UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

February 22, 2006

COMMISSION VOTING RECORD

DECISION ITEM: SECY-05-0197

TITLE: **REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

The Commission (with a majority of Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of February 22, 2006. Commissioner Jaczko disapproved.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons
OGC
EDO
PDR

VOTING SUMMARY - SECY-05-0197

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	11/10/05
COMR. McGAFFIGAN	X				X	11/21/05
COMR. MERRIFIELD	X				X	11/29/05
COMR. JACZKO		X			X	12/16/05
Comr. LYONS	X				X	11/28/05

COMMENT RESOLUTION

In their vote sheets, a majority of Commissioners approved the staff's recommendation and provided some additional comments. Commissioner Jaczko disapproved the staff's recommendation and provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on February 22, 2006.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN DIAZ

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved _xx_ w/comments Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

SIGNATURE

Nov 10, 05

DATE

Entered on "STARS" Yes ✓ No ___

Chairman Diaz's Comments on SECY-05-0197

I approve the staff's recommendations in SECY-05-0197, subject to the comments below.

I commend the staff for its efforts and for working with stakeholders, in a public and transparent manner, to meet the Commission's direction in SRM-SECY-04-0032. As is evident by the increasing number of announcements of potential COL applicants, the staff's work in this area is expected to significantly increase in the coming years. I believe that a clear understanding by all stakeholders of the process to be used for reviewing COL applications is critical for the NRC to be able to conduct its reviews in an effective and efficient manner. I believe the staff's proposal in SECY-05-0197 allows for such a process in the review of operational programs.

I approve the use of the license conditions proposed by the staff for the operational programs listed in Tables 1 and 2 of Attachment 1 to SECY-05-0197. I note that the staff's Recommendation 1.c. to include a license condition that specifies that "the licensee shall make available to the NRC staff..." should be understood to mean that "the licensee shall submit to the NRC staff..." as explained in the staff's discussion of this license condition on Page 7 of SECY-05-0197.

I approve the use of the generic EP ITAAC included in Attachment 2 to the paper as the minimum set of ITAAC for EP included in a COL application, recognizing that the acceptability of proposed plant-specific EP ITAAC will be reviewed on a case-by-case basis.

I approve the recommendation to use the SRP update process to identify additional operational programs. I agree that the possibility of identifying additional operational programs should not be ruled out. However, I expect that few, if any, additional operational programs will be identified, given the staff's efforts to date on this matter. I also believe that the inclusion of such additional programs should receive the same level of management review as has been given to the programs listed in Attachment 1 to the SECY paper. As such, the staff should inform the Commission of the identification of such programs through information papers. The staff should similarly inform the Commission if any applicant chooses to use an operational program to meet a regulatory requirement when the requirement does not call for an operational program, and as a result, the staff adds this program to the list addressed by the license condition. Such a Commission notification should be made to the extent permitted by the separation of functions rule.

Regarding the standard license conditions for fire protection and security, I believe that codifying these conditions is more efficient than including them in each license issued. The staff should consider including these fire protection and security issues in the next rulemaking opportunity affecting the associated regulations for each condition and provide its assessment to the Commission as part of the proposed rule package.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN DIAZ

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved w/comments xx Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

This vote supplements my previous vote on SECY-05-0197.

SIGNATURE

Feb 19, 06

DATE

Entered on "STARS" Yes ✓ No ___

Supplemental Vote by Chairman Diaz on SECY-05-0197

I join in Commissioner Merrifield's supplemental vote on this matter, and appreciate his thoughtful analysis of several key issues surrounding the use of inspections, tests, analyses and acceptance criteria ("ITAAC") for operational programs.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MCGAFFIGAN

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved X w/comments Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Edward McGaffigan Jr.
SIGNATURE

November 21, 2005
DATE

Entered on "STARS" Yes X No ___

Commissioner McGaffigan's Comments on SECY-05-0197

I approve the staff's recommendations in SECY-05-0197, subject to the comments below.

I support the comments made by Chairman Diaz and join with him in commending the staff both for its hard work over the past several years (including multiple iterations with the Commission) on the issue of programmatic ITAACs and also for having conducted its efforts in a public and transparent process. I agree that the possibility that additional operational programs might be identified cannot be ruled out, but that any such candidates should be formally identified to the Commission and the recommendations supported by information papers (which could be converted to voting papers under Commission procedures). Similarly, the Commission should be informed if any applicant should choose to use an operational program to meet a regulatory requirement when that requirement does not call for an operational program.

The proposal by Chairman Diaz to codify the requirements for fire protection and security, rather than developing and including them separately in each license would appear to have great merit. The staff should also consider addressing the safety-security interface in any such proposed rule. For example, in considering changes to its fire protection program, a licensee might need to consider whether the change would adversely affect the ability to defend against the design basis threat.

EMcG
11/21/05

Commissioner McGaffigan's Supplemental Comments on SECY-05-0197

I agree with the Commissioner Merrifield's supplemental comments on SECY-05-0197. In particular, this is an issue that the Commission has clearly deliberated on carefully, soliciting input from stakeholders, arriving at a well-reasoned conclusion. I would note that early on in this multi-year deliberative process, I was an advocate for broad programmatic ITAAC. By 2002 I was convinced that I had been misreading the legislative history and that programmatic ITAACs were not required, indeed were not intended, outside of the emergency preparedness program. The additional thoughts expressed by Commissioner Merrifield, which I fully support, do not modify my prior approval of the staff's recommendations in SECY-05-0197.

E McGaffigan Jr
2/16/06

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MERRIFIELD

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved ✓ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments

SIGNATURE

11/29/05

DATE

Entered on "STARS" Yes ✓ No ___

Commissioner Merrifield's Vote on SECY-05-0197

Review of Operational Programs in a Combined License Application and Generic Emergency Planning Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC)

I approve the staff's recommendations in SECY-05-0197, subject to the following comments.

I approve the staff recommendations to include license conditions for operational programs in a combined license (COL), including motor-operated valve (MOV) testing and safeguards contingency operating plans. I also approve the inclusion of the generic emergency planning ITAAC in a COL application. The staff should be commended for their perseverance to engage stakeholders in a series of public meetings to determine whether operational programs could be fully described in a COL application. That effort has paid off with the identification of only one area where ITAAC will be necessary, the area of emergency planning.

I join Chairman Diaz in approving the recommendation to use the ongoing effort to update the Standard Review Plan (SRP) in preparation for reviewing COL applications, as a mechanism to identify any additional operational programs that should be included in a COL application. Given the substantial effort by the staff and the industry to identify operational programs, I believe identification of additional programs is unlikely. Nonetheless, updating the SRP is an excellent way to identify such programs, if they exist. If any additional programs are identified, I would expect them to receive the same level of scrutiny as those already identified up to this point, and that the Commission be kept fully and currently informed.

The staff noted in the paper that COL applicants have the option of using an operational program to satisfy a regulation even though the operational program is not required by the regulation, and if so, the applicant should include said program in the FSAR. I believe such a program would be a rare occurrence, and thus, the Commission should be informed if an applicant chooses this option.

I also agree with the Chairman that the staff should consider addressing fire protection and security programs through the rulemaking process the next time the staff contemplates revisions to these areas of the regulations. Initiating rulemaking just to incorporate these programs is not justified, since license conditions imposed on individual COL applicants will ensure that the programs are adequately addressed in the short term. However, if the staff considers revising the regulations in these areas for other reasons, addressing these programs as an adjunct to such a rulemaking effort could provide some efficiencies in the review of COL applicants that would save both NRC and applicant resources in the long run.

11/29/05

Additional Comments of Commissioner Merrifield on SECY-05-0197

In his vote on this paper, Commissioner Jaczko addresses whether inspections, tests, analyses, and acceptance criteria (ITAAC) are required for operational programs. The Commission has given significant attention to this issue for almost six years, and this paper provides the final implementation details for a matter that has been well-aired. The staff's proposal, which accurately captures the Commission's previous direction, was developed through a thoughtful, informed review process with input and direction from the Commission, as well as significant interaction with a wide variety of stakeholders. Public comment was solicited at regular intervals through public meetings, workshops, and review of staff documents. In my view, the staff's proposed approach for reviewing operational programs in the context of a combined license (COL) application is fully consistent with Congressional intent, and is a legally sound and appropriate interpretation of previous Commission policy decisions.

Interpretation of Legislative History

In his vote, Commissioner Jaczko states that despite a long history of prior Commission decisions, he is unpersuaded by these previous arguments primarily because those decisions "largely focused on the legislative history of section 185b. of the Atomic Energy Act." In his view, such a "focus on legislative history is largely misplaced." While an outright rejection of legislative history can be quite tempting for many a Department or Agency, any Commission would be well advised to consider precisely what Congress intends when implementing its statutory authority. In my view, this is exactly what the Commission has done since the enactment of Energy Policy Act of 1992 (EnPA/92).[1]

In enacting EnPA/92, Congress clearly intended to create a framework that would reduce the difficulties associated with ordering, licensing and building nuclear power plants, while at the same time, permitting individuals to have an opportunity to raise concerns in an administrative proceeding. Consistent with this approach, Congress set out specific requirements governing the issuance of a combined license to provide a robust opportunity to resolve safety and environmental issues before plants are built, rather than after.[2]

With regard to ITAAC, the language of the statute states that in a COL, the Commission must identify:

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[1]Rather than repeat the Commission's reasoning and deliberations on ITAAC for operational programs, I would instead refer readers to the staff requirements memorandum and votes on SECY-02-0067 from former Chairman Meserve, former Commissioner Dicus, then Commissioner Diaz, Commissioner McGaffigan, and my own vote on that paper.

[2]The intent behind Section 185b. was the following:
"The Committee believes that requiring resolution of all important safety issues and establishing the licensing criteria against which the plant will be judged in the combined license before construction begins will have several major benefits. First, it will enhance public participation by airing all safety issues first, before the license is issued and the plant is built . . . Second it will enhance certainty for the utility building the plant by spelling out before construction begins what conditions the completed plant must satisfy in order to operate. No longer will the rules be made up after the game is played. Finally, it will provide the NRC regulators objective safety standards with which to measure the constructed plant in deciding whether the plant is safe to operate."
S. Rep. No. 102-72, 102d Cong., 1st Sess. 293 (1991) (Committee Report).

> the inspections, tests, and analyses, *including those applicable to emergency planning*, that the licensee shall perform, and the acceptance criteria that, if met, are necessary and sufficient to provide reasonable assurance . . . [3]

It is worth noting that Congress specifically mentions emergency planning, an operational program, for inclusion in ITAAC. Congress could have chosen to include a much wider number of operational programs, but it did not.[4] The language of the Act, together with the legislative history, expresses Congress' view that ITAAC for operational programs is permissible, but should be used sparingly in order to provide as much issue resolution at issuance of the COL as possible. And as mentioned before, the Commission was well disposed to conclude that Congress intended the list of operational issues considered under ITAAC to be as narrow as practicable. In sum, I believe the Commission has fulfilled Congressional intent through its current and previous policy decisions on implementation of ITAAC requirements.

Scope of post-construction hearing

In his vote, Commissioner Jaczko raises the fact that Congress specifically and unambiguously limited the issues open to litigation at the potential post-construction hearing to whether the acceptance criteria embodied in the COL had been satisfied. Consistent with the view of previous Commissions, I believe this limitation demonstrates that Congress intended to significantly narrow the scope of this second hearing and would endorse the approach of limiting ITAAC to only those programs that cannot be fully described by the applicant, reviewed by the staff, and adjudicated during the hearing prior to COL issuance.[5] Given the nature of operational programs, any ITAAC associated with programs are likely to be broader than those associated with hardware and will necessarily have a subjective element. Attempting to mandate ITAAC for every operational program would increase the number of issues that could not be resolved prior to construction, broaden the issues open to litigation in any post-construction hearing, and introduce a level of risk to the proceedings that would be completely contradictory to the original intent that Congress had in enacting Section 185b. Indeed, it would make virtually meaningless the desire of Congress to create a "one-step licensing process."

The fact is, the approach offered by the staff does not prohibit the use of ITAAC for operational programs. There are at least two situations in which ITAAC for operational programs would be

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[3]Pub.L. 102-486, 106 Stat. 3120 (October 24, 1992), codified at 42 U.S.C. § 2235 (emphasis added).

[4]As the Supreme Court has explained: "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last." *Id.*

[5]In the Statement of Considerations for the Part 52 rule, the Commission spoke on the subject of the post-construction hearing stating:

> There have to be substantial limits on the issues that can be raised after construction. A licensing proceeding without any uncertainty in result may be a sham, but the bulk of the uncertainty should be addressed and resolved prior to, not after construction. Part 52 does not remove uncertainty, it simply reallocates it to the beginning of the licensing process.

54 Fed. Reg. 15,373, 15,381 (1989).

appropriate:

1) the applicant voluntarily opts to include an ITAAC for one or more programs in lieu of providing the detailed information necessary for the staff to approve the program at the time it issues a COL; and

2) the staff can impose an ITAAC for an operational program if an applicant fails to provide the information necessary for the staff to make the requisite reasonable assurance finding.

Further, the public will have the opportunity in the pre-issuance hearing to challenge whether the programmatic information submitted in an application is adequate and "fully describes" a program such that an ITAAC is not necessary. If such a challenge were successful, the applicant would be required to supplement its programmatic information or the staff could include an ITAAC for the program in question. This process provides a comprehensive opportunity for the public to express its concerns regarding operational issues. Consistent with Congressional intent, however, the post-construction hearing would limit parties to raising only questions of compliance with ITAAC, rather than the adequacy of the program itself.

It must also be noted that even if a program is covered by ITAAC, and compliance with such ITAAC is at issue in a post-construction hearing, this does not necessarily prohibit the reactor from entering into operation.[6] Given the authority granted by Congress in the EnPA/92, the Commission has the discretion to allow "interim operation" of a reactor even though ITAAC compliance issues are the subject of a second hearing, provided it can determine that the compliance in question does not undermine a reasonable assurance finding that the public health and safety will be adequately protected during interim operation. Such a decision is no different than those the Agency must make every time the staff identifies a programmatic deficiency through its inspection of currently operating licensees. The Commission bases any such decision on protection of public health and safety, just as it would if the staff identified a non-compliance through its robust inspection program following start-up under a COL. The most important safety principle remains unchanged: no facility regulated by the NRC will be allowed to operate if such operation would jeopardize public health, safety or the environment.

Authority to impose license conditions

With respect to Commissioner Jaczko's concern regarding our authority to use license conditions in a COL, I would note that conditions on licenses are cornerstones of regulatory licensing. Conditions on licensees are requirements that must be complied with. Additionally, the staff has extensive experience using license conditions, and we have well-developed case law discussing the appropriate use of license conditions.[7] The Commission has recognized that

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[6] Pub.L. 102-486, 106 Stat. 3120 (October 24, 1992), codified at 42 U.S.C. § 2239. *See also* 10 CFR § 52.103(c).

[7] *See e.g., Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-01, dated Jan. 11, 2006, *slip op.* at 2-7 (license conditions requiring the establishment of groundwater quality baseline and upper control limits and the conduct of pump and fracture testing prior to operations deemed acceptable); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 20 & n.25 (2003)(acceptable to issue license prior to completing program for testing soil and cement mixtures to determine which will best meet design requirements).

"the key to the validity of post-licensing Staff reviews is whether the NRC staff inquiry is essentially 'ministerial'" and "by [its] very nature require[s] post-licensing verification."[8]

The specific license conditions proposed by the staff in this paper are acceptable as license conditions, rather than ITAAC, because they do not contemplate specific licensee action necessary to demonstrate reasonable assurance (*e.g.*, the performance of a test to show criteria have been met). Rather, they describe only the *timing* of the implementation of the programs and, with respect to fire protection and security operational programs, describe an acceptable *process for allowing program modifications*. The timing of program implementation can be verified through an inspection, and more importantly, the staff's review is not subject to meaningful debate, since the programs' scope, acceptability, and characteristics will have all been subject to litigation as part of the COL application. In addition, compliance with the license conditions will be subject to the NRC's continuing regulatory oversight and authority.

At the end of his discussion on this matter, Commissioner Jaczko states a concern that by imposing license conditions, "the burden of ensuring compliance essentially shifts from the licensee to the NRC staff." Burden shifting is nothing new to our Agency, and quite frankly, the burden always shifts after issuance of a license. A COL is the equivalent of an operating license, and as with operating licenses, we will be able to enforce all conditions and requirements imposed by the COL. In my mind, we gain no greater assurance of safe operation by imposing ITAAC for operational programs. Licensees must always be capable of demonstrating compliance, and it is difficult to believe that one of our licensees would risk operating in willful non-compliance simply because we had not imposed ITAAC for a particular program. At the end of the day, as a regulator, we must rely on our oversight, inspection and enforcement tools in our role as overseer of regulatory compliance. Such "burden shifting," in my mind, does not justify the imposition of ITAAC for operational programs.

In sum, while I appreciate Commisioner Jaczko's extensive views on the issue of ITAAC for operational programs, in my view they not only contradict the intention of Congress as set out in the EnPA/92, but they are also inconsistent with the longstanding and broadly supported policy decisions made by the Commission.

2/16/06

[8] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 (2000) ("sufficient details should be provided in the license so that the Staff's review is not subject to meaningful debate").

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER JACZKO

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved _____ Disapproved ✓ Abstain _____

Not Participating _____

COMMENTS:

See attached comments

SIGNATURE

12/16/05

DATE

Entered on "STARS" Yes ___ No ___

Commissioner Jaczko Comments on SECY-05-0197
"Review of Operational Programs in a Combined License application and Generic Emergency Planning Inspections, Tests, Analyses, and Acceptance Criteria"

I disapprove of portions of the staff's plan to review operational programs in a combined license (COL) application. Specifically, I disapprove of the recommendation to include license conditions for operational programs in a COL, rather than developing Inspection, Tests, Analyses, and Acceptance Criteria (ITAAC) for those operational programs. I approve the generic EP ITAAC proposed by the staff with the understanding that it is to provide a reasonable basis for the development of a site-specific EP ITAAC based on the state of EP today. My approval is conditioned upon the fact that there is substantial work ongoing in this area and EP regulations and/or policy may be modified. To the extent that any EP regulation or policy changes affect this generic ITAAC, it is, therefore, subject to change.

I am aware of the long history and prior Commission decisions on this issue, but am unpersuaded by the arguments presented and am greatly concerned about the consequences that these decisions create. Primarily, this is because past arguments opposing programmatic ITAAC have largely focused on the legislative history of section 185b. of the Atomic Energy Act, as amended (AEA). I believe that the focus on legislative history is largely misplaced since the legislation which added section 185b. in essence simply codified the Commission's Part 52 regulations, taking the heart of the Part 52 regulations and placing them into the AEA. This is evident in statements surrounding the legislative history of section 185b, including a statement made by Senator Domenici during the Senate debates on the legislation in which he noted that, "[T]itle IX is not a new idea. It codifies reforms that the NRC adopted in 1989, the so-called Part 52 rule."[1] Likewise, a Senate Report of the Committee on Energy and Natural Resources, noted that "[t]he Committee endorses the approach adopted by the NRC in Part 52."[2] Moreover, quotes from the Commission's Statements of Consideration supporting Part 52 and from NRC Commissioners regarding Part 52 are quoted throughout the legislative history surrounding section 185b.[3] And while there are some exceptions to Congress' endorsement of Part 52, none of the Commission's regulations altered by Congress changes the answer to the question presented here - that of whether the Commission intended operational programs to be covered by ITAAC. Therefore, given the Congressional endorsement of the Part 52 regulations, I find that detailed discussion focusing on what Congress intended creates a circular argument. What Congress intended was to implement the Commission's Part 52 regulations.

Therefore, I believe the appropriate focus of the inquiry regarding programmatic ITAAC must be on the Commission's Part 52 regulations and their history. Reading the history surrounding Part 52 it is clear that the staff and Commission struggled mightily with the issue of preserving the agency's ability to provide the public with the opportunity to meaningfully participate in this process and the Commission with the ability to ensure compliance with the Commission's

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[1] 138 Cong. Rec. S1153 (daily ed. Feb. 6, 1992).

[2] S. Rep. No. 102-72, at 295, 102nd Cong. 1st Sess., "National Energy Security Policy Act", report from the Committee on Energy and Natural Resources (accompanying S.1220); June 5, 1991.

[3] *See* S. Rep 102-72, at 293 (1991), quoting former NRC Chairman Marcus; *see also*, S. Rep. 102-72, at 295 (1991), quoting from 54 Fed. Reg. 15372, 15381 ((April 18, 1989).

regulations in a fashion that provided efficiency and stability. The answer required the agency to find a way to capture everything previously accomplished in the traditional two-step licensing process in a more efficient process while still maintaining the necessary focus on safety and public involvement. The ultimate solution as laid out in 10 CFR Part 52 was to replace the two hearing process with a mandatory hearing designed to resolve all safety issues early in the proceeding, plus acceptance criteria designed to confirm that the issues would be implemented as described in the COL. The regulations then provide an optional second hearing, but only on the issue of whether or not the acceptance criteria were satisfied. This was, in essence the bargain the Commission established in the Part 52 rulemaking - to provide for early input for the public and early resolution of issues for the applicant.[4]

Nowhere in this bargain, however, were programmatic issues excluded from this equation. The Part 52 regulations certainly make no distinction between providing information regarding hardware and information regarding programs. Instead, the Part 52 regulations describing the contents of a COL application state that:

> The application for a combined license must include the proposed inspections, tests, and analyses, including those applicable to emergency planning, which the licensee shall perform and the acceptance criteria therefor which are necessary and sufficient to provide reasonable assurance that, if the inspections, tests, and analyses are performed and the acceptance criteria met, the facility has been constructed and will operate in conformity with the combined license, the provisions of the Atomic Energy Act, and the NRC's regulations.

10 CFR 52.79(c). In the brief filed with the DC Circuit Court of Appeals during the litigation surrounding implementation of the Part 52 final rule, section 52.79(c) was cited as the first step in the Part 52 process and further explanation provided that "[t]he first step of Part 52 requires an applicant for a combined license to make a demanding showing: that **all** safety issues associated with the site and design have been resolved. As part of this showing the applicant must set out acceptance criteria as well as proposed tests and inspections such that, if the tests are performed and the criteria are met, there will be a reasonable assurance that the plant has been constructed and will operate in conformity with the combined license."[5] Moreover, in early SECY papers surrounding Part 52, staff often spoke of the necessity for ITAAC on all issues, not just those verifying implementation of "hardware". In discussing additional ITAAC beyond

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[4] *See* "Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, Final Rule, 54 FR 15372, 15373, April 18, 1989 ("The Commission's intent with this rulemaking is only to have a sensible and stable procedural framework in place for the consideration of future designs, and to make it possible to resolve safety and environmental issues before plants are built, rather than after.")

[5] En Banc Brief for Respondents on Petition to Review a Final Rule of the United States Nuclear Regulatory Commission, August 30, 1991, pg. 25-26, *emphasis added*, filed on behalf of respondents in Nuclear Information Resource Service, et al. v. U.S. Nuclear Regulatory Commission, U.S. Court of Appeals for the District of Columbia, Docket No. 89-1381.

those that would be required for the design certification, staff explained that the COL ITAAC it envisioned, "will verify implementation of both hardware (e.g., site-specific design features) and licensee specific "soft" procedural requirements (e.g., training, quality assurance, etc.)."[6]

It is also clear from statements gathered during consideration of the legislation enacting section 185b. of the AEA that, not only NRC staff, but other stakeholders also did not view a distinction between hardware issues and operational issues. In commenting on a proposed NRC bill regarding COL, Bart Cowan of the Atomic Industrial Forum stated that, "[s]uch inspections, tests, and analyses together with the specific acceptance criteria can be established not only to assure proper construction, but for such matters as management structure, quality assurance, emergency planning, etc."[7] Similarly, Howard P. Friend, Vice-President, Bechtel Power Corporation testified that standardization extends beyond physical structures to include procedures and programs in such things as quality assurance and inspections. He explained that to not include such things would mean that the utility would proceed with preapproval "only for the concrete and steel part of the project."[8]

In fact, Congress itself was so wedded to the idea of early resolution of all safety issues that one of the few changes Congress made following the litigation on Part 52 placed increased emphasis on the importance of the verifications required by the acceptance criteria. The D.C. Circuit originally envisioned a second opportunity for a hearing which would provide, in addition to a challenge regarding ITAAC conformance, the opportunity to raise any significant new information that was discovered after the COL. Congress, however specifically denied this provision and instead directed that verification of satisfaction of the acceptance criteria would provide the only issue that could be potentially litigated during a second hearing. This revision provides great insight into the importance that Congress placed upon the ideas embodied in the public policy that the NRC forged through Part 52. Congress relied upon the understanding that early resolution of all issues was key and that verification of those issues would be accomplished through acceptance criteria. With Congress wholly endorsing this principal, I find it difficult to understand how the NRC would now attempt to limit the pre-operational verification of programs required of licensees by NRC regulations.

Despite the historic views of NRC staff, stakeholders and Congress, the Commission's current path would break this long-sought and heavily debated bargain with the public and with the licensees. The Commission is now directing the staff to address programmatic issues not through acceptance criteria, but in another way - a way not envisioned in the regulations - through license conditions. Not only am I concerned about the Commission's authority to introduce this alternative path without a rulemaking that would provide for such an option, but

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[6] SECY-92-214, "Development of Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) for Design Certifications," June 11, 1992, pg 4.

[7] Nuclear Regulatory Reform: Hearings on S.16 and S. 836 before the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, June and July 1985, pg. 396-397.

[8] Nuclear Facility Standardization Act of 1986: Hearing on S. 2073 before the Committee on Energy and Natural Resources, 99th Cong., 2nd Sess. (April 1986)("Hearing on S. 2073), pg. 53.

also, I am concerned that it is a decision that would be detrimental to the agency.

The Commission's regulations (10 CFR 52.97(b)) clearly provide the only basis upon which an issue should not be required to be verified through acceptance criteria. If the acceptance criteria are not necessary and sufficient to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the AEA, and the Commission's regulations, then they are not needed. Since the programs being discussed are programs required by NRC regulations, I find it difficult to imagine a persuasive argument that simply because these are programs their proper implementation is not necessary to provide reasonable assurance that the facility will be operated in conformity with the COL. But even assuming there is a valid argument that acceptance criteria for programs are for some reason not necessary and sufficient to provide this reasonable assurance, then why is it necessary to include these programmatic issues as license conditions? By creating license conditions to establish implementation milestones for these programs such that the staff can then verify their conformity with the COL, we are, in essence, applying ITAAC just under a different name. Regardless of the nomenclature, if staff finds these programs important enough to condition a license on their implementation, then the proper implementation of these programs is necessary and sufficient to provide reasonable assurance that the facility will be operated in conformity with the COL.

Furthermore, I am troubled by the consequences of identifying these items as license conditions as opposed to ITAAC. By doing so, the burden of ensuring compliance essentially shifts from the licensee to the NRC staff. As a license condition, the burden will be upon the staff to identify any deficiencies in the licensee's operational programs; whereas with ITAAC, the burden will be upon the licensee to demonstrate compliance. This shifting burden has numerous repercussions, including the fact that should the staff identify an issue with a licensee's program which is confined to a license condition, the staff must take enforcement action to cure the defect. This enforcement action will not necessarily halt the operation of a facility despite the staff's knowledge of an improperly implemented program. If, instead, the implementation of the program was verified through ITAAC, the operation of the facility would not be allowed until the issue was resolved. And it is important to remember that we are not talking about inconsequential or trivial issues; instead the programs under discussion involve such critical areas as fire protection and security. By allowing the operation of a facility which the staff knows to have a programmatic deficiency, the agency, at a minimum, risks losing important and hard-earned public confidence.

An additional consequence of not developing these programmatic acceptance criteria early in the process is the delay that could result from potential litigation challenging this decision. It certainly appears reasonable that petitioners could raise the lack of programmatic acceptance criteria as a contention. Should such a contention be admitted into the adjudication of the COL, even at the early stage, you risk a lengthy and complex adjudicatory process with the Licensing Boards, and ultimately the Commission, being required to resolve the question that the Commission should be resolving now - whether or not acceptance criteria for programs are necessary and sufficient to provide reasonable assurance that the facility will operate in conformity with the COL. While I am open to the possibility that it is not necessary for all programs or all elements of programs to require acceptance criteria in order to provide the necessary reasonable assurance finding, I believe as a policy decision the Commission should decide on what basis acceptance criteria are or are not necessary for this reasonable

assurance finding. As was argued by the NRC during the litigation surrounding Part 52, "Part 52 equates compliance with the acceptance criteria with conformity to the Act because that is how the acceptance criteria must be devised in order to pass muster at the time the combined license is issued."[9] I do not believe that the Commission has addressed this policy decision with sufficient clarity that the Licensing Boards, the Commission, or the Federal Courts that could potentially hear this issue would find easy to explain. Regardless of the legal outcome of such a situation, the adjudicatory process takes time and all of this legal wrangling could ultimately delay these COL licensing actions. After all, part of the mandatory hearing on the COL is intended to determine in a public way what acceptance criteria are appropriate. If the Commission categorically denies a whole class of acceptance criteria without providing due process on this issue, we not only create confusion later in the process, but we also create litigative risk. The Commission could, however, either decide to include acceptance criteria for programs, or decide with a sound rationale why acceptance criteria are not necessary for some of the programs despite their requirement by NRC regulations. Either way, the Commission has the ability to avert the potential delays of continuing to avoid properly answering this question, and I believe it should do so.

Based upon all of these arguments and information, I am convinced that without further deliberation, not including programmattic ITAAC in a COL is wrong - not only from the view of potential nonconformity with the Commission's regulations, but also as a policy decision. I believe that the compromise forged by the NRC in developing Part 52 was a good one which allowed us to remove uncertainty in the licensing process by working out all safety issues early in the first stage of the process, including reaching agreement on the criteria necessary to ensure proper compliance with the COL prior to operation. Looking back on the development of this issue, it appears that part of the rationale for abandoning programmatic ITAAC was simply because it was difficult to establish objective criteria. I fail to find difficulty a legitimate reason to sacrifice a process that involved this much deliberation and compromise. Moreover, the fact that staff has been able to develop objective criteria in formulating license conditions for these programs, lends further support that it is indeed possible to establish such objective acceptance criteria. Therefore, I believe the staff should not abandon acceptance criteria for programmatic issues, but should instead work with our stakeholders to ensure that the acceptance criteria are properly objective. I strongly believe the decision not to do so places undue risk on the new licensing framework. In light of the potential new licensing activity, now is the time for the Commission to get this right. If we fail to do so, we risk not only the stability of this new framework, but also our credibility.

Gregory B. Jaczko 12/16/05
Date

[9] En Banc Brief for Respondents on Petition to Review a Final Rule of the United States Nuclear Regulatory Commission, August 30, 1991, pg. 19, *emphasis added*, filed on behalf of respondents in Nuclear Information Resource Service, et al. v. U.S. Nuclear Regulatory Commission, U.S. Court of Appeals for the District of Columbia, Docket No. 89-1381.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER LYONS

SUBJECT: **SECY-05-0197 - REVIEW OF OPERATIONAL PROGRAMS IN A COMBINED LICENSE APPLICATION AND GENERIC EMERGENCY PLANNING INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA**

Approved with comments ___X___ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Peter B. Lyons

11/28/05

DATE

Entered on "STARS" Yes ✓ No ___

Commissioner Lyons' Comments on SECY-05-0197

Review of Operational Programs in a Combined License Application and Generic EP ITAAC

I approve the staff's recommendations in SECY-05-0197 and support the comments of both the Chairman and Commissioner McGaffigan.

In addition, the staff states that its inspections of operational programs and their implementation would be intended to verify that any changes made by the applicant to such programs would not have adversely impacted the bases for the Commission's findings of reasonable assurance and that any adverse impacts would be subject to enforcement action. It will be important to the goal of achieving a predictable and stable licensing process that the staff clearly articulate the conditions under which such a particular change would adversely impact a basis for a Commission finding of reasonable assurance and the range of enforcement actions that could be employed. Staff should address this point during the next Commission meeting on the topic of advanced reactor licensing.

11/28/05

NOTATION VOTE

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TO: Annette Vietti-Cook, Secretary

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Approved w/additional comments __X__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Peter B. Lyons

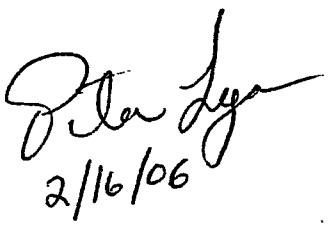
2/16/06

DATE

Entered on "STARS" Yes _X_ No ___

Additional Comments of Commissioner Lyons on SECY-05-0197

I agree with the additional views expressed by Commissioner Merrifield that the staff's proposal for reviewing operational programs in the context of a combined license application is legally sound, consistent with Congressional intent, and in keeping with previous Commission policy decisions. While I do not have the benefit of service on the Commission during the earlier development of issues related to the use of inspections, tests, analyses, and acceptance criteria (ITAAC) for operational programs, I discussed these matters with my three fellow commissioners who were involved with these developments. I am persuaded by their arguments, as stated in Commissioner Merrifield's additional views.



2/16/06