

November 20, 2003

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SUBJECT: RESOLUTION OF COMBINED LICENSE TOPIC 5 (COL-5), THE 10 CFR 52.103
HEARING PROCESS

Dear Dr. Simard:

This letter confirms our understandings and expectations regarding the 10 CFR 52.103 hearing process. This topic is identified as COL-5 on the list of Nuclear Energy Institute's (NEI's) generic combined license (COL) issues provided to the staff by NEI during a public meeting on May 22, 2003 (Meeting Summary - ADAMS Accession No. ML031970065). NEI provided its positions associated with the 10 CFR 52.103 hearing and inspections, tests, analyses and acceptance criteria (ITAAC) in a letter dated November 20, 2001, titled, "Draft White Paper: ITAAC Implementation and Transition to Full Power Operations Under Part 52" (ADAMS Accession No. ML020070338). The staff provided a response to NEI's white paper in a letter dated June 4, 2002 (ADAMS Accession No. ML021550137). In its letter, the staff provided only a partial response to the hearing issues identified in the NEI paper. The enclosure to this letter provides the response to the remaining hearing issues. Please contact Joseph Sebrosky, COL Project Manager, at 301-415-1132 if you have any questions on this matter.

Sincerely,

/RA/

James E. Lyons, Program Director
New, Research and Test Reactors Program
Division of Regulatory Improvement Programs
Office of Nuclear Reactor Regulation

Project No. 689

cc: See next page

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* See previous concurrence

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Distribution for Letter to R. Simard dated November 20, 2003

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Comments Related to the 10 CFR 52.103 Hearing Process From
November 20, 2001, Nuclear Energy Institute Letter

On November 20, 2001, the Nuclear Energy Institute (NEI) submitted to the NRC staff a "Draft White Paper: ITAAC Implementation and Transition to Full Power Operations Under Part 52" (NEI paper), which included, among other things, NEI's views on several issues related to hearings requested pursuant to 10 CFR § 52.103. The staff responded to the NEI paper by a letter dated June 4, 2002. While the staff fully responded to most of the issues NEI raised in its white paper, the staff made only a partial response to the hearings issues. The staff's comments related to the remaining hearings issues are set forth below. Since most of the rationale for NEI's positions is set forth in its "Main Points," in Section 6.1 of the NEI paper the staff comments follow the organization of those "Main Points."

By way of background, Section 185b. of the Atomic Energy Act of 1954 (Act), as amended, provides, in part, that "[t]he [NRC] shall identify within [a] combined license [(COL)] the inspections, tests, and analyses . . . that the licensee shall perform, and the acceptance criteria that, if met, are 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 Act, and the Commission's rules and regulations." The Commission implements this portion of Section 185b. in 10 CFR § 52.97(b)(1), which quotes the statutory language *verbatim*.

The Act also requires the Commission to make certain findings before operation. As set forth in Section 185b., "[f]ollowing issuance of the [COL], the Commission shall ensure that the prescribed inspections, tests, and analyses are performed, and, prior to operation of the facility, shall find that the prescribed acceptance criteria are met." The NRC implements this provision through 10 CFR § 52.99, under which the NRC staff issues notices of the successful completion of individual or multiple ITAAC, and 10 CFR § 52.103, under which the Commission may authorize facility operation, as set forth below. Section 52.103 also implements Section 189a.(1)(B), which, as also discussed below, provides opportunities for hearings with respect to completion of ITAAC. Except for cross-references and the statement that Section 189a.(1)(A) does not apply to commencement of operation under a COL, §§ 52.103(a)-(e) incorporate *verbatim* Sections 189a.(1)(B)(i)-(v), respectively.

Under 10 CFR § 52.99, upon completion of various stages of construction, the staff will verify that the associated ITAAC have, in fact, been met. As the staff verifies that ITAAC are satisfied, it periodically publishes notice of such determinations in the *Federal Register*, as required by § 52.99. When construction nears completion, the procedures of § 52.103 are invoked, as follows.

At least 180 days before scheduled fuel load, as required by § 52.103(a), the Commission will publish in the *Federal Register* a notice of intended operation of a nuclear power plant being constructed under a COL, and will provide an opportunity to request a hearing. Pursuant to § 52.103(b), such a request for a hearing must show, *prima facie*, that: (1) one or more of the acceptance criteria in the COL have not been, or will not be met; and (2) the specific operational consequences of nonperformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. NEI's positions on how this process should be implemented and the staff's response to those positions follows.

NEI Position 1

“The licensee precipitates the Section 52.103 process and the notice of intended operation required by Section 52.103(a) by sending a letter to the NRC identifying the intent to load fuel on a specified date. The Licensee’s letter is also expected to identify those ITAAC that have yet to be completed and a schedule for their completion.” NEI Paper at 23.

Staff Response

While neither Section 185b. of the Act nor 10 CFR § 52.103(a) requires a COL holder to inform the NRC of its schedule for initially loading fuel into the reactor, it would seem that the COL holder is in the best position to know when the ITAAC would be complete and the first opportunity to load fuel would occur.¹ Thus, the regulations do not proscribe such a process, and it appears reasonable for the COL holder to notify the NRC in writing of its desire to load fuel by a specified date. The COL holder should submit its letter to the NRC early enough so that the staff has time to prepare the notice and arrange for its publication to meet the requirement that the Commission publish the notice of intended operation at least 180 days prior to scheduled fuel load.

In addition, the staff believes the information described above should be submitted under oath or affirmation. Although 10 CFR § 50.30(b) applies only to applications for, and amendments to licenses, and does not in literal terms apply to the type of letter proposed here, because of the importance of the information, the staff believes that it should be submitted under oath or affirmation.

NEI also suggests that licensees identify incomplete ITAAC and a schedule for their completion. As described in the analysis of NEI Position 3, below, the staff believes that § 52.103(a) allows for issuance of the notice of intended operation before all ITAAC have been completed. While Part 52 does not require licensees to identify ITAAC that are not complete when the licensee informs the Commission of the schedule for initial fuel loading, the staff agrees that such identification would enable the Commission to publish meaningful notice at least 180 days before scheduled fuel load, in accordance with 10 CFR 52.103(a).

NEI Position 2

“The NRC will publish in the *Federal Register* the notice of intended operation required by Section 52.103(a). This notice will provide opportunity to request a hearing on matters of ITAAC noncompliance.” NEI Paper at 23.

Staff Response

NEI accurately summarizes the provision of the regulation. As indicated above, the § 52.103(a) notice would be issued at least 180 days before scheduled initial fuel loading.

¹ The Statements of Consideration for the final rule, 54 *Fed. Reg.* 15372 (Apr. 18, 1989), do not describe how the NRC is to obtain this schedule. While the original proposed rule would have required a holder of a COL to apply for authorization of operation (53 *Fed. Reg.* 32060, 32077), the final rule did not retain such a requirement.

NEI comments that “the NRC staff would be expected to inform the Commission regarding the status of ITAAC completion and to publish the required Section 52.103(a) notice—despite the existence of open QAP [Quality Assurance Program] deficiencies or other incomplete activities—provided that the deficiencies and incomplete activities do not impact the determination that the ITAAC have been or will be satisfied before fuel load.” NEI Paper at 25. The staff, of course, will not issue the § 52.103(a) notice unless the Commission delegates authority to the staff to do so. If identified deficiencies do not affect ITAAC determinations, there would be no need to delay issuance of the notice, but the nature of any deficiencies and their significance is a fact-specific matter.

NEI Position 3

“A number of ITAAC are expected to be uncompleted at the time of the Section 52.103 notice. It is expected that the notice will identify those ITAAC for which § 52.99 notices of completion have and have not been issued. To request a hearing on ITAAC completed after issuance of the Section 52.103(a) notice, Section 2.714 provides standard NRC administrative procedures for submittal and consideration of late-filed petitions.” NEI Paper at 23.

Staff Response

Section 52.103(a) provides for a notice of opportunity to request a hearing with respect to certain issues. This notice must be issued at least 180 days before scheduled fuel load, as indicated above, but is independent of any notice issued pursuant to Section 52.99. The notices issued under Section 52.99 are intended only to inform the public of the staff’s conclusions regarding the ITAAC that are the subject of such notices. Notices issued pursuant to Section 52.99 do not convey an opportunity to request a hearing.

Section 52.103(a) incorporates language from Section 189a.(1)(B)(i) of the Act stating that the notice of intended operation shall provide that any person whose interest may be affected by operation of the plant may request a hearing on “whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.” This language explicitly allows the Commission to issue the notice of intended operation before completion of the facility, and, consequently, with incomplete ITAAC. Therefore, NEI’s proposed scenario in which the Commission issues the notice under § 52.103(a) with outstanding incomplete ITAAC is permitted by the Act and the Commission’s regulations.

With respect to identification of incomplete ITAAC in the notice of intended operation, Section 52.103(a) does *not* require such identification. The notice will likely identify sources of information (e.g., NRC’s Public Document Room (PDR), ADAMS, and the NRC website) that provide the status of the application, and information regarding whether ITAAC have been completed or not should be available from these sources. If ITAAC are incomplete when the Commission issues the notice, the staff will likely prepare its own list of ITAAC it believes incomplete, place the list in the public domain, and reference that list, as well as any list prepared by the licensee, in the notice. In view of the above, including this information in the notice of intended operation appears to be unnecessary.

As for NEI’s position on applicability of the late-filing standards in 10 CFR § 2.714, the staff interprets that position to mean that such standards would apply upon the expiration of the 60 day period specified in § 52.103(a) for requesting a hearing. For example, a person could

request a hearing with respect to an ITAAC completed 10 days after issuance of the notice of intended operation under § 52.103(a), and do so well within the 60 day period for requesting a hearing specified in the notice. A person filing a request for a hearing in this manner would not be required to meet the late-filing criteria of § 2.714.

At the same time, a hearing request under § 52.103(a) filed within the allotted 60 days must, to the extent possible, raise issues with respect to ITAAC whether they are complete or not. Specifically, if a person believes that an ITAAC that is not yet complete (i.e., an ITAAC for which the staff has not issued a notice of successful completion under 10 CFR § 52.99) will not be successfully completed, and desires a hearing on that matter, that person must request a hearing during the period specified in the notice. (The petitioner would also need to satisfy the other requirements for requesting a hearing in Section 52.103(b)). In this regard, NEI states that “[a] person should be allowed to file a request for hearing with respect to [ITAAC completed after issuance of the § 52.103(a) notice] within 60 days of the 52.99 notice on the ITAAC.” NEI Paper at 26.

The staff believes that NEI’s proposed procedure is not contemplated by the current regulations, as indicated above, and is unnecessary because the late-filed contention provisions in Section 2.714 adequately address NEI’s concern. If the § 52.99 notice of completion provides information that was not previously available to the public, and that information is an essential portion of a petitioner’s basis for requesting a hearing, the petitioner may well rely on such circumstances to show good cause for late-filing, in accordance with § 2.714. The staff believes that the concern addressed by NEI’s statement that § 52.99 notices of ITAAC completion issued after the § 52.103(a) notice of intended operation should provide an opportunity to request a hearing for the ITAAC covered in the § 52.99 notice is adequately treated under the regulations. Therefore, such § 52.99 notices need not include an opportunity to request a hearing.

NEI also states that the Commission may consider, in deciding whether to grant a request for a hearing, “whether the contention is exempt from adjudication under the Administrative Procedures Act.” NEI Paper at 27; see Administrative Procedure Act (APA), 5 U.S.C. § 554(a)(3). The NRC staff agrees.

NEI Position 4

“Requests for hearing are due in 60 days, at which time the Commission will deny or grant the request. The Commission is obligated to make every effort to resolve issues raised by the hearing requests prior to the scheduled date of fuel load.” NEI Paper at 23.

Staff Response

The regulation in 10 CFR § 52.103(c) requires that the Commission expeditiously either deny or grant a request for hearing after receiving one. In addition, 10 CFR § 52.103(e) indicates that the Commission shall, to the maximum extent possible, render a decision on the issues raised by hearing requests within 180 days of publication of the notice issued pursuant to § 52.103(a), or the anticipated date for initial fuel load, whichever is later. The staff does not interpret NEI’s position as meaning that the Commission do more.

NEI Position 5

"If there are no requests for hearing, none granted, or if all issues raised are resolved before fuel load, the NRC would, upon completion and NRC staff verification of all ITAAC, make the required Section 52.103(g) finding authorizing plant operation, including scheduled fuel load, power ascension testing and full power operations." NEI Paper at 23.

Staff Response

Although the staff agrees with the general thrust of NEI's position, the staff disagrees with some of the particulars stated by NEI. Specifically, as indicated in comments number 30 and 32 in the Staff's Response of June 4, 2002, the COL will likely contain license conditions to control power ascension testing and the commencement of full power operations. The staff also provided a position relative to the process associated with the § 52.103(g) finding in the "Draft 10 CFR Part 52 Construction Inspection Program Framework Document," May 2003 (ADAMS Accession Number ML031400849). Section III.D.4.f of this framework document, "Commission § 52.103(g) ITAAC Finding," states the following:

Before a facility may operate the Commission is required by 10 CFR 52.103(g) to find that the acceptance criteria in the COL were met. Once the licensee has informed the staff that all the ITAAC have been completed, the staff will perform an independent review to ensure that it has received an ITAAC determination letter for each ITAAC and that the staff agrees that all the ITAAC have been met. This independent review could be done by the same team that will perform the operational readiness assessment that is discussed in section III.E.2.b of this report. The [Regional Administrator] will rely on an independent review and the recommendation from the senior NRC site manager to make a recommendation to the Director of Nuclear Reactor Regulation (NRR) stating that all the ITAAC have been met. The Director of NRR will make a recommendation to the Commission that the Commission find that all acceptance criteria in the COL have been met. If the Commission determines that all of the acceptance criteria in the ITAAC for the COL have been met, it will make the finding required under 10 CFR 52.103(g).

In addition, as noted in comment number 28 of the June 4, 2002, staff response, the Commission is free to revisit the staff's § 52.99 determinations. Should the Commission obtain new information casting doubt on the earlier staff conclusions, or determine that there is an unresolved issue needing inspection or evaluation, it could revisit the staff's conclusions.

NEI Position 6

"The Section 52.103(g) finding will be based collectively upon the individual determinations made under Section 52.99. The NRC will not need to perform any new or additional inspections or reviews to make its Section 52.103(g) finding (except as may be necessary to respond to a contention in a Section 52.103 hearing)." NEI Paper at 23.

Staff Response

As noted in the staff response to NEI Position 5, the staff does intend to perform a review to ensure that an ITAAC determination letter for each ITAAC has been received and that the staff agrees that all the ITAAC have been met. There is also the possibility that new and significant information could be received by the staff prior to the § 52.103(g) finding that brings the validity of the § 52.99 conclusions into question. Section III.D.4.e, "Invalidation of Previously Accepted NRC ITAAC Interim Conclusions," of the construction inspection program framework document discusses this possibility and the staff's process for handling such information. The staff also notes that the Commission may reach conclusions different from those of the staff.

NEI Position 7

"If issues are raised that cannot be resolved before fuel load, Section 52.103(c) provides that the Commission shall allow operation for an interim period provided, based on consideration of the outstanding issues, that there would be reasonable assurance of adequate protection of public health and safety." NEI Paper at 23.

Staff Response

Section 52.103(g) requires the Commission to find that all the ITAAC are met before operation of the facility. Section 52.103(c) provides that, if a request for a hearing on the facility's compliance with the ITAAC is granted, the Commission shall determine whether, during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. Section 52.103(c) provides further that if the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period (until the Commission makes a final determination on the issues raised in the hearing) under the COL.

NEI's statement generally parallels the above provisions, through which the Commission may allow interim operation if it does not make the finding required under § 52.103(g) before fuel load, but does not reflect the provisions of § 52.103(d). Section 52.103(d) states that the Commission has discretion to determine the procedures to be used to resolve issues of compliance with the ITAAC in contention in a hearing using appropriate procedures.

NEI Position 8

"[I]n the event there are unresolved hearing issues, the Commission must—in addition to the Section 52.103(g) finding—also make a finding under Section 52.103(c) allowing operation for an interim period." NEI Paper at 24.

Staff Response

The staff disagrees with NEI's position. The Commission cannot make the § 52.103(g) finding if there are unresolved hearing issues. Under such circumstances, the Commission may allow interim operation under § 52.103(c), as discussed above in the staff response to NEI position 7.

NEI Position 9

“As discussed in Section 8, after the Commission makes its Section 52.103(g) finding authorizing fuel load and operation, no further authorization by the NRC is required to proceed to full power and commercial operation. For example, no separate authorization is required to exceed 5% power.” NEI Paper at 24.

Staff Response

See staff response of NEI Position 5, above.

As a final note, NEI includes a diagram of the process. NEI Paper at 28. This diagram is correct to the extent it reflects the above discussion. The diagram, however, is inaccurate in several particulars, but the staff has not attempted to identify all such inaccuracies.

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