

## NON-CONCURRENCE PROCESS COVER PAGE

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.

Employees are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, employees 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://nrcweb.nrc.gov:8600/policy/directives/catalog/md10.158.pdf>.

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

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 a non-concurring NRC employee.

Section B of the form includes the personal opinions and views of the non-concurring 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.

At the end of the process, the non-concurring employee(s):

- Concurred
- Continued to non-concur
- Agreed with some of the changes to the subject document, but continued to non-concur
- Requested that the process be discontinued
  
- The non-concurring employee(s) requested that the record be non-public.
- The non-concurring employee(s) requested that the record be public.
  
- This record is non-public and for official use only.
- This record has been reviewed and approved for public dissemination.



**NON-CONCURRENCE PROCESS**

NCP-2015-006

**SECTION A - TO BE COMPLETED BY NON-CONCURRING EMPLOYEE**

TITLE OF SUBJECT DOCUMENT

Report for the Audit Regarding Implementation of Mitigating Strategies and Reliable Spent Fuel Pool Instr.

ADAMS ACCESSION NO.

ML I 5098A056

DOCUMENT SIGNER

Peter Bamford

SIGNER TELEPHONE NO.

(301) 415-2833

TITLE

Senior Project Manager

ORGANIZATION

NRR/JLD/JOMB

NAME OF NON-CONCURRING EMPLOYEE(S)

Eva Brown

TELEPHONE NUMBER

(301) 415-2315

TITLE

Senior Project Manager

ORGANIZATION

NRR/DORL/LPLII-2

DOCUMENT AUTHOR

DOCUMENT CONTRIBUTOR

DOCUMENT REVIEWER

ON CONCURRENCE

NON-CONCURRING EMPLOYEE'S SUPERVISOR

Travis Tate

TITLE

Branch Chief

ORGANIZATION

NRR/DORL/LPLII-2

I WOULD LIKE MY NON-CONCURRENCE CONSIDERED AND WOULD LIKE A WRITTEN EVALUATION IN SECTION B AND C.

I WOULD LIKE MY NON-CONCURRENCE CONSIDERED, BUT A WRITTEN EVALUATION IN SECTIONS B AND C IS NOT NECESSARY.

WHEN THE PROCESS IS COMPLETE, I WOULD LIKE THE NCP FORM:

PUBLIC

NON-PUBLIC

REASONS FOR NON-CONCURRENCE AND PROPOSED ALTERNATIVES (use continuation pages or attach Word document)

This non-concurrence is related to the process used to come to an interim staff decision and should not be construed to reflect any deficiency with the ongoing efforts by FirstEnergy Nuclear Operating Company to provide enhancements to the Perry Nuclear Power Plant's ability to respond to beyond basis events arising out of the NRC's Fukushima-related efforts. This non-concurrence is related to the NRC's Organizational value of openness in our communications related to the ongoing Fukushima Mitigating Strategies audit reports, which are being used to status the industry's compliance with Order EA-12-049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" (Agencywide Documents Access and Management System (ADAMS) Package Accession No. ML I 2054A 736)."

My concern centers on the potential misinterpretation of the completeness of licensee actions by the public, those inspectors performing the actual compliance inspections, and those with oversight responsibilities, due to the characterization of items being "closed," and some of those decisions being made using draft information, which was not maintained by the audit team consistent with NRR Office Instruction LIC-111, "Regulatory Audits." In a letter dated August 28, 2013 (ADAMS Accession No. ML 13234A503 ), Jack Davis, Director of Japan Lessons-Learned Division indicated that the NRC intended to perform audits to "promote the ability of the NRC staff to focus and streamline obtaining the information needed to conduct the EA-12-049 reviews and is intended to complement the ePortal system previously set up by licensees in this area .... Audits of licensee's responses will be performed in accordance with ... Office Instruction LIC-111, "Regulatory Audits." Section 4.6 of LIC-111, states that "[i]n general, draft information should not be invited or physically accepted by audit members. If draft information needs to be reviewed as part of the audit, it should be preserved as an OAR when it is needed to provide a complete record of the decision making process ... That is, if the draft licensee information was received by the agency in connection with the transaction of agency business, the draft (cont.)

SIGNATURE

*Eva D. Brown*

DATE

5/14/15

NRC FORM 757  
NRC MD 10.158  
(02-2015)

U. S. NUCLEAR REGULATORY COMMISSION

NCP TRACKING NUMBER

NON-CONCURRENCE PROCESS

NCP-2015-006

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

TITLE OF SUBJECT DOCUMENT

Report for the Audit Regarding Implementation of HS & Reliable SFP

ADAMS ACCESSION NO.

ML15098A056

NAME

Travis Tate

TITLE

Branch Chief

TELEPHONE NUMBER

(301) 415-3901

ORGANIZATION

NRR/DORL

COMMENTS FOR THE NCP REVIEWER TO CONSIDER (use continuation pages or attach Word document)

No comments.

SIGNATURE

*Travis L. Tate*

DATE

5/18/15

**NON-CONCURRENCE PROCESS**

NCP-2015-006

**SECTION C - TO BE COMPLETED BY NCP COORDINATOR**

TITLE OF SUBJECT DOCUMENT  
Report for the Audit Regarding implementation of Mitigating Strategies and Reliable Spent Fuel Pool Instr.

ADAMS ACCESSION NO.  
ML15098A056

NAME  
John McHale

TITLE  
Associate Director, Technical Support Directorate

TELEPHONE NUMBER  
(301) 415-3254

ORGANIZATION  
NRR/JLD/TSD

AGREED UPON SUMMARY OF ISSUES (use continuation pages or attach Word document)  
The focus of the non-concurrence centers on whether the agency is properly documenting staff actions taken and properly using information reviewed during the mitigating strategies and spent fuel pool instrumentation audits being performed by NRR's Japan Lessons-learned Division (JLD). Specific concerns relate to whether the JLD is properly following MD 3.53, "NRC Records and Document Management Program" and Office Instruction LIC-111, "Regulatory Audits," particularly regarding draft information and its use in the audit process.  
  
SOI agreed to 5/19/2015.

EVALUATION OF NON-CONCURRENCE AND RATIONALE FOR DECISION (use continuation pages or attach Word document)  
See attached Word Document

TYPED NAME OF NCP COORDINATOR  
John McHale

TITLE  
Associate Director, Technical Support Directorate

ORGANIZATION  
NRR/JLD/TSD

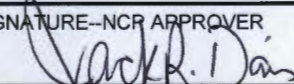
SIGNATURE--NCP COORDINATOR  


DATE  
5/20/15

TYPED NAME OF NCP APPROVER  
Jack Davis

TITLE  
Director, Japan Lessons-Learned Division

ORGANIZATION  
NRR/JLD

SIGNATURE--NCP APPROVER  


DATE  
5/21/15

**NON-CONCURRENCE PROCESS**

NCP-2015-006

TITLE OF SUBJECT DOCUMENT

Report for the Audit Regarding Implementation of Mitigating Strategies and Reliable Spent Fuel Pool Instr.

ADAMS ACCESSION NO.

ML I 5098A056

CONTINUATION OF SECTION

A     B     C

the draft information should be preserved if it is necessary for a proper understanding of the agency's formulation and execution of basic policies, decisions, actions or responsibilities [emphasis added]

The indication that LIC-111 was to be followed is also in the cover letter of the Perry audit report. As discussed in Section 3.0 of the Perry Audit report (ADAMS Accession No. ML15098A056), the NRR staff made a determination to "close" out audit items using draft information associated with determining the interim status of the licensee's compliance with Order EA-12-049.

I understand that the JLD staff does not consider what is being provided in the audit report as a regulatory decision because it is not the final determination on compliance, however, this audit, as with all other audits the NRC staff performs, appears to "[d]ocument the formulation and execution of basic policies and decisions and the necessary actions taken, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference)" [Management Directive 3.53, "NRC Records and Document Management Program"]. To that end appropriate documentation of not only the staff actions taken, but the information used to come to the staff's determination of sufficiency should be maintained; or a sufficiently focused (i.e. review of closed audit items) module should be added to actually ensure the appropriate documentation is retained and used to make an NRC decision.

Alternatives to the current practice recommended to the JLD include:

1] For Perry specifically, the JLD could revise the audit report leaving open those items that were closed relying on draft information; or,

2] For Perry specifically, the JLD could only status the progress made without making a determination on whether the progress is "open" or "closed."

3] More generically, going forward consistent with the guidance in LIC-111, instruct the JLD audit team leaders, that draft information is not sufficient to close out an audit item. For those plants that you have already issued audit reports for the JLD could revise the associated Temporary Instruction 2515/191 (ADAMS Accession No. ML14273A444) to require the inspection staff to select "closed" audit items as part of the sample. Then the JLD could add a section to the TI to explicitly require the inspection staff, in their confirmations of procedural adequacy, to include in the scope of their samples those items that were closed using draft information during the audits.

4] The best alternative is to change the Perry audit report and require the inspection staff to do a 100 percent review of all "open" and draft information closures as part of the TI. However I recognize that actually reviewing all those items is manpower intensive and defeats the intent of this interim look to make an interim decision on the status of the licensee's compliance with Order EA-12-049.

**NCP-2015-006**  
**Section C**

**Evaluation of Non-Concurrence**

The basic concerns identified in the non-concurrence about ensuring proper and complete documentation of our regulatory conclusions are shared by leadership within the Japan Lessons Learned Division and NRR senior leadership. In fact, many of these concerns informed the decisions that went into putting the current review process in place. The fundamental differing view lies with the timing of when actual regulatory decisions are being made.

As outlined in NRR Office Instruction LIC-111, "Regulatory Audits:"

A regulatory audit is a planned, license or regulation-related activity that includes the examination and evaluation of primarily non-docketed information. A regulatory audit is conducted with the intent to gain understanding, to verify information, and/or to identify information that will require docketing to support the basis of the licensing or regulatory decision.

The typical NRC application of a regulatory audit is to support a decision on a pending licensing action. As such, the audit activities determine which information should be docketed to support a corresponding regulatory decision on whether to implement the licensing action (i.e., approval of a license amendment request). In contrast, but still consistent with the purpose stated in LIC-111, the current mitigating strategies audits are being performed to gain understanding as part of a broader regulation-related activity – progress towards eventual compliance with NRC Order EA-12-049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" and Order EA-12-051, "Spent Fuel Pool Level Instrumentation." In consultation with the Office of the General Counsel (OGC), the staff confirmed that no subsequent NRC action was required after issuance of the orders. The audits being performed are part of an elective process that was put in place to address external stakeholder concerns about NRC perspectives as licensees implement the requirements of Orders EA-12-049 and EA-12-051. Specifically, the objective is to allow the NRC staff to obtain fuller understanding of licensees' plans, and to communicate the staff's perspective on those plans as licensees pursue compliance with the orders. The audits and associated reports are not establishing any regulatory decisions associated with order compliance; nor are they supporting any pending licensing decisions, since the licensing action was already taken with the issuance of the orders. The only regulatory decision that needs to be made is whether or not the NRC agrees that licensees are in compliance with the orders. This conclusion is reserved for documentation in an inspection report, as part of the NRC's oversight process.

Another aspect to consider is the evaluation of draft information. As part of each order, timelines were established for when licensees need to comply with the specific requirements. The orders further established that plans for meeting the requirements should be identified; however, the

orders acknowledged that these plans were flexible, and could be modified until the required compliance date. Due to a variety of factors, plans may not be able to be implemented as originally intended. Therefore, although the NRC staff is reviewing licensee plans, these plans (including the associated supporting final or draft documents) are actively being changed, as permitted by the order. In cases where these changes are subsequent to an NRC review, the NRC's prior assessment of that aspect of the licensee's plan is rendered moot. The staff interacted with OGC and confirmed that this is acceptable under the provisions of the orders and included language in the audit reports that acknowledges this possibility. To this end, there is little value in preserving draft licensee documents that may or may not support a regulatory decision. The staff had further discussions with OGC and determined it was acceptable to discuss the NRC assessment of the plan in the audit report, despite the preliminary nature of that assessment. The staff's "final" assessment will be documented in the post-compliance safety evaluation (SE), which will be based on the licensee's final plan and associated supporting documents (which will be docketed as official agency records). Even this "final" assessment in the SE will include language similar to the audit report because the only regulatory decision associated with the orders is confirmation of compliance; and this confirmation of compliance is reserved for the post-compliance inspection report. It should be noted that the associated inspection procedure, Temporary Instruction 2515/191, Appendix A, Section 3.02 (a) specifically calls for a sampling of the FLEX Support Guidelines, which comprise a large portion of the draft materials reviewed during a typical audit.

Regarding the management directive (MD-3.53) and office instruction (LIC-111) procedural references in the non-concurrence, it is the JLD staff's position that draft information reviewed during the onsite audits is not needed to document the formulation and execution of basic policies, nor to provide a proper understanding of the decision making process. This rationale for this position is that the inputs to the NRC's safety evaluation will be based on the licensee's Final Integrated Plans and other docketed correspondence, as well as the consideration that the NRC conclusion regarding order compliance will be based on the results of the associated inspection report.

Another way to look at the audit process in the context of the EA-12-049 and EA-12-051 orders is that there is no requirement for the NRC to perform an interim evaluation of a licensee's progress toward meeting these orders. Thus, the NRC staff could have not performed any of these audits and proceeded with only post-compliance inspections. This approach would have avoided all of the issues discussed above, including the review of draft information during the audits. However, it is unlikely that not performing the audits would have provided a more complete, open, and transparent review process, as compared to the approach taken, for all stakeholders.

During interactions with the non-concurring individual, some potential adjustments to the process were discussed. There is merit to some of the recommendations, and JLD agrees that it may be desirable to use language other than "open" and "closed" when describing the staff's assessment of interim plans. Unfortunately, given where the agency is with the current process (36 of 63 audits complete), it would be difficult to adopt these suggestions in a way that doesn't

introduce potential confusion and stakeholder concerns. However, JLD is evaluating other potential enhancements by exploring whether some of the NRC staff's "draft" documents should be maintained as official agency records, even if they don't support the eventual final regulatory decision. Any enhancements will consider how to balance the benefits with the impact of potential unintended consequences.