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Mr. Ho K. Nieh
Director, Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Request for Changes to the Significance Determination Appeal Process

Project Number: 689

Dear Mr. Nieh:

As you are aware, for the past year the Nuclear Energy Institute (NEI)¹ and its members have been actively engaged in the public dialogue regarding potential enhancements to the Reactor Oversight Process (ROP). We appreciate the effort that the NRC has put into this first phase of ROP Enhancement, which has included conducting over a dozen public meetings and reviewing approximately 100 recommendations to improve the ROP received from both internal and external stakeholders.² As outlined in our May 20, 2019, letter,³ the areas of interest to the industry include the NRC's response to white findings, as well as improvements to the significance determination process (SDP).

Although much time and attention has been focused on how to properly determine the significance of, and respond to, inspection findings, one area not yet addressed in the ROP enhancement efforts is the process for appealing NRC's characterization of inspection findings (SDP Appeal Process).⁴ The purpose of this letter is to request several straight-forward changes to the SDP Appeal Process that will improve the fairness, objectivity and utility of the process.

The existing SDP Appeal Process suffers from several flaws that could be easily remedied. For example, the

¹ The Nuclear Energy Institute (NEI) is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

² See <https://www.nrc.gov/reactors/operating/oversight/rop-enhancement.html> (last viewed, August 26, 2019).

³ Letter from J.L. Uhle (NEI) to H.K. Nieh (NRC), *Proposed SECY on ROP Enhancement*, May 20, 2019.

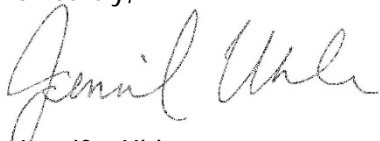
⁴ See NRC Inspection Manual Chapter 0609, Attachment 2, *Process for Appealing NRC Characterization of Inspection Findings (SDP Appeal Process)*, Jan. 1, 2019.

only option for a licensee under the current process is to appeal a significance determination to the NRC official who was responsible for the determination in the first instance. Further, the scope of appeals that will be accepted by the NRC is artificially constrained, and does not provide the opportunity for an independent and objective reviewer to assess the substantive grounds upon which a significance determination was made. NEI does not believe that the existing appeals process is reflective of the agency's commitment to transparency, fairness and independence.

The SDP Appeal Process should be revised to function similarly to the agency's facility-specific backfitting appeals process, which does not suffer from these flaws.⁵ A more detailed description of the flaws in the current SDP Appeal Process, as well as recommended improvements, is included in the attachment to this letter.

Once again, we appreciate the NRC's ongoing work to enhance the ROP and hope that changes to the SDP Appeal Process can be included in the staff's "phase 2" efforts. Please feel free to contact me if you would like to discuss this request.

Sincerely,



Jennifer Uhle

cc: Margaret Doane, EDO, NRC
Christopher G. Miller, D/DIRS, NRC

⁵ *Management of Facility-Specific Backfitting and Information Collection*, Management Directive 8.4, Oct. 9, 2013. We note that the Commission recently provided direction to the staff to make changes to Management Directive 8.4. See Staff Requirements Memorandum SECY-181-0049, *Management Directive and Handbook 8.4, "Management of Backfitting, Issue Finality, and Information Collection,"* May 29, 2019. None of the changes directed by the Commission significantly impact the recommendations in this letter.

I. Appeals of Significance Determinations

The SDP Appeal Process is described in Inspection Manual Chapter (IMC) 609, Attachment 2. Attachment 2 first defines the scope of appeals that the NRC will accept for review. Specifically, this document states that licensee appeals to reduce the significance of an inspection finding will be considered as having sufficient merit for review only if the licensee's contention falls into one of the following categories:

- The staff's significance determination process was *inconsistent with the applicable SDP guidance or lacked justification*. Issues involving the staff's choice of probabilistic risk modeling assumptions used in the SDP will not be considered appealable under this process, provided the staff documented its justification in those cases where the licensee presented a different point of view.
- *Actual (verifiable) plant hardware, procedures or equipment configurations*, identified by the licensee to the NRC staff at the Regulatory Conference or in writing prior to the staff reaching a final significance determination, *was not considered by the staff*.
- A licensee submits *new information which was not available at the time of the Regulatory Conference*. New information will be considered only if the licensee informed the staff that additional information was under development prior to or during the Regulatory Conference, or in their written response to the preliminary significance determination. The information under development should have been received within a reasonable period of time (agreed upon between the licensee and the staff) for the staff to review it.

Also of note, IMC 609, Attachment 2 seems to suggest that the licensee should request a Regulatory Conference as a prerequisite to appealing the final decision. Further, the IMC provides that the licensee can provide additional information "that the licensee indicated was not available to present at the Regulatory Conference" within a reasonable time after the Regulatory Conference has concluded. That additional information can be considered by the appeal panel if the appeal is accepted. Beyond that, there is no process provided in IMC 609, Attachment 2, for a licensee to seek an independent assessment of an SDP finding.

II. History of SDP Appeals

The last major revision to the appeal process was issued on January 31, 2008, which significantly changed the acceptance process for appeals, including a substantial contraction of the scope of appeals that would be accepted. The public record, however, is incomplete with respect to the basis for the 2008 revision. It appears that the change might have been prompted by a May 3, 2007 appeal submitted by Duke Energy. In that appeal, Duke raised generic issues about the appeal process, noting: "While Duke appreciates the increased focus on timeliness, there is some concern that the appeal process has not also been changed in order to allow licensees to provide additional information that may not have been available during the time period before a finding was issued."⁶ In its November 2007 decision on the appeal, the NRC noted that Duke "also stated that the NRC should change the appeal process such that licensees would be allowed to provide additional information during the process. The NRC staff is currently evaluating that

⁶ Letter from Bruce H. Hamilton, Vice President, Oconee Nuclear Station, to Dr. W.D. Travers, Regional Administrator, U.S. Nuclear Regulatory Commission – Region II (May 3, 2007) (ADAMS Accession No. ML072970510).

recommendation.”⁷

It is noteworthy that the number of appeals accepted for review on the merits dropped to zero after the issuance of the January 2008 revision to IMC 609. In total, we could identify records of only 12 appeals in the NRC’s Agencywide Document Management System (ADAMS) dating back to 1999.⁸ Of the five appeals we found prior to January 2008, the NRC had at least accepted each for review on its merits, although in each case the licensee’s argument was ultimately rejected by the appeals panel. The NRC did not accept any of the five post-2008 appeals for review on their merits because it determined that the appeals did not meet the acceptance criteria provided in Attachment 2 to IMC 609. We found no instance (before or after 2008), in which the NRC accepted the licensee’s appeal and subsequently changed a significance determination as a result.

III. Analogous Appeals Process – Facility-Specific Backfitting

A process that should be looked to as instructive is the NRC’s process for appealing facility-specific backfit determinations. Backfitting is not entirely dissimilar from the issuance of an SDP finding because both processes could result in a licensee being compelled to make changes to its license, procedures, or systems, structures or components. As such, it is important that both processes are subject to rigorous controls, and provide a meaningful way for licensees to request an independent review of NRC decisions. The backfitting process is outlined in NRC Management Directive 8.4, “Management of Facility-Specific Backfitting and Information Collection,” Section III.A. Several parts of the backfitting appeal process that are instructive in improving the SDP Appeal Process are highlighted below.

- Appeals may be filed for purposes of challenging the staff’s finding that there was no backfit, or, in the case where a backfit was imposed, that the backfit was unjustified. Either way, the scope of what a licensee may challenge in a backfit appeal is very broad and not inappropriately constrained.
- Licensee appeals go first either to the relevant office director or Regional Administrator, depending upon who was responsible for imposing the backfit, *however*, a licensee may appeal the office director or Regional Administrator’s initial decision to the Executive Director for Operations (EDO). The EDO has flexibility in handling the appeal and may appoint an independent panel to review the appeal and provide a recommendation. Management Directive 8.4 does not constrain the scope of the EDO’s review of an initial backfit decision, nor does it impose limitations on what evidence the EDO may consider in reaching his or her decision.
- Also of note, throughout every step of the backfitting appeal process, the EDO is required to be informed by the office director or Regional Administrator. This is important because the backfit appeal process specifically empowers the EDO to take up the matter, even in the absence of an appeal by the licensee.

⁷ Letter from William D. Travers, Regional Administrator, U.S. Nuclear Regulatory Commission to Bruce H. Hamilton, Vice President, Oconee Nuclear Station (November 20, 2007) (ADAMS Accession No. ML073241045).

⁸ The evaluation provided in this paragraph was supported by a review of the publicly available historical record dating back to the beginning of the Reactor Oversight Process in 1999. This review identified records of 12 significance determination appeals dating back to 1999, however, in two of those cases, no public record of the NRC’s decision the on the licensee’s appeal could be located. The remaining 10 appeals, where the NRC’s decision could be accessed, were considered in the discussion that follows.

IV. Concerns with the Current SDP Appeal Process

The current process for appealing significance determinations does not give licensees a fair opportunity to have their concerns heard by an objective, independent arbiter. The process also artificially constrains the scope of an appeal and lacks transparency in how appeals are ultimately adjudicated.

Specifically, the appeal process is deficient in the following ways:

- **The standard of review for appeals is too narrow.** Constraining a licensee's ability to appeal a significance determination only to process errors, omissions of fact, or new and significant information is an ineffective method to address legitimate concerns raised by licensees. Under the current acceptance criteria, substantive appeals challenging the staff's conclusions and analyses cannot be considered, thus preventing licensees from raising legitimate challenges to SDP decision-making. There is no legal or regulatory rationale for constraining an appeal in this way, and the NRC has broad discretion in the manner and process through which it may consider appeals. With such a narrow scope of review, the availability of a Regulatory Conference (where the licensee will presumably present its entire case to the NRC), effectively makes the current SDP Appeal Process moot.
- **Appeals must be made to the official who made the initial decision.** As a matter of fundamental fairness, an aggrieved licensee should not have as its only recourse an appeal to the very official responsible for the initial decision. This flaw can be mitigated somewhat if additional layers of appeal are available to the aggrieved licensee after the initial review. For example, the NRC's facility-specific backfitting appeal process provides for a first-level appeal to the Office Director or Regional Administrator, but also provides for a second-level appeal of that decision to the EDO. But when no such avenues exist, as is the case here, offering the deciding official as the sole appellate authority makes little sense. It is also inconsistent with the NRC's own Principles of Good Regulation, specifically the principle of Independence, which states "Final decisions must be based on objective, unbiased assessments of all information...." It is hard to understand how the official who made the initial decision could be considered to be objective or unbiased when acting as the arbiter on appeals of his or her own decisions.
- **The appeal process itself is documented in an Inspection Manual Chapter, rather than in an NRC Management Directive.** The appeal process for significance determinations should not be located in an Inspection Manual Chapter because these documents are not subject to the appropriate level of review within the agency. IMC 0040, "Preparing, Revising, and Issuing Documents for the NRC Inspection Manual," Section 0040-05, Paragraph 06.11, states that inspection manual chapters are approved only at the division director or deputy division director level. Similar processes, such as the backfitting appeal process, exist in NRC Management Directives, which often are concurred upon by the EDO,⁹ and on occasion are reviewed and approved by the Commission when they implicate Commission authorities or responsibilities or reflect implementation of major policy issues. Also of note, the Chairman may, on her own initiative, review and approve any Management Directive that "affects the rights of a member of the public." The significance determination appeal process should be subject to the same level of management review and oversight as analogous processes, like the

⁹ Management Directive 1.1 states that the EDO approves the issuance of new or revised MDs that (1) Affect the EDO's authorities and responsibilities, or (2) Reflect Chairman and Commission decisions that have major implications in terms of agency operations.

facility-specific backfitting appeals process, that implicate the rights of licensees.

V. Recommendations

NEI believes that the NRC should reassess the existing SDP Appeal Process and develop a better solution to effectively adjudicate these appeals. In our view, key features of a revised appeal process would include the following:

- **The scope of appeals accepted for review should be broadened.** As described above, the narrow scope of significance determination appeals limits the utility and effectiveness of the process. The most likely avenue for a licensee to appeal is by presenting new information which was not available at the time of the Regulatory Conference. It is hard to imagine a circumstance, however, in which a licensee would not present all the information it had at its disposal at the Regulatory Conference, and therefore the likelihood of the licensee being able to meet the acceptance standard and have an appeal considered in its merits seems inappropriately low.¹⁰ As such, the NRC should consider establishing a new standard for appeals that permits the appellate decision-maker to objectively and independently assess the information that was originally presented to the Significance and Enforcement Review Panel (SERP).

In the legal context, the standard of review for an appeal would be considered “*sua sponte*,” in that the appellate decision-maker would be able to examine any part of the appeal that he or she deems appropriate to reach the right conclusion. By comparison, the appeal process for site-specific backfitting provided in Management Directive 8.4 does not limit the Executive Director for Operation’s ability to review the initial decision. A similar scope should be considered for appeals of SDP determinations.

- **There should be second-level or direct appeal to the EDO.** It seems fundamental that licensees should have the opportunity to appeal significance determinations to someone other than the agency official responsible for the decision being appealed. As with the backfit appeal process, we recommend that—at the very least—licensees should be provided the opportunity for a second-level appeal of the Office Director or Regional Administrator’s decision to the EDO or his/her designee. The EDO would serve as an independent and objective arbiter and should be empowered to establish a panel to advise him or her on the final decision. Another option would be to eliminate the first-level appeal to the Office Director or Regional Administrator, and have all significance determination appeals sent directly to the EDO.
- **Licensees should have the opportunity to present their case in writing and in person.** Any appeal process should include an opportunity for the licensee to submit a written brief outlining its position as well as oral presentation to the appellate decision-maker. Oral presentations are important, because they provide the decision-maker an opportunity to ask questions and for the licensee to provide real time responses to explain its position.
- **The SDP appeal process should be in a Management Directive.** We also recommend that any

¹⁰ The only example where the NRC reconsidered an appeal based on new and significant information was in 2007 regarding Duke Energy’s Oconee site. The NRC’s stated basis for accepting the re-appeal was that the licensee had demonstrated that the new and significant information was still under development at the time of the appeal (ML073241045).

new appeal process should be documented in an NRC Management Directive, such as MD 8.13, "Reactor Oversight Process." This would put a greater imprimatur on the process, comparable that of Management Directive 8.4 on facility-specific backfitting. This change would ensure an appropriate level of management oversight of the process, and provide an opportunity for the Commission to review changes to the process, if appropriate.