

January 31, 2013

MEMORANDUM TO: Michele G. Evans, Director
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

FROM: Meena K. Khanna, Chief */RA by REnnis for/*
Plant Licensing Branch I-2
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

SUBJECT: CLOSURE OF WORK ITEM TRACKING SYSTEM ITEM
11-00245 ASSOCIATED WITH THE OFFICE OF THE
INSPECTOR GENERAL'S REGULATORY COMMITMENT
MANAGEMENT AUDIT REPORT OIG-11-A-17
(TAC NO. ME7526)

This memorandum provides the assessment performed by the Division of Operating Reactor Licensing (DORL) staff of the corrective action associated with Recommendation No. 5 regarding the Office of the Inspector General's (OIG) Audit Report dated September 19, 2011,¹ "Audit of NRC's [Nuclear Regulatory Commission's] Management of Licensee Commitments (OIG-11-A-17)." Completed corrective actions included the issuance of a memorandum to DORL project managers (PMs) on March 29, 2012,² providing revised guidance regarding the conduct of triennial licensee regulatory commitment management audits. The memorandum included additional actions that PMs are to take, associated with the triennial audits, in order to identify misapplied regulatory commitments. The guidance contained in the memorandum was subsequently included in Revision 4 of the Office of Nuclear Reactor Regulation (NRR) Office Instruction LIC-105, "Managing Regulatory Commitments Made by Licensees to NRC."³

The issuance of the assessment, as enclosed in this memorandum completes the NRR corrective action associated with Recommendation No. 5 of the OIG audit report, as described in the status update memorandum issued from NRR to OIG dated November 1, 2012.⁴ In accordance with the corrective action, data was gathered and assessed from the triennial commitment management audits issued in the 9-month period, following the issuance of the March 29, 2012, DORL guidance memorandum. The information was evaluated to determine the extent to which misapplied commitments may exist, and to make recommendations for future actions based on the conclusions of the assessment.

Enclosure:
As stated

¹ Agencywide Documents Access and Management System (ADAMS) Accession No. ML112620529.

² ADAMS Accession No. ML120720345.

³ ADAMS Accession No. ML12251A203.

⁴ ADAMS Accession No. ML12291A795.

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ASSESSMENT OF THE CORRECTIVE ACTION ASSOCIATED WITH
RECOMMENDATION NO. 5 REGARDING THE OFFICE OF THE
INSPECTOR GENERAL'S REGULATORY COMMITMENT
MANAGEMENT AUDIT REPORT OIG-11-A-17

BACKGROUND

The Office of the Inspector General (OIG) issued audit report, "Audit of NRC's [Nuclear Regulatory Commission's] Management of Licensee Commitments (OIG-11-A-17)," on September 19, 2011.¹ The audit identified the following recommendations:

1. Revise the section of LIC-105,² "Managing Regulatory Commitments Made by Licensees to the NRC," on conducting triennial commitment management audits to include detailed sampling direction, such as a checklist of sources to be used in identifying a universe of commitments from which to sample.
2. Revise LIC-105, "Managing Regulatory Commitments Made by Licensees to the NRC," to include well-defined expectations and guidelines regarding the conduct of commitment management audits. The guidelines should include an expectation that audited commitments are reviewed to ensure that they have been appropriately implemented in the plant facility, procedures, program, or other plant documentation.
3. Develop training that sufficiently addresses the definition and use of commitments and provide it to all agency staff involved in reviewing reactor licensee commitments.
4. Identify actions to determine the extent to which commitments that are considered safety significant and/or necessary for approval of proposed licensing actions exist. This could be accomplished by either: (1) The Office of Nuclear Reactor Regulation (NRR) project managers (PMs) identifying any such commitments as part of the triennial commitment management audits, or (2) conducting a review of all existing commitments and identifying any inappropriately applied commitments. Any such commitments should be identified to NRC management for appropriate action.
5. Depending on the outcome of the efforts to meet Recommendation 4, develop and utilize a tool for systematically tracking the status of commitments that are deemed safety significant and/or necessary for approval of proposed licensing actions.

The status update memorandum issued from NRR to OIG dated November 1, 2012,³ described NRR corrective actions that had been completed, or were in process, to address the OIG audit report recommendations. A summary of the status update is provided below.

¹ Agencywide Documents Access and Management System (ADAMS) Accession No. ML112620529.

² ADAMS Accession No. ML12251A203.

³ ADAMS Accession No. ML12291A795.

Per the corrective actions associated with Recommendations 1 and 2 above, interim guidance memorandums were issued to Division of Operating Reactor Licensing (DORL) PMs on November 29, 2011,⁴ December 15, 2011,⁵ and March 29, 2012.⁶ The interim guidance addressed the identification of misapplied⁷ commitments, regulatory commitment audit sample selection and verification of commitment implementation. The guidance that was included in these interim memorandums was subsequently incorporated into Revision 4 of office instruction LIC-105, which was approved on September 10, 2012.

Training has been provided to various NRC staff and management, as described in the status update memorandum issued from NRR to OIG dated November 1, 2012,⁸ to implement NRR corrective actions associated with Recommendation No. 3, above. In addition, Section 4.1 of Revision 4 of LIC-105, approved on September 10, 2012, includes instructions on the definition and appropriate use of regulatory commitments. LIC-105 was distributed to all NRR staff through a Program Management, Policy Development and Analysis Information Notice on September 14, 2012.

NRR staff is also collaborating with the Office of the Chief Human Capital Officer, Human Resources Training and Development, Regulatory Fundamentals Training Branch, to develop a formal, agencywide training module regarding the application and use of regulatory commitments. The training module is scheduled to be completed by September 30, 2013, and will implement the final corrective action associated with Recommendation No. 3 of the OIG audit report.

Revision 4 of office instruction LIC-105 also addressed NRR corrective actions associated Recommendation No. 4 above, including the following:

Revise LIC-105 to direct PMs to include the expectation that inappropriately applied commitments, which have been misused for issues that are safety significant or may have formed the basis of the NRC staff's reasonable assurance finding on a licensing action, will be identified as part of the triennial commitment management audits.

Section 4.3 of LIC-105, describes and defines misapplied commitments and provides specific guidance to DORL PMs with regard to identifying and addressing misapplied commitments. The newly added Enclosure 2 of LIC-105 regarding sample selection also provides guidance to focus the commitment audit on the identification of misapplied commitments.

Specifically, in addition to the 10 or more commitments selected for the audit sample, Section 4.3 requires DORL PMs to identify all license amendment safety evaluations (SEs), exemptions and relief request SEs issued for a facility during the previous 3 years. Project Managers are

⁴ ADAMS Accession No. ML113190085.

⁵ ADAMS Accession No. ML113400148.

⁶ ADAMS Accession No. ML120720345.

⁷ A misapplied commitment is one that has been used to ensure safety or used as the basis for a regulatory decision, including approval of a proposed licensing action.

⁸ Ibid No. 3.

directed to review all commitments in these documents and identify and evaluate each commitment to determine if it has been misapplied, per the criteria in Section 4.2 of LIC-105.

Enclosure 2 also directs DORL PMs to review the licensee's full list of all open regulatory commitments, noting commitment descriptions that appear to be associated with license amendment requests, exemptions and relief requests, as these documents involve regulatory decisions made by the NRC staff. PMs will consider the item descriptions on this list that may indicate safety significance or a regulatory requirement for inclusion in the audit sample. This effort will apply a first-level screening for potentially misapplied commitments to the full scope of all open commitments that the licensee tracks.

ASSESSMENT

The assessment provided in this enclosure implements the NRR corrective action associated with Recommendation No. 5, above:

Issue an action review memorandum to the DORL Division Director that compiles the results of the actions from Recommendation 4 for a period of 9 months after the commitment identification memorandum is issued. Include an assessment of the data and recommendations for further actions as needed.

In accordance with this corrective action, data was gathered and assessed from the triennial commitment management audits issued in the 9-month period, following the issuance of the March 30, 2012, DORL guidance memorandum. The information was evaluated to determine the extent to which misapplied commitments may exist, and to make recommendations for future actions based on the conclusions of the assessment, as discussed below.

A total of 14 DORL triennial regulatory commitment audit reports, prepared by DORL PMs between April 1, 2012, and December 31, 2012, were evaluated as part of this assessment. The audit reports reviewed are listed in the table below.

DORL Audit Reports Reviewed

Item No.	Facility	Issue Date	ADAMS Accession No.
1	Beaver Valley U1 and U2	04/30/2012	ML121140300
2	Byron U1 and U2	09/13/2012	ML12236A294
3	Donald C. Cook U1 and U2	06/29/2012	ML12178A028
4	Duane Arnold	07/20/2012	ML12178A456
5	Edwin I. Hatch U1 and U2	07/05/2012	ML12153A167
6	Grand Gulf U1	08/22/2012	ML12228A516

Item No.	Facility	Issue Date	ADAMS Accession No.
7	Monticello U1	09/07/2012	ML12198A507
8	Nine Mile Point U1 and U2	08/31/2012	ML12235A254
9	San Onofre U2 and U3	05/31/2012	ML121030472
10	Shearon Harris U1	11/13/2012	ML12277A129
11	Fermi U2	12/05/2012	ML12324A273
12	H.B. Robinson U2	12/12/2012	ML12342A016
13	Oyster Creek	12/26/2012	ML12256A424
14	Three Mile Island-U1	12/28/2012	ML12348A353

The regulatory commitment audits listed above did not identify any misapplied commitments. However, one audit currently in process is evaluating regulatory commitments that appear to have been misapplied. Based on a preliminary review, all the commitments that were relied on in the NRC staff's safety evaluation have been implemented by the licensee (i.e., promised actions have been taken). As such, there does not appear to be any impact due to the misapplied commitments and no further action is expected. Although the issuance of this audit will fall outside of the corrective action review period, the result of the associated regulatory commitment review will be included in a future status update to the OIG. While these results do not confirm that there are no misapplied commitments that are presently active, it is an indication that our process has the capability to identify misapplied commitments, and that the presence of misapplied commitments is not pervasive.

Additional documents were reviewed, as described below, to complete DORL's assessment of the extent to which misapplied commitments may exist. Specifically, the treatment of regulatory commitments associated with several recently-issued relief requests was evaluated.

The NRC granted a relief request on April 4, 2012,⁹ for Joseph M. Farley Nuclear Plant, Unit 1 (Farley), approving alternative depth sizing criteria contained in the American Society of Mechanical Engineers *Boiler and Pressure Vessel Code* (ASME Code), Code Case N-695, "Qualification Requirements for Dissimilar Metal Piping Welds." During the course of the review, the NRC staff sent a Request for Additional Information (RAI) to the licensee regarding the submittal. The RAI requested that the licensee provide a regulatory commitment to perform a flaw evaluation, and submit it to the NRC, if specific cracks were identified during scheduled examinations.

⁹ ADAMS Accession No. ML12094A281.

The RAI included specific elements to be included in the flaw evaluation and stated that the provision of such a commitment to perform these evaluations, if required in the future, would be a potentially acceptable approach to address the issue of crack sizing. The licensee provided the requested regulatory commitment to perform the flaw evaluation, if required. The SE stated that granting of the relief was “subject to” the licensee providing the flaw evaluation, if required, as requested in the RAI and subsequently agreed to by the licensee in the regulatory commitment. A similar relief was granted for the Braidwood Station, Units 1 and 2 (Braidwood), on April 19, 2012,¹⁰ utilizing the same RAI request and disposition in the associated SE.

The concern with the issuance of this relief is that the process of the NRC requesting, and the licensee providing, a regulatory commitment to complete a future action, as a basis for granting the relief, may be misconstrued as reliance on the commitment for the NRC staff’s approval. However, discussions with the responsible DORL PM and BC and Office of General Counsel staff affirmed that the inclusion in the SE of the phrase “subject to” with regard to the action, and not the regulatory commitment, legally obligated the licensee to perform the action as a condition of the relief. However, the NRC staff interviewed also agreed that characterizing the future action of performing the flaw evaluation, if required, in terms of a regulatory commitment, could cause confusion regarding the fact that the action was elevated to an obligation.

On July 18, 2012,¹¹ the NRC staff issued the same relief request approving alternative depth sizing criteria for the Beaver Valley Nuclear Station, Unit 2 (Beaver Valley). Similar to the Farley and Braidwood relief requests, the licensee included a regulatory commitment to complete flaw evaluations, if required. However, based on the NRC staff discussions described above, the DORL PM for Beaver Valley included specific and deliberate language in the SE to articulate that the action associated with the licensee’s proposed regulatory commitment was elevated to a legal obligation. The SE included the following:

In its letter dated June 1, 2012, the licensee modified the relief request to include a flaw evaluation submittal, if required, for NRC review and approval, prior to the expiration of the relief. In addition to including this as part of the relief request, the licensee categorized the flaw evaluation submittal as a “regulatory commitment.” The NRC staff considers the flaw evaluation submittal, and the associated NRC review and approval of the flaw evaluation submittal prior to startup, to be integral to the granting of this relief request. Thus, the licensee’s flaw evaluation submittal, should it be required under this relief request, is an obligation that is not changeable under the licensee’s commitment management program.

In addition, the Beaver Valley example above was provided to, and discussed with, the NRC technical staff involved in evaluating and preparing the SE input for the subject relief requests, as well as the DORL PMs.

¹⁰ ADAMS Accession No. ML12108A123.

¹¹ ADAMS Accession No. ML12188A110.

CONCLUSIONS AND RECOMMENDATIONS

Determination of the Extent to Which Misapplied Commitments Exist

The assessment of DORL commitment audits performed between April 1, 2012, and December 31, 2012, and the review of additional relief requests, did not identify any misapplied commitments. However, based on the results of the OIG commitment audit report issued in September of 2011, DORL does not conclude that misapplied commitments have never been issued by NRC staff. Rather, these results indicate that the existence of misapplied regulatory commitments, especially active commitments, is not pervasive. This result can be explained by the following observations:

1. NRC staff SEs often do not discuss regulatory commitments that are proposed in the licensee's submittal. Therefore, no documented, legal reliance on the commitment exists.
2. Regulatory commitments that are relied on for approval of a proposed action are often relatively short-term, time-limited actions. The relief requests addressed above illustrate this observation. Therefore, these actions have typically been completed and the associated regulatory commitment has been closed and is no longer an active commitment.
3. Finally, while the OIG audit report identified that approximately 20 to 30 percent of NRC staff interviewed exhibited a lack of understanding regarding the proper use of regulatory commitments, the vast majority responded with an accurate understanding of regulatory commitments. Therefore, it is reasonable to expect that, in most instances, cognizant NRC staff will ensure that regulatory commitments are used appropriately in the course of the review and approval of a licensee request.

For the reasons discussed above, the DORL staff has concluded that misapplied regulatory commitments do not exist to a great extent, and have occurred on a limited basis. In addition, in going forward, the training and knowledge sharing sessions that have been conducted, as well as the web-based continuing training course under development, place particular emphasis on clearly articulating, in NRC staff SEs, that a regulatory commitment has been elevated to an obligation.

Recommendations

The DORL regulatory commitment audit report for Grand Gulf (Item No. 6 in the table above) provided information that illustrates the vast number of regulatory commitments that each licensee initiates and tracks. Section 2.2 of the report notes the following:

Since the system was created, the licensee has entered more than 36,000 licensee-defined commitments. At the time of the audit, the licensee was tracking approximately 5,300 items in the LRS [Licensing Research System] as regulatory commitments of which 77 were designated as "OPEN" actions items. There also approximately 900 items that are being tracked as "continuing compliance."

This demonstrates the impracticality of NRC staff constructing a database that compiles and evaluates the thousands of regulatory commitments made by all licensees for misapplied commitments. Moreover, the DORL staff believes that this approach is not effective for identifying misapplied commitments in a timely manner, while the 3-year retrospective review in the revised audit process accomplishes this in a much more effective and efficient manner. Based on this assessment, the DORL staff does not recommend the development of a regulatory commitment tracking database.

The changes that were made to Revision 4 of LIC-105 provide guidance to the DORL PMs, that the scope of the documents to be reviewed during the audit be expanded to include the NRC safety evaluations issued since the previous audit, and screening the licensee's list of open commitments, to specifically determine if any regulatory commitments were misapplied. This periodic exercise provides the appropriate tools for DORL PMs to appropriately characterize the elevation of regulatory commitments to obligations in NRC SEs and identify historical regulatory commitments that have been misapplied.

NEI 99-04¹² guidance, developed by industry for managing regulatory commitments, directs that NRC staff are to be notified of changes to regulatory commitments involving safety significance or NRC reliance. The NRC staff has observed that this guidance has largely been adopted by licensees and proceduralized in the commitment management programs. From a qualitative, risk-informed perspective, these change guidelines provide a defense-in-depth mechanism to alert NRC staff to historical regulatory commitments that may have been misapplied and are subsequently modified by licensees.

In summary, at this time, the DORL staff recommends that in lieu of a tracking database to identify misapplied commitments, more effective tools exist through the revisions to LIC-105, made initially to determine the extent to which misapplied commitments exist, and now are permanently in place to provide both a retrospective review of likely candidates for misapplied commitments, and ensuring that current and future approvals do not contain misapplied commitments. Further, the staff believes that the criteria provided for licensees in NEI 99-04, provide an additional, effective tool to identify historically misapplied regulatory commitments.

The results of this assessment, and the proposed recommendations detailed above, will be included in a future OIG status update memorandum, which is due by March 4, 2013. DORL staff will request a meeting with the cognizant OIG staff prior to issuing the status update memo, to ensure that any remaining OIG concerns are addressed.

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¹² NEI 99-04, "Guidelines for Managing NRC Commitment Changes," July 1999 (ADAMS Accession No. ML003680088).