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U. S. NUCLEAR REGULATORY COMMISSION

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER: NCP-2018-008

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

TITLE OF SUBJECT DOCUMENT	ADAMS ACCESSION NO.
Safety Evaluation Associated with Vogtle Units 3 and 4 License Amendment Request 17-037	ML18207A262

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NRO/DSRA/ARPB

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

SIGNATURE	DATE
John Segala	9/12/2018

Section B - Comments for the NCP Reviewer to Consider - Completed by John Segala

Introduction

Joe Williams is a Senior Project Manager within my branch. He is among one of three staff members that prepared a non-concurrence (NCP-2018-008) to document their views on the safety evaluation associated with the Vogtle Units 3 and 4 License Amendment Request (LAR) 17-037. I fully support Joe and the other staff in using the non-concurrence process to assure that all views are presented to decision-makers in support of NRC's important safety mission.

Joe Williams, et al., raised the following four principal issues in NCP-2018-008:

A. The licensee's request is an unprecedented licensing action that is inconsistent with Commission policy.
B. The licensee's request has significant generic implications, and circumvents the rulemaking process, inappropriately reducing opportunities for public involvement.
C. The staff's safety evaluation is not based on a well-described and thoroughly vetted regulatory framework. The staff's conclusions do not align with the framework described in the safety evaluation.
D. Resistance to addressing these issues has created a chilling effect that has inhibited addressing issues in a timely fashion and adversely affected the free and open discussion of possible issues and challenges associated with this first-of-a-kind LAR.

My comments on each of the issues are described below.

A. The licensee's request is an unprecedented licensing action that is inconsistent with Commission policy.

The Reorganization Plan No. 1 of 1980, Section 1(a) identifies the functions of policy formulation, rulemaking (with certain exceptions), adjudications, and orders as being reserved for the Commission itself, instead of the staff. As such, the final arbitrator of whether a matter involves policy or not resides with the Commission. I also recognize that policy matters are not stagnant, and that what one Commission may view as a policy matter at a particular point in time, may change with a different Commission at a later time. As such, the NRC staff needs to continue to be mindful of identifying and raising "potential" policy matters to the Commission for their awareness and potential decisions.

Based on my review of the list of historical SECY papers and associated Staff Requirements Memorandum (SRMs) developed during the early to mid-1990s provided in NCP-2018-008, I believe that the proposed amendment to the Tier 2* change process in LAR 17-037 contains facets that have been previously presented to the Commission for their policy consideration through SECY papers.

However, since the NRC has never developed objective criteria for how to determine if a potential policy issue warrants Commission awareness or approval, the staff's process for identification of Commission level policy issues is subjective and involves engagement with senior NRC management.

Policy issues can involve technical, regulatory, and process related issues. They can involve significant issues that warrant Commission awareness or approval, and they can involve less significant issues that the staff has the authority to make the decision on its own

through issuance of an exemption request and/or a license amendment. There are differing views as to whether this LAR is a policy issue that warrants Commission awareness or approval.

As discussed in NCP-2018-008, the "NRO Office Director has indicated that he has discussed LAR 17-037 with the Commissioners and that no objection has been expressed" to the Office Director's assessment that this LAR is not a policy issue and does not warrant Commission awareness or approval. As a result, the Office Director, in conjunction with the Office of the General Counsel (OGC), made the decision to not send the Commission a SECY paper on this topic. This is not a unique circumstance, as senior management and OGC need to weigh the merits of issues to determine whether they contain "potential" policy issues for the Commission's consideration. Notwithstanding that decision, the NRO Office Director did decide to take an extra step by planning to issue a Commissioner's Assistant (CA) Note 3 days before the staff issues the safety evaluation for the LAR to notify the Commission of the issues associated with this LAR. The CA note is supposed to include the non-concurrence to facilitate informing the Commission of the issues and differing views.

Since the NRO Office Director discussed this LAR with individual Commissioners, albeit informally, I believe that the decision as to whether this LAR is a "potential" policy issue that would warrant Commission approval or awareness falls within the discretion of the Office Director. In addition, I believe that issuance of the CA Note provides the Commission the opportunity to become aware of the issue prior to issuance of the LAR and to redirect the staff if necessary. However, I do note that CA Notes have less transparency to internal and external stakeholders than SECY papers because they are typically not made publically available and do not have an associated Staff Requirements Memorandum (SRM) documenting the Commission's decision.

B. The licensee's request has significant generic implications, and circumvents the rulemaking process, inappropriately reducing opportunities for public involvement.

I agree that when we issue the safety evaluation report approving the departure to the Tier 2* change process in VIII.B.6 in the LAR that it has generic implications. With that said, any amendment has the potential to introduce generic implications. When I reviewed the draft version of the safety evaluation of this LAR, I provided the following comment:

> "OGC may be able to come up with better wording, but I think that no matter what we say here the NRC would not have a basis to deny the same LAR being submitted in the future by another AP1000 COL licensee…"

When any LAR is approved by the NRC, it establishes precedence that can be used by other licensees as a basis for submitting a similar LAR to the NRC for review and approval. Unless the staff can develop a basis for why that precedence is not applicable to the other AP1000 COL holders, or that the precedence has been altered in a way that makes it unsafe or inconsistent with current regulatory requirements, the NRC would not have a basis to deny a similar LAR. Therefore, approval of LAR 17-037 has generic implications.

I also agree with the statement in the staff's draft letter (ADAMS Accession Number ML14314A941) regarding the similar 2014 Tier 2* LAR (LAR-008) that "…a more appropriate regulatory venue may be one that more fully engages all stakeholders,

especially other AP1000 COL holders and applicants referencing the AP1000 certified design, other reactor vendors, and the public."

However, I think that this could also be accomplished in a different manner by approving the plant specific LAR and then incorporating the departure to the Tier 2* change process, which was the subject of the LAR, into the renewal of the AP1000 design in Appendix D of 10 CFR Part 52, which also involves a rulemaking. This is a similar approach NRC decided to take to address the generic technical issues associated with the AP1000 design (e.g., condensate return, main control room heat up, main control room dose, and hydrogen vent location issues). All of the AP1000 COL licensees and applicants agreed to adopt Westinghouse's generic resolution of these issues, and the staff expects these design changes will be included in the renewal of Appendix D (which expires on February 27, 2021). Using a similar approach for the Tier 2* change process would also assure broad input from stakeholders, and would apply this change to future COL applications referencing the certified AP1000 design.

I differ with the assertion in the NCP that approving the departure to the Tier 2* change process in the LAR is a reduction in standardization. Changes to Tier 1 require an exemption request in accordance with VIII.A.4[1], and involve a staff assessment of whether special circumstances exist that "outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption." The existing Tier 2* change process in VIII.B.6 requires staff review and approval of any change to Tier 2* material, but does not require the staff to consider standardization. Therefore, once the certified design designates Tier 1 equivalent information as Tier 2* information, the NRC has in effect made the decision that the control of changes to that Tier 2* information no longer needs to consider the potential impacts of reduction in standardization.

C. The staff's safety evaluation is not based on a well-described and thoroughly vetted regulatory framework. The staff's conclusions do not align with the framework described in the safety evaluation.

In general, I agree with this issue raised in the NCP regarding the lack of a review framework and inconsistent staff findings/conclusions in NCP-2018-008. This issue largely existed through June, and then additional efforts were undertaken to define the framework. As discussed in the NCP, I reviewed the draft of the safety evaluation of LAR 17-037 that was provided for concurrence in August and provided extensive markups and comments. I also suggested that we have a "Chapter Day" to have all of the technical staff and the Office of the General Counsel (OGC) attorneys meet to discuss and agree on the revisions to the safety evaluation. The Project Manager agreed with my comments and my suggestion for a "Chapter Day." As a result, the staff and attorneys participated in a two day "Chapter Day"

[1] VIII.A.4 states: "Exemptions from Tier 1 information are governed by the requirements in 10 CFR 52.63(b)(1) and 52.98(f)." 10 CFR 52.63(b)(1) states: "An applicant or licensee who references a design certification rule may request an exemption from one or more elements of the certification information. The Commission may grant such a request only if it determines that the exemption will comply with the requirements of § 52.7. In addition to the factors listed in § 52.7, the Commission shall consider whether the special circumstances that § 52.7 requires to be present outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption. The granting of an exemption on request of an applicant is subject to litigation in the same manner as other issues in the operating license or combined license hearing."

meeting and agreed to revise the safety evaluation consistent with my comments to establish a common set of staff findings that were consistently used throughout the safety evaluation and to reorganize the safety evaluation to group Tier 2* items with similar staff findings.

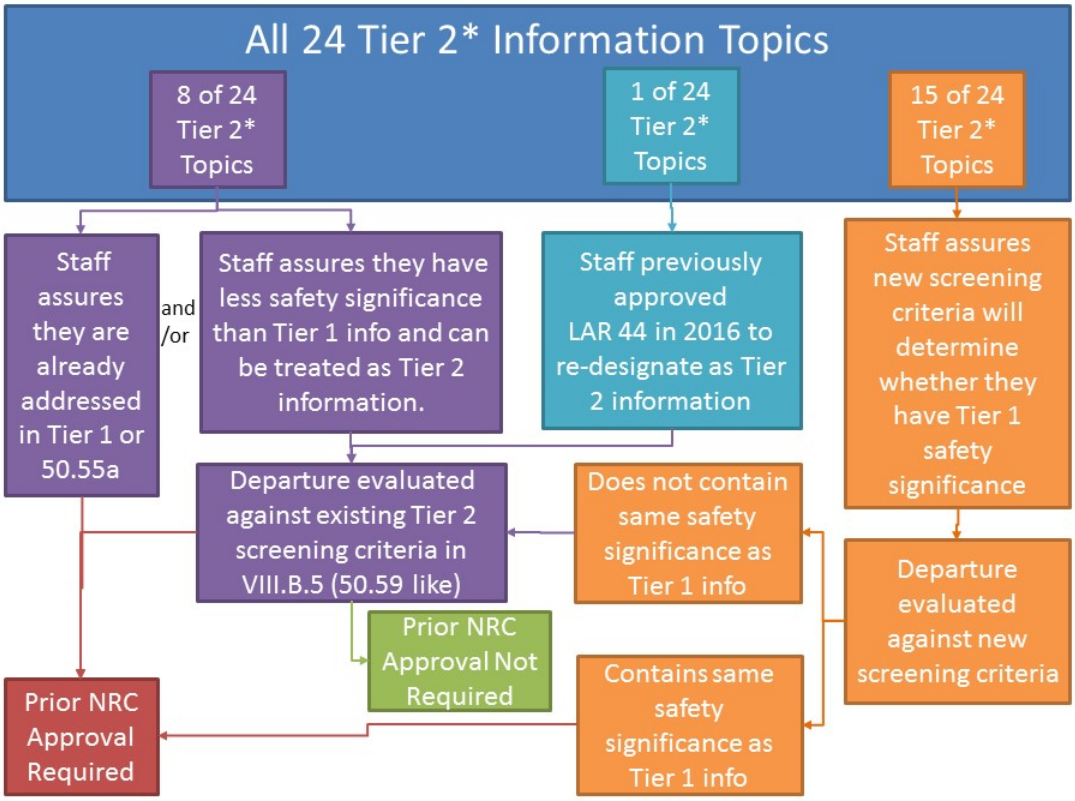
Since the issues provided in this NCP issue were based on earlier drafts of the safety evaluation, I believe that the resolution of my (and OGC's) comments and markups during the "Chapter Day" meetings on September 10 and 11, 2018, adequately resolved this NCP issue regarding the concerns with the lack of a review framework and inconsistent staff findings/conclusions.

Based on my review of the draft safety evaluation for LAR 17-037 circulated for review and approval in September, I have determined that the new Tier 2* change process in the proposed license condition will ensure that prior NRC review and approval will be required for safety significant departures to Tier 2* information.

D. Resistance to addressing these issues has created a chilling effect that has inhibited addressing issues in a timely fashion and adversely affected the free and open discussion of possible issues and challenges associated with this first-of-a-kind LAR.

In regards to this NCP issue, Joe Williams indicated that he "has a reasonable perception that the issues he has raised in the course of this review have been suppressed and discouraged." I believe that the perception of whether a chilling effect exists is an individual experience. This is because it is tied to the perspectives and feelings of the individual involved, and those perspectives and feelings are based on a series of the interactions. Different individuals had varying levels of interactions and experiences in reviewing this LAR. Therefore, as a learning organization open to feedback and wanting to improve our organizational performance, I think that this NCP issue should be referred to NRC's Office of the Inspector General (OIG) and Office of the Chief Human Capital Officer (OCHCO) in accordance with the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012.

I do agree with Joe Williams that the overall LAR review should have been managed better throughout the review process. First, since this is a first-of-a-kind LAR for which there is no established review guidance for the staff, there should have been early review team meetings (including the project manager, the technical staff, the OGC attorney, and the appropriate first line supervisors) scheduled to develop and gain agreement on the regulatory framework for the review. This should have been initiated before the staff started its review of the LAR and before the staff started developing requests for additional information (RAIs). However, this was not the case. In fact, the regulatory framework was not fully established until 9 months after the review started, when I provided my comments on the LAR 17-037 safety evaluation that was provided for concurrence. As part of my comments, I provided the following flowchart (and the associated safety evaluation wording) depicting the evaluation and conclusions that the NRC staff should be making consistently throughout the safety evaluation:



Developing this regulatory framework early in the review and obtaining staff agreement would have led to a more effective and efficient review by ensuring consistent reviews, RAIs, SER write-ups and SER conclusions across all of the technical review branches.

Second, these team meetings should be continued on a regular basis throughout the review to (1) ensure consistent implementation of the review approach, (2) make necessary enhancements to the regulatory framework, and (3) identify potential issues.

Third, all issues identified during the team meetings should have been fully evaluated and promptly addressed and corrected. This was not done for many of the issues Joe Williams identified early in the review.

Fourth, although management has the discretion to make executive decisions, it helps cultivate NRC's values of openness, cooperation, and respect when management listens to all of the different team members viewpoints before making decisions regarding issues raised by the staff. Further, management should clearly articulate the basis for such decisions to further the staff's understanding of the path forward. Even though staff may not agree with the final management decision, they will feel respected and likely not issue non-concurrences by knowing that all of the pertinent information was considered.

If NRO were to implement these four steps when reviewing first-of-a-kind LARs, it would help foster an open and collaborative work environment, the staff would feel more respected, the reviews would be conducted more effectively and efficiently, and the potential for a non-concurrence may be minimized.