

July 16, 2008

MEMORANDUM TO: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
Commissioner Svinicki

FROM: R. W. Borchardt /RA/ Martin J. Virgilio for
Executive Director for Operations

SUBJECT: REQUEST FOR AN EXTENSION OF DISCRETION FOR THE
INTERIM ENFORCEMENT POLICY FOR FIRE PROTECTION
ISSUES ON 10 CFR SECTION 50.48(c), "NATIONAL FIRE
PROTECTION ASSOCIATION STANDARD NFPA 805"

I request Commission approval to publish a *Federal Register* Notice announcing a revision to the U.S. Nuclear Regulatory Commission (NRC) Enforcement Policy. The revision concerns the transitioning of plants to the risk-informed, performance-based, alternative fire protection guidance of Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.48(c), "National Fire Protection Association Standard (NFPA) 805." This revision will extend the enforcement discretion period for licensees who have demonstrated substantial progress toward completion of their NFPA 805 transition efforts.

On June 16, 2004, the NRC published a final rule in the *Federal Register* amending 10 CFR 50.48, "Fire Protection" (69 FR 33536). This rule became effective July 16, 2004, and allows licensees to adopt 10 CFR 50.48(c), a risk-informed, performance-based alternative to then current fire protection requirements in 10 CFR 50.48(b). 10 CFR 50.48(c) endorses NFPA 805, "Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants," 2001 Edition (with limited exceptions stated in the rule language).

Also on June 16, 2004, the NRC revised its Interim Enforcement Policy (69 FR 33684) to provide enforcement discretion during a "transition" period. The policy change included discretion provisions to address: (1) noncompliances identified during the licensee's transition process; and (2) existing noncompliances that licensees could reasonably correct under NFPA 805. The discretion period would start when the licensee informs the NRC of the transition start date in a letter of intent (LOI) to transition to NFPA 805. The discretion period would remain in effect for up to 2 years for the licensee to submit to the NRC a License Amendment Request (LAR) to transition to NFPA 805; the discretion period would continue until the NRC dispositioned the LAR. In order to obtain discretion for existing noncompliances, the policy required the licensee to submit its LOI by January 15, 2005.

CONTACT: Gerald Gulla, OE
(301) 415-2872

On July 7, 2004, the Nuclear Energy Institute (NEI) requested that the NRC modify the Interim Enforcement Policy by extending the January 15, 2005, LOI due date for obtaining a discretion period for existing noncompliances. In its letter, NEI contended that the licensees needed additional time to plan for transition within their next budget cycle and to make decisions about adopting NFPA 805. In response, the NRC extended the LOI submittal date. Licensees who submitted their LOIs by December 31, 2005 (70 FR 2662) could receive discretion for existing fire protection noncompliances.

Duke Power and Progress Energy were the first utilities to submit a LOI to transition to 10 CFR Section 50.48(c) (for the Oconee Nuclear Power Station and Shearon Harris Nuclear Power Station, respectively). The NRC accepted both Oconee and Shearon Harris as pilot plants, and their License Amendment Requests (LARs) were submitted in May 2008.

By the deadline of December 31, 2005, the NRC had received LOIs from 36 units. Many of the licensees requested three or more years of enforcement discretion to conduct their transitions. The basis for the extension included the following: (1) the need for more time to evaluate their existing fire analysis; (2) a lack of resources; (3) the need for more time to incorporate lessons learned; and (4) the need for more time to develop fire probabilistic risk assessments (PRAs). The NRC considered the requests and on April 18, 2006, revised the Interim Enforcement Policy to extend the enforcement discretion period from 2 to 3 years (71 FR 19905).

On February 2, 2007, NEI submitted a request for additional discretion for sites transitioning to NFPA 805 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML070460550). NEI stated that the extension of the enforcement discretion period would allow an orderly transition process (at the time of the NEI letter, 42 units had committed to transitioning to 10 CFR 50.48(c)). NEI also recommended that the NRC stagger the LAR submittals into four groups—one group every 6 months. The first group would begin 6 months after the NRC approves the first pilot plant safety evaluation report (SER).

NEI stated that transitioning licensees are compelled to complete portions of the transition in advance of the pilot plants due to the current 3-year enforcement discretion period. This could result in creating substantial risk of rework and inconsistency among the transitioning licensees. The following four issues formed the basis for NEI's request that the staff reexamine the Interim Enforcement Policy:

- 1) Pilots Schedule vs. Nonpilot Deadline

The pilot plants are generating a substantial knowledge base. Joint NRC and industry processes are in place to support a successful pilot effort and a success path for industry to follow. These include regular pilot plant observation visits, regular public meetings to discuss progress and issues, regular public meetings to discuss frequently asked questions (FAQs) regarding transition to NFPA 805, and joint NRC-industry workshops to discuss NFPA 805 transition issues. However, the schedule for the two pilot plant LAR submittals and staff review with the present enforcement discretion deadline compels some nonpilot licensees to complete portions of the transition before the pilot program is complete. This poses a risk of rework and inconsistency for NFPA 805 nonpilot submittals and programs.

2) Consensus PRA Standard

The NRC participated with other stakeholders to develop the American Nuclear Society (ANS) fire PRA standard, published in November 2007. Currently the ANS fire PRA standard is being folded into the combined American Society of Mechanical Engineers (ASME) PRA standard. NRC endorsement of the combined standard in Regulatory Guide (RG) 1.200, "An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities," is scheduled for December 2008. NEI noted that this is a deviation from the original schedule. As such, many licensees transitioning would not have a final, NRC-endorsed fire PRA standard to support their fire PRA development effort. To address this issue, on March 18, 2008, the staff issued a publicly-available memorandum (ADAMS Accession No. ML080250107) that provides NRC staff major positions on the fire PRA aspects of the combined ASME PRA standard.

3) Availability of Fire PRA Expertise

Development and peer review of fire PRAs is a resource and time-intensive process. Internal events PRA resources are interrelated with the fire PRA, and these resources are also occupied with the implementation of NRC RG 1.200. Industry estimates peak loading for PRA work on internal events and the fire PRA will occur in 2009.

4) Timely Reviews of NFPA 805 LARs

At the current schedule, 20 nonpilot units will submit their LARs by the end of the year. NEI expressed concern that the additional resource burden on the NRC staff was too great to provide timely and effective LAR reviews.

The staff anticipates having sufficient resources to accomplish the task within the licensing action timeliness goals of 96% of all licensing actions being complete within 1 year, and 100% being complete within 2 years, as stated in NRR Office Instruction LIC-101. As stated in the existing enforcement policy, discretion will continue to be applied while the NRC staff reviews the NFPA 805 LAR.

Nuclear safety is the first consideration in any request for additional enforcement discretion. NRC requires transitioning licensees to fully maintain their approved fire protection program. Transitioning licensees must address all nonconforming conditions with adequate compensatory measures to assure fire safety. Throughout the transition process, the NRC will continue to inspect the licensees to ensure that they maintain their existing fire protection program until transition is complete. The agency will continue to apply normal inspection and enforcement to all plants that are not actively transitioning to 10 CFR 50.48(c).

The staff recommends extending the discretion window six months past the date of the safety evaluation approving the second pilot plant LAR review. Acceptance review to evaluate the completeness of the two pilot plant applications is ongoing. Final review schedules will be established following completion of the acceptance reviews. As described in the July 15, 2008 Closure Plan for Key Fire Protection Topics (ADAMS Accession No. ML081970473), the staff anticipates a nine month review period for a high quality complete pilot application. This six month enforcement discretion window would allow nonpilot licensees time to review pilot plant safety evaluations and apply lessons learned to their own LAR submittals. The NRC would grant this additional discretion extension on a case-by-case basis and to those licensees who have demonstrated substantial progress toward completion of their NFPA 805 transition and who will continue to maintain and enhance fire safety at their facilities.

Therefore, I recommend that the Commission approve publication of a *Federal Register* Notice (enclosed) announcing the revision to the Enforcement Policy to extend the enforcement discretion period 6 months past the date of the safety evaluation approving the second pilot plant LAR review.

SECY, please track.

Enclosure: As stated

cc: SECY
OGC
OCA
OPA
CFO

NOTICES

NUCLEAR REGULATORY COMMISSION

NRC Enforcement Policy: Extension of Discretion Period of Interim Enforcement Policy

[DATE]

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Policy Statement: Revision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is revising the NRC “Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fire Protection Issues” (Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.48 “Fire Protection”), which will allow a licensee the option to request an extended enforcement discretion period if they are pursuing transition to 10 CFR 50.48(c), “National Fire Protection Association Standard NFPA 805.”

DATES: This revision is effective [DATE]. Please submit any comments on this revision to the Enforcement Policy on or before [DATE].

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to 11555 Rockville Pike, Rockville, MD 20852, between 7:30 a.m. and 4:15 p.m., on Federal workdays. Examine copies of comments received at the NRC Public Document Room, Room O1F21, 11555 Rockville Pike, Rockville, MD 20852. You may also e-mail comments to nrcprep@nrc.gov.

ENCLOSURE

The NRC maintains the current Enforcement Policy on its Web site at <http://www.nrc.gov>. Mouse over “Public Meetings and Involvement” on the far right, then select “Enforcement” from the drop-down menu. Under the bolded “Comments” section select “Enforcement Policy”.

FOR FURTHER INFORMATION CONTACT: Cynthia Carpenter, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, (301) 415-2741, e-mail Cynthia.Carpenter@nrc.gov.

SUPPLEMENTARY INFORMATION:

On June 16, 2004, the NRC published a final rule in the *Federal Register* amending 10 CFR 50.48, “Fire Protection” (69 FR 33536). This rule became effective July 16, 2004, and allows licensees to adopt 10 CFR 50.48(c), a risk-informed, performance-based alternative to their current fire protection requirements in 10 CFR 50.48(b). The NRC revised its Enforcement Policy (69 FR 33684) to provide interim enforcement discretion during a “transition” period. The interim enforcement discretion policy includes provisions to address the following:

(1) noncompliance identified during the licensee’s transition process and (2) existing identified noncompliances.

The discretion period would start when the licensee informs the NRC of a transition start date in a Letter of Intent (LOI) to transition to the National Fire Protection Association Standard 805 (NFPA 805). The discretion period would remain in effect for up to two years for the licensee to submit to the NRC a License Amendment Request (LAR) to transition to NFPA 805 and the discretion period would continue until the NRC dispositioned the LAR. Many licensees requested 3 or more years for the transition period. The basis for the extended discretion included the following: (1) the need for additional time to properly evaluate existing fire analysis, (2) a lack of resources, (3) the need for additional time to develop fire probabilistic risk assessments (PRAs), and (4) the need for additional time to utilize lessons learned from the pilot plants. On April 18, 2006, the NRC revised the Interim Enforcement Policy to extend the enforcement discretion period from two to three years (71 FR 19905).

On February 2, 2007, the Nuclear Energy Institute (NEI) submitted a request for additional discretion for sites transitioning to NFPA 805 (Agencywide Documents Access and

Management System (ADAMS) Accession No. ML070460550). NEI stated that the extension of the enforcement discretion period would allow an orderly transition process.

NEI states transitioning licensees are compelled to complete portions of the transition in advance of the pilot plants due to the enforcement discretion deadline. This could result in creating substantial risk of rework and inconsistency among the transitioning licensees. The following issues formed the base for NEI's request that the staff reexamine the Interim Enforcement Policy:

- (1) Timing of the pilots schedule versus the nonpilot plant discretion deadline.
- (2) Delay of the industry fire PRA standard and the NEI peer review guidance.
- (3) Limited fire PRA expertise available.
- (4) Burden on NRC staff to conduct timely reviews of concurrent LARs.

The NRC is revising the Enforcement Policy to extend, on a case-by-case basis, the current 3-year enforcement discretion period. The NRC will grant additional time extension depending on the progress the licensee has made in the transition effort. The additional period of discretion would end 6 months after the date of the safety evaluation approving the second pilot plant LAR review.

Nuclear safety is the first consideration in any request for additional enforcement discretion. NRC requires all transitioning licensees to fully maintain their approved fire protection program. Transitioning licensees must address all nonconforming conditions with adequate compensatory measures to assure adequate fire safety. The NRC will continue to apply normal inspection and enforcement to all plants that are not actively transitioning to 10 CFR 50.48(c).

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150-0136. The approved information collection requirements contained in this policy statement appear in Section VII.C.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, collection of information, unless it displays a currently valid OMB control number.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Accordingly, the NRC Enforcement Policy is amended to read as follows:

NRC Enforcement Policy

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Interim Enforcement Policies

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Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fire Protection Issues (10 CFR 50.48)

This section sets forth the interim enforcement policy that the U.S. Nuclear Regulatory Commission (NRC) will follow to exercise enforcement discretion for certain noncompliances of requirements in 10 CFR 50.48, "Fire protection," (or fire protection license conditions) that are identified as a result of the transition to a new risk-informed, performance-based fire protection approach included in paragraph (c) of 10 CFR 50.48 and for certain existing identified noncompliances that reasonably may be resolved by compliance with 10 CFR 50.48(c). Paragraph (c) allows reactor licensees to voluntarily comply with the risk informed, performance-based fire protection approaches in National Fire Protection Association Standard 805 (NFPA 805), "Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants," 2001 Edition (with limited exceptions stated in the rule language).

For those noncompliances that the NRC identifies during the licensee's transition process, this

enforcement discretion policy will be in effect for up to 3 years from the date specified by the licensee in their letter of intent to adopt the requirements in 10 CFR 50.48(c). The enforcement discretion will continue to be in place, without interruption, until NRC approval of the license amendment request to transition to 10 CFR 50.48(c).

An additional period of enforcement discretion may be granted on a case-by-case basis, if a licensee has made substantial progress in its transition effort. This additional period of discretion, if granted, would end 6 months after the date of the safety evaluation approving the second pilot plant¹ LAR review.

The NRC will assess “substantial progress” based on accomplishment of tasks that are not resource-limited with respect to fire probabilistic risk assessment (PRA) technical expertise (e.g., classical fire protection transition, deterministic nuclear safety performance criteria transition, non-power operational transition, radioactive release transition, development of the NFPA 805 monitoring program, operator manual action transition to NFPA 805 recovery actions). In order for the NRC to adequately evaluate the transition progress, licensees that request enforcement discretion beyond the three years currently available should make their request to the NRC in writing at least 3 months before the expiration of the 3-year discretion period and compile or submit the following information:

- Compile, for on-site NRC audit/inspection, a list of all fire protection-related noncompliances and the related compensatory measures for those noncompliances.
- Document, for onsite NRC audit/inspection, that each Operator Manual Action put in place as compensatory measures are feasible and reliable, in accordance with staff provided guidance in Regulatory Issue Summary 2005-07, “Compensatory Measures to Satisfy the Fire Protection Program Requirements.”
- Submit a description of the physical modifications performed, if any, to address existing risk-significant fire protection issues.

¹ The NRC accepted the request from both Duke Power (ML051080005) and Progress Energy (ML052140391) to allow Oconee Nuclear Power Station and Shearon Harris Nuclear Power Station respectively, to become pilot NPFA 805 plants.

- Submit a status report of the transition, including a schedule of milestones for completing the fire PRA. The status report should be broken down into the following major areas:
 - Classical fire protection transition (in accordance with NFPA 805 Chapter 3)
 - Nuclear Safety Performance Criteria transition (in accordance with NFPA 805 chapters 1, 2 and 4)
 - Nonpower operational transitions
 - NFPA 805 monitoring program

If the NRC determines that a licensee has not made sufficient progress during the transition to NFPA 805, the NRC will deny the request for an extension of enforcement discretion.

If, after submitting the letter of intent to comply with 10 CFR 50.48(c) and before submitting the license amendment request, the licensee decides not to complete the transition to 10 CFR 50.48(c), the licensee must submit a letter stating its intent to retain its existing license basis and withdrawing its letter of intent to comply with 10 CFR 50.48(c). After the licensee's withdrawal from the transition process, the staff, as a matter of practice, will not take enforcement action against any noncompliance that the licensee corrected during the transition process and will on a case-by-case basis, consider refraining from taking action if reasonable and timely corrective actions are in progress (e.g., an exemption has been submitted for NRC review). Noncompliances that the licensee has not corrected, as well as noncompliances identified after the date of the above withdrawal letter, will be dispositioned in accordance with normal enforcement practices.

A. Noncompliances Identified During the Licensee's Transition Process

Under this interim enforcement policy, enforcement action normally will not be taken for a violation of 10 CFR 50.48(b) (or the requirements in a fire protection license condition) involving a problem such as in engineering, design, implementing procedures, or installation, if the violation is documented in an inspection report and it meets all of the following criteria:

(1) It was licensee-identified, as a result of its voluntary initiative to adopt the risk-informed, performance-based fire protection program included under 10 CFR 50.48(c) or, if the NRC identifies the violation, it was likely in the NRC staff's view that the licensee would have

identified the violation in light of the defined scope, thoroughness, and schedule of the licensee's transition to 10 CFR 50.48(c) provided the schedule reasonably provides for completion of the transition within 3 years of the date specified by the licensee in their letter of intent to implement 10 CFR 50.48(c) or other period granted by NRC;

(2) It was corrected or will be corrected as a result of completing the transition to 10 CFR 50.48(c). Also, immediate corrective action and/or compensatory measures are taken within a reasonable time commensurate with the risk significance of the issue following identification (this action should involve expanding the initiative, as necessary, to identify other issues caused by similar root causes);

(3) It was not likely to have been previously identified by routine licensee efforts such as normal surveillance or quality assurance (QA) activities; and

(4) It was not willful.

The NRC may take enforcement action when these conditions are not met or when a violation that is associated with a finding of high safety significance is identified.

While the NRC may exercise discretion for violations meeting the required criteria where the licensee failed to make a required report to the NRC, a separate enforcement action will normally be issued for the licensee's failure to make a required report.

B. Existing Identified Noncompliances

In addition, licensees may have existing identified noncompliances that could reasonably be corrected under 10 CFR 50.48(c). For these noncompliances, the NRC is providing enforcement discretion for the implementation of corrective actions until the licensee has transitioned to 10 CFR 50.48(c) provided that the noncompliances meet all of the following criteria:

(1) The licensee has entered the noncompliance into their corrective action program and implemented appropriate compensatory measures;

(2) The noncompliance is not associated with a finding that the Reactor Oversight Process Significance Determination Process would evaluate as Red, or it would not be categorized at Severity Level I;

(3) It was not willful; and

(4) The licensee submits a letter of intent by December 31, 2005, stating its intent to transition to 10 CFR 50.48(c).

After December 31, 2005, as addressed in (4) above, this enforcement discretion for implementation of corrective actions for existing identified noncompliances will not be available and the requirements of 10 CFR 50.48(b) (and any other requirements in fire protection license conditions) will be enforced in accordance with normal enforcement practices. However, licensees that submit letters of intent to transition to 10 CFR 50.48(c) with existing noncompliances will have the option to implement corrective actions in accordance with the new performance-based regulation. All other elements of the assessment and enforcement process will be exercised even if the licensee submits its letter of intent before the NRC issues its enforcement action for existing noncompliances.

Dated at Rockville, MD, this _____ day of _____, 2008.

For the Nuclear Regulatory Commission

Annette L. Vietti-Cook,
Secretary of the Commission