS SECTION 52.103

PURPOSE:

In response to the Staff Requirements Memorandum (SRM) dated May 11, 2012, on SECY-12-0030, "Final Rule: Requirements for Maintenance of Inspections, Tests, Analyses, and Acceptance Criteria [RIN 3150-A177]," dated February 23, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML113390369) this paper informs the Commission of issues associated with interim operation while Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) hearings are pending. This paper also provides options on a policy matter related to interim operation under Title 10 of the *Code of Federal Regulations* (10 CFR) Section 52.103(c) "Operation under a combined license" and seeks Commission approval for the staff's recommended option. This paper does not address any new commitments or resource implications. Concurrent with this paper, The Office of General Counsel (OGC) is transmitting a separate memorandum to the Commission regarding issues associated with interim operation.

SUMMARY:

Subpart C of 10 CFR Part 52 sets forth the process for issuing a combined license (COL) for a nuclear power facility. A COL authorizes both the construction of the facility and, subject to the satisfaction of conditions set forth in the COL, the operation of the facility. A COL includes ITAAC to ensure that the facility has been constructed and will be operated in accordance with

CONTACT: Earl R. Libby, NRO/DARR
301-415-0522

the COL, the Atomic Energy Act of 1954, as amended (AEA), and U.S. Nuclear Regulatory Commission (NRC) rules and regulations. A licensee cannot operate the facility until the Commission finds, in accordance with AEA § 185b. and 10 CFR 52.103(g), that the acceptance criteria in the ITAAC are met.

10 CFR 52.103 provides an opportunity for interested persons to request a hearing on the licensee's conformance with the acceptance criteria in the ITAAC. The contention admissibility standards include a requirement that the petitioner show, *prima facie*, (1) that one or more of the acceptance criteria have not been or will not be met, and (2) that the specific operational consequences of nonconformance with the acceptance criteria would be contrary to reasonable assurance of adequate protection of the public health and safety. If the NRC grants the hearing request, the Commission must then determine whether interim operation may be allowed pending the completion of that hearing. The AEA and NRC regulations provide that interim operation shall be allowed if the Commission determines that there is reasonable assurance of adequate protection of the public health and safety during an interim period of operation. The term "interim operation" is used throughout this paper to describe that time during which the plant is operating pending the completion of a hearing granted under 10 CFR 52.103(c).

This paper describes how adequate protection during interim operation is to be determined. As explained below, Congress did not intend that the Commission would rule on the merits of the petitioner's *prima facie* showing when making this adequate protection determination. Instead, interim operation was intended for situations in which the petitioner's *prima facie* showing relates to alleged safety consequences that will not arise during the interim operation allowed, or in which mitigation measures can be taken to preclude potential safety consequences during interim operation. This paper also presents options that the NRC may take in order to make the 10 CFR 52.103(g) finding that the acceptance criteria in the ITAAC are met, regardless of the pendency of a hearing. For reasons described in this paper, the staff recommends that the Commission delegate to the staff the 10 CFR 52.103(g) finding that the acceptance criteria in the ITAAC are met.

This paper also informs the Commission of four other matters related to interim operation. One, if interim operation is allowed, the staff intends to rely on the environmental evaluation of operational impacts performed in the COL Environmental Impact Statement (EIS) unless the approval of interim operation would present new and significant information that calls for a separate environmental analysis. Two, for operational programs specified as being implemented on a 10 CFR 52.103(g) finding, these programs would also be implemented in the event that the Commission allows interim operation. Three, ITAAC maintenance activities would no longer be necessary or required after a 10 CFR 52.103(g) finding is made, regardless of the pendency of a hearing. Four, if a petition to modify the terms and conditions of the COL is received pursuant to 10 CFR 52.103(f), the review of this petition needs to be coordinated with decisions having the effect of allowing operation, including interim operation.

BACKGROUND:

On July 28, 2011, the Nuclear Energy Institute (NEI), in response to the staff's request for comments on the proposed rule, "Requirements for Maintenance of Inspections, Tests, Analyses, and Acceptance Criteria" published in the *Federal Register* (FR) (76 FR 27925; May 13, 2011), recommended that the NRC revisit the proposed rule changes and supplementary information concerning 10 CFR 2.340(j), "Issuance of Finding on Acceptance

Criteria under 10 CFR 52.103.” NEI stated its belief that the staff, in developing this part of the rulemaking, may not have adequately considered the effect of 10 CFR 52.103(c), which allows a period of interim operation pending the completion of a hearing on one or more ITAAC provided there is reasonable assurance of adequate protection to the public health and safety.

Specifically, NEI requested that the NRC clarify the relationship between the interim operation provision in 10 CFR 52.103(c) and the finding in 10 CFR 52.103(g) that the acceptance criteria in the COL are met. As explained in the final rule, “Requirements for Maintenance of Inspections, Tests, Analysis, and Acceptance Criteria” (77 FR 51882; August 28, 2012), the NRC disagreed with NEI’s comment because the relationship between 10 CFR 52.103(c) and (g) was outside the scope of the rulemaking, and AEA § 189a.(1)(B)(iii) clearly provides the Commission with the authority to allow interim operation while an ITAAC hearing proceeds. In SECY-12-0030, which forwarded the draft final rule to the Commission for its consideration, the staff stated it would provide the Commission with a future paper addressing issues associated with interim operation. In the SRM for SECY-12-0030 (SRM- M120511A), dated May 11, 2012 (Accession No. ML121320208) the Commission directed the staff to proactively identify issues and bring them to the attention of the Commission, as full implementation of the ITAAC program and processes are carried out for the first time. Furthermore, the Commission stated that it looked forward to the staff’s paper addressing issues associated with an interim operation determination during a pending ITAAC hearing. This paper is the staff’s response to the SRM on SECY-12-0030.

DISCUSSION:

In accordance with AEA § 185b. and 10 CFR 52.97(b), ITAAC are included in a COL to be used to verify whether the facility has been constructed and will be operated in conformance with the license, the AEA, and NRC rules and regulations. Operation of the facility cannot begin until the Commission finds that the acceptance criteria for all ITAAC are met as required by 10 CFR 52.103(g). Once that 10 CFR 52.103(g) finding is made, the licensee may proceed to the operational phase, which includes initial fuel load. In accordance with 10 CFR 52.103(h), the ITAAC no longer constitute regulatory requirements after the finding required by 10 CFR 52.103(g) has been made.

There is an opportunity for a hearing on conformance with the acceptance criteria, and the *Federal Register* notice of intended operation announcing this hearing opportunity must be published at least 180 days before scheduled initial fuel load. Among other things, a petitioner’s hearing request must, as mandated by AEA § 189a.(1)(B)(ii), contain a *prima facie* showing (1) that one or more of the acceptance criteria have not been or will not be met, and (2) that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. If a hearing request is granted, AEA § 189a.(1)(B)(iii) provides that the Commission shall allow interim operation if it determines, after considering the petitioner’s *prima facie* showing and any answers thereto, that there will be reasonable assurance of adequate protection of the public health and safety during an interim period of operation. In accordance with 10 CFR 52.103(c), the Commission will make this determination acting as the presiding officer.

Interim Operation

Interim operation is that time during which the plant is operating pending the completion of activities associated with a hearing granted under 10 CFR 52.103(c). There are two key issues associated with interim operation: (1) how adequate protection during interim operation is to be determined and (2) who will make the finding under 10 CFR 52.103(g) in support of interim operation.

Determination of Adequate Protection During Interim Operation

Section 52.103(c) states:

If the Commission grants the [hearing] request, the Commission, acting as the presiding officer, shall determine whether during a period of interim operation there will be reasonable assurance of adequate protection to the public health and safety. The Commission's determination must consider the petitioner's *prima facie* showing and any answers thereto. If the Commission determines there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

A key question associated with interim operation is how the Commission could make the adequate protection determination allowing interim operation even though the petitioner has made a *prima facie* showing that operation is contrary to reasonable assurance of adequate protection of the public health and safety. The legislative history of the interim operation provision sheds light on Congressional intent. The interim operation language in the enacted statute is the result of an amendment made in the Senate to a previous version of the interim operation provision. In introducing this amendment and in explaining the amendment just before its adoption, Senator Johnston stated that the situation envisioned for interim operation is "where there is no question about the safe operation of the plant, but there might be, for example, a long term implication for safety" (138 Cong. Rec. S1143 (Feb. 6, 1992)). Senator Johnston gave the following explanation:

The authority to allow interim operation is limited. It could be used where, although a petitioner has raised a question about the long-term safety of the plant and the NRC has decided a hearing on the issue is warranted, the NRC is able to determine that the plant is safe to operate during an interim period. This could occur, for example, where the safety problem will not occur for several years or where mitigating measures can be taken to avoid the problem during a period of interim operation.

(138 Cong. Rec. S1173 (Feb. 6, 1992)). Therefore, Congress did not intend that the Commission would rule on the merits of the petitioner's *prima facie* showing. Instead, interim operation was intended for situations in which the petitioner's *prima facie* showing relates to alleged safety consequences that will not arise during the interim operation allowed, or in which mitigation measures can be taken to preclude potential safety consequences during interim operation. These mitigation measures could be addressed in the answers to the hearing request, since both the petitioner's *prima facie* showing and the answers filed in response to the petition must be considered in making the interim operation determination. The Commission's decision allowing interim operation could be appropriately limited or conditioned to ensure that

there will be reasonable assurance of adequate protection of the public health and safety during interim operation notwithstanding the petitioner's *prima facie* showing.

In its answer to the hearing request, the staff would address whether the petitioner's *prima facie* showing has been made, as well as whether the other standing and contention admissibility requirements of 10 CFR 2.309, "Hearing Requests, Petitions to Intervene, Requirements for Standing, and Contentions," have been satisfied. Participating as a party would allow the staff to actively contribute to the development of the hearing record on contested issues, but this would preclude the staff from advising the Commission on contested issues, including the 10 CFR 52.103(c) adequate protection determination on interim operation. Therefore, the Commission may want to designate specific staff as Commission adjudicatory employees to provide technical support to the Commission on contested issues, especially the determination on whether there will be reasonable assurance of adequate protection of the public health and safety during interim operation.

Relationship Between the 10 CFR 52.103(g) Finding and the 10 CFR 52.103(c) Interim Operation Determination

The second key issue associated with interim operation concerns the requirement that operation not begin until the Commission finds under 10 CFR 52.103(g) that the acceptance criteria in the ITAAC are met. Because interim operation involves operation during the pendency of an ITAAC hearing, making the 52.103(g) finding in support of a decision allowing interim operation involves making a pre-hearing finding that the acceptance criteria that are the subject of the contested hearing are met. The staff considered various scenarios to address how a 10 CFR 52.103(g) finding could be made, both within and outside of the hearing context, but only two options merited further evaluation.

The Staff evaluated two options for making the 52.103(g) finding in support of a decision allowing interim operation:

1. The first option is that the Commission makes the 10 CFR 52.103(g) finding on all acceptance criteria. In the context of a 10 CFR 52.103(g) finding in support of interim operation, this option would require the Commission to find that the contested acceptance criteria are met prior to the completion of the hearing.
2. The second option is that the Commission delegates the 10 CFR 52.103(g) finding on all acceptance criteria to the staff, whether there is a hearing pending or not. This option allows the finding to be made by the staff based on the staff's inspection activities and its review of ITAAC notifications received from the licensee. The staff's determination that all ITAAC acceptance criteria are met will be communicated to the Commission with a paper to that effect before the staff would issue a 10 CFR 52.103(g) finding.

In both options, the Commission would determine under 10 CFR 52.103(c) whether there is reasonable assurance of adequate protection of the public health and safety during a period of interim operation.

The staff recommends that the Commission approve the second option delegating the 10 CFR 52.103(g) finding to the staff. Given the Commission's role as the ultimate arbiter of contested issues in NRC adjudications, practical difficulties would arise if the Commission itself were to

make the 10 CFR 52.103(g) finding prior to the completion of the hearing, as discussed in the OGC memorandum transmitted concurrently with this paper. Delegation of the 10 CFR 52.103(g) finding to the staff would avoid these practical difficulties. The possibility that the Commission might delegate the 10 CFR 52.103(g) finding to the staff is at present recognized in the regulations at 10 CFR 2.340(j), "Issuance of finding on acceptance criteria under 10 CFR 52.103," which states that "The Commission, the Director of the Office of New Reactors, or the Director of the Office of Nuclear Reactor Regulation, as appropriate, shall make the finding under 10 CFR 52.103(g) that acceptance criteria in a combined license are met...." The basis for the staff making the 10 CFR 52.103(g) acceptance criteria finding is that the 10 CFR 52.103(g) finding is the culmination of the staff's construction inspection program and ITAAC notification reviews. There are several current examples from Commission practice which support the delegation of the 10 CFR 52.103(g) acceptance criteria finding to the Office of New Reactors (NRO). One example is the COL, which governs both construction and operation and is issued by the NRO Office Director. Furthermore, the 52.103(g) finding is comparable to 10 CFR Part 50 "Domestic Licensing of Production and Utilization Facilities," operating licenses which authorize operation and are issued by the Director of the Office of Nuclear Reactor Regulation (NRR). A recent additional supporting example is the action taken by NRR pertaining to the restart of North Anna Power Station Units 1 and 2 (Accession No. ML11308B405) following the August 2011 earthquake, in which the NRR Office Director concluded that the licensee had demonstrated that there was no functional damage to those features necessary for continued operation of the North Anna units, a conclusion required by 10 CFR Part 100, Appendix A before the resumption of operation.

In implementing this option, the staff intends to inform the Commission of the staff's determination that all acceptance criteria are met prior to the staff making the finding under 10 CFR 52.103(g). The staff's 52.103(g) finding would be based on the ITAAC-related inspection activities performed during construction and the staff's independent ITAAC closure verification activities, which would be summarized in a basis document to be enclosed with a paper to the Commission. The basis document would describe the ITAAC construction inspection and closure verification processes and will reference information pertaining to the verification of completion of all ITAAC for a specific COL. In addition to the staff's inspection activities, the staff relies on the licensee's submittals in accordance with:

- (1) 10 CFR 52.99(c)(1), which requires the licensee to submit for every ITAAC a notification containing sufficient information to demonstrate that the ITAAC was successfully completed;
- (2) 10 CFR 52.99(c)(2), which requires the licensee to report new information materially altering the basis for determining either that the inspections, tests, and analyses were performed as required or that the acceptance criteria are met; and
- (3) 10 CFR 52.99(c)(4), which requires the licensee to notify the NRC that all ITAAC are complete.

Whether or not the Commission delegates the 10 CFR 52.103(g) finding to the staff or decides that the Commission, itself, should make the 10 CFR 52.103(g) finding based on a recommendation from the staff, the staff will work to ensure that the NRC is able to make a timely 10 CFR 52.103(g) finding allowing operation.

In addition to the key issues described above, this paper also informs the Commission of four other matters related to interim operation: (1) environmental reviews of decisions allowing interim operation, (2) operational program implementation during interim operation, (3) ITAAC maintenance requirements during interim operation, and (4) receipt of a petition under 10 CFR 52.103(f) to modify the terms and conditions of the combined license. These matters are described more fully below.

Environmental Review of Decisions Allowing Interim Operation

In 2007 the Commission determined through rulemaking that the 10 CFR 52.103(g) finding can be categorically excluded from NEPA review and added 10 CFR 51.22(c)(23) to reflect this determination. The Commission stated that it never intended to make an environmental finding with respect to the 10 CFR 52.103(g) finding and that NEPA does not require such an environmental finding. The Commission justified categorically excluding the 10 CFR 52.103(g) finding on the basis that (1) the major Federal action with respect to facility operation is the issuance of the COL, because the COL authorizes both construction and operation subject to successful completion of the ITAAC; (2) the environmental effects of construction and operation are evaluated in the COL EIS; and (3) the 10 CFR 52.103(g) finding involves only a finding on whether the predetermined acceptance criteria are met ("Licenses, Certifications, and Approvals for Nuclear Power Plants" (72 FR 49428; Aug. 28, 2007)). However, NRC regulations do not explicitly address how the requirements of NEPA apply to decisions allowing interim operation.

There are actions taken by the NRC for which no separate environmental review is required, but for which a categorical exclusion has not been established. For example, the Commission explained in the Shoreham Nuclear Power Station proceeding (CLI-84-9) that in the usual case no separate environmental analysis is needed to issue a low-power operating license, because the low-power license is simply an intermediate step to the full-power license, and the environmental evaluation for low-power operation is inherently included within the EIS for full-power operation. The Commission further explained that it is well-established NEPA law that separate environmental statements are not required for such intermediate, implementing steps where an EIS has been prepared for the entire proposed action. In the underlying precedent cited by the Commission in CLI-84-9, no new or supplemental EIS was considered necessary because the later implementing action did not involve any significant environmental impacts that were not identified and described in the previous EIS.

Consistent with the Commission's reasoning in *Shoreham* and the precedent cited therein, a decision allowing interim operation is an intermediate step implementing the COL's authorization of construction and operation, and thus the Commission does not need to perform a separate environmental review of a decision allowing interim operation where the environmental impacts of interim operation do not significantly differ from the impacts described in the COL EIS. This is also consistent with the Commission's basis for categorically excluding the 10 CFR 52.103(g) finding, because the COL is the major Federal action authorizing construction and operation, and the COL EIS describes the environmental impacts of both construction and operation.

Based on the considerations discussed above, the staff intends to rely on the COL EIS environmental evaluation unless the approval of interim operation would present new and significant information that calls for a supplemental environmental evaluation. The NRC could make this determination on a case-by-case basis. Based on the nature of interim operation, the

staff believes that it would be unusual for the approval of interim operation to result in impacts that differ significantly from the impacts described in the COL EIS. Instead, the environmental impacts from interim operation will likely be bounded by the COL EIS environmental evaluation.

Operational Program Implementation During Interim Operation

In their final safety analysis reports (FSARs), licensees describe the operational programs that must be implemented before or during operation. The regulatory approach to operational programs and their implementation was previously established in SECY-05-0197, "Review of Operational Programs in a Combined License Application and Generic Emergency Planning Inspections, Tests, Analyses, and Acceptance Criteria," dated October 28, 2005, and approved by the Commission in SRM-SECY-05-0197, dated February 22, 2006. Operational programs considered in SECY-05-0197 include such programs as the fire protection, radiation protection, reactor operator training, fitness for duty, security, initial test, and maintenance rule programs. Operational program implementation is either specified by regulation or included as a condition in the license. In addition, plant operation is governed by operational requirements such as technical specifications. For operational programs and requirements specified as being implemented on a 10 CFR 52.103(g) finding, these programs and requirements would also be implemented in the event that the Commission allows interim operation in accordance with 10 CFR 52.103(c), given that the 10 CFR 52.103(g) finding would be made in support of interim operation. A Commission decision allowing interim operation should make it clear that these programs must be implemented. Operational programs and requirements establish specific operability and surveillance requirements for structures, systems, and components that would remain in effect for the licensed period of operation.

ITAAC Maintenance During Interim Operation

With respect to ITAAC maintenance, 10 CFR 52.99(c)(2) provides that ITAAC post-closure notifications are only required until the 10 CFR 52.103(g) finding is made. In addition, 10 CFR 52.103(h) provides that ITAAC no longer constitute regulatory requirements after the 10 CFR 52.103(g) finding. Therefore, ITAAC maintenance activities and associated ITAAC post-closure notifications would no longer be necessary or required after a 10 CFR 52.103(g) finding, including during interim operation.

Receipt of a Petition Under 10 CFR 52.103(f) to Modify the Terms and Conditions of a License

In addition to hearing requests on conformance with the ITAAC acceptance criteria, members of the public also may submit a petition to modify the terms and conditions of the COL in accordance with 10 CFR 52.103(f). Such a petition might be submitted, for example, if a member of the public wants to raise an issue outside the scope of the ITAAC or to dispute the adequacy of the ITAAC, itself. Such petitions shall be filed with the Secretary of the Commission and processed in accordance with 10 CFR 2.206, "Requests for Action under this Subpart." Furthermore, 10 CFR 52.103(f) provides that before the licensed activity purportedly affected by the petition begins, the Commission will determine whether any immediate action is required. For this reason, the NRC's review of petitions under 10 CFR 52.103(f) needs to be coordinated with decisions having the effect of allowing operation; this would include interim operation. Section 52.103(f) also provides that if the petition is granted, an appropriate order will be issued, but the granting of a petition will not affect fuel loading and operation unless the order is made immediately effective.

RECOMMENDATION:

The staff recommends that the Commission delegate to the staff the making of the 10 CFR 52.103(g) acceptance criteria finding for all ITAAC, whether there is a hearing pending or not.

COORDINATION:

OGC has reviewed this paper and has no legal objection. Concurrent with this paper, OGC is transmitting a separate memorandum to the Commission regarding issues associated with interim operation.

/RA/

R. W. Borchardt
Executive Director
for Operations

RECOMMENDATION:

The staff recommends that the Commission delegate to the staff the making of the 10 CFR 52.103(g) acceptance criteria finding for all ITAAC, whether there is a hearing pending or not.

COORDINATION:

OGC has reviewed this paper and has no legal objection. Concurrent with this paper, OGC is transmitting a separate memorandum to the Commission regarding issues associated with interim operation.

/RA/

R. W. Borchardt
Executive Director
for Operations

ADAMS Accession No.: ML12289A928

SECY-012

OFFICE	NRO/DARR/APOB	NRO/DARR/APOB	NRO/DARR/APOB	NRO/DCIP/CITB	NRO/DCIP
NAME	ELibby	BAbeywickrama	ACubbage	MKowal	LDudes (via e-mail)
DATE	03/07/2013	03/07/13	03/07/13	03/07/13	03/07/13
OFFICE	NRO/DSEA	NRO/DARR	NRO/DNRL	RII/DRA	QTE
NAME	SFlanders (via e-mail)	MMayfield (SCoffin for via e-mail)	DMatthews (via e-mail)	FBrown (JYerokum for via e-mail)	CHsu (via email)
DATE	03/07/13	03/07/13	03/07/13	03/07/13	03/13/13
OFFICE	OGC	NRO	EDO		
NAME	MSpencer (via email)	GTracy	RBorchardt		
DATE	03/26/13 (NLO)	03/27/13	04/04/13		

OFFICIAL RECORD COPY