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January 4, 2000

Chief, Rules and Directive Branch
Division of Administrative Services
Office of Administration
Mail Stop: T-6 D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Comments of Hopkins & Sutter on the new NRC Reactor Oversight Process (64 Fed. Reg. 40394 and 60244)

Dear Madam or Sir:

Attached is a copy of the comments of Hopkins & Sutter on the new NRC Reactor Oversight Process. These comments were submitted in a timely fashion, electronically, on December 30, 1999. The attached comments are a courtesy copy.

Sincerely,


Daniel F. Stenger

:ldh

Add:
J. O'Brien

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December 30, 1999

Comments of Hopkins & Sutter

In January 1999, the Nuclear Regulatory Commission released SECY-99-007, "Recommendations for Reactor Oversight Process Improvements," and shortly thereafter released SECY-99-007A, "Recommendations for Reactor Oversight Process Improvements." (The NRC also issued NUREG-1649, "New NRC Reactor Inspection and Oversight Program," to facilitate inspection during the test period for the new oversight process at pilot plants.) As a result of concern over the adequacy of time to assess initial program results before providing comments to the NRC, the deadline for public comments on the new oversight process was extended to December 31, 1999 (see 64 Fed Reg. 40394 and 64 Fed. Reg. 60244). In keeping with the extended deadline, Hopkins & Sutter, a law firm that represents a number of nuclear utility companies, submits the following comments on the NRC's new reactor oversight process.

We fully support the NRC's intent to overhaul its oversight process to establish a more objective and predictable process, and to reduce the regulatory burden on licensees. It is clear that the new oversight process seeks to address the subjectivity inherent in the old Systematic Assessment of Licensee Performance (SALP) process through an increased reliance on objective measurable indicators of performance. Preliminary results from the pilot program participants, as well as comments made by licensees in a recent Commission briefing, suggest that the new oversight process is a distinct improvement over the NRC's former oversight processes, but that there are still areas requiring clarification and continued focus. In that regard, we endorse the comments on the oversight process submitted by the Nuclear Energy Institute (NEI).

Key areas for improvement or clarification include: (1) the necessity to assure "buy-in" to the new process throughout the NRC (e.g., training on the new process) and scrutable monitoring of inspector performance; and (2) implications of 10 C.F.R. § 50.9 violations for errors in performance indicator (PI) data.

1. Need for Continued Training and Feedback

The new oversight process is a fundamental change from the NRC's previous programs for plant oversight such as the SALP program. The new process depends much more, as it should, on objective indicators of plant performance. A key purpose of this new more objective process is to reduce regulatory burden on licensees and minimize the NRC's involvement in management of plants and influencing day-to-day station priorities. To accomplish the Commission's goals will require considerable discipline within the NRC.

An oversight process that depends on objective indicators must, of necessity, be based on clear definitions of the indicators being measured. In this regard, licensees participating in the current pilot program at nine sites have expressed concern about a lack of clarity in the definition of some performance indicators, as well as the basis for some thresholds for changing from one band to another. It is our understanding that the NRC is working with the NEI to develop guidance to provide additional clarity. We support this effort and urge the NRC to place a high priority on achieving needed clarification.

Some licensees have questioned whether the Staff is implementing the oversight process consistent with its intent. In addition, while the pilot plants generally believe the new process is a positive change, some pilot plants have yet to witness the expected reduction in regulatory impact. It appears that both of these concerns are related to the newness of the process and the need for "buy-in" at all levels of the NRC Staff. Without question, unless the NRC obtains "buy-in" to this process throughout the organization, implementation of the program will fall short of expectations. The NRC should recognize that achieving "buy-in" will not be a short-term effort, but rather continuing emphasis will be needed, probably over a period of several years, to assure that the new program is accepted throughout the Staff.

As noted above, a key reason for adopting the new oversight process was to reduce regulatory burden by preventing the NRC from dictating the day-to-day priorities at individual plants. This reflects the NRC's desire to shift its emphasis away from the *management* of licensees. Under the new process, licensees are supposed to be free to manage their facilities with risk-based priorities so long as they are in the "licensee response band." Unfortunately, some licensees are seeing "business as usual" with NRC inspectors driving certain priorities. If a licensee is within the "green zone" or licensee response band, then the expectation is that it should have complete discretion over how resources are allocated.

It has been noted that some Region-based inspectors, however, have not "bought into" the new process, as evidenced by efforts to regulate within the green zone - creating a "light green" and "dark green" distinction where inspectors believe there may be an adverse trend or a need for improvement. The growing concern about

the lack of alignment between the inspection Staff (and their immediate supervisors) and the objectives of the new oversight process as defined by senior NRC management is based on more than just anecdotal evidence. Preliminary results from an audit performed by the General Accounting Office (GAO) of the NRC's implementation of the new oversight process point to serious and widespread morale, acceptance, and motivation issues among the NRC Staff, particularly the inspection force. Senior NRC management has no doubt been aware of these issues and has been working on resolving them, but now, given the results of the GAO audit, Senior NRC management should address these problems with a new sense of urgency.

Instilling "behavior change" within the NRC is the key to whether the new oversight process will succeed. For this reason, the NRC should continue training of the entire Staff, including the Regions, with respect to the new oversight process, and effectively communicate NRC management expectations. The NRC should also encourage open dialogue and feedback - without fear of recrimination - by both licensees and Staff, as the pilot program and ultimately the full program are implemented. Licensees must also be able to verify similar accountability on the part of the NRC - e.g., are far more inspections taking place than should be required? One method to make the entire process more scrutable is for the NRC to publish their internal inspector accountability data in a public forum such as the NRC web site much in the same way it is posting initial data reports from the pilot plants. We therefore suggest that the NRC should take steps to make inspector accountability data publicly available.

2. Completeness and Accuracy of PI Data

With respect to 10 C.F.R. § 50.9, licensees are well aware that information provided to the Commission by the licensee must be complete and accurate in all material respects. Therefore, licensees have expressed concern that the short time-frame for submission of PI data creates an increased likelihood of inaccuracies in submitted data, and therefore the potential for enforcement action under Section 50.9. Initially, licensees will be submitting historical data, which was not collected with an understanding of the PI definitions which were yet to come. In addition, licensees attending the recent pilot program workshop were clear about their concerns, and about their recommendation for a longer reporting period (currently, the data are required to be submitted by the 15th of the month following the end of the quarter - some licensees are requesting until the end of that month to better assure quality data submission).

The NRC has indicated that it would be lenient with information submitted in error, provided that information was not intentionally misleading, and that the licensee resubmitted revised data as soon as the data were available to them. The NRC's Enforcement Guidance Memorandum 99-006, "Implementation of the Interim Enforcement Policy for Use During the Reactor Oversight Pilot Program," similarly focuses on willful violations, and errors that are significant enough to cause a change

from one performance band to another. Nevertheless, it does suggest that some minor errors in PI data could constitute violations of Section 50.9 unless enforcement discretion were granted.

In our view, the NRC should establish some specific safeguards to protect against unjust enforcement for unintended errors by licensees, particularly during the initial implementation of the oversight program at all sites. The NRC has offered similar enforcement discretion in its interim enforcement policy, which provides for the exercise of enforcement discretion to address noncompliance with license conditions because of Year 2000 ("Y2K") transition or rollover issues. See 64 Fed. Reg. 41474 (Jul. 30, 1999). Some useful protections/clarifications for licensees implementing the new oversight process would address how the NRC will determine the completeness and accuracy of PI data and the "willfulness" of the licensee error if inaccuracies are found. The NRC should also recognize that uniform definitions do not always exist for certain key factors -- e.g., WANO, INPO and the NRC have all used different definitions of "unavailability" of equipment. This lack of definitional clarity may create differences in how licensees submit information.

Moreover, in determining whether PI data were *materially* inaccurate so as to give rise to a Section 50.9 violation, the NRC should generally only be concerned with errors that would cause a change from one color band to the next (assuming the error was not willful and the licensee promptly took corrective action). If no change in color band would have occurred, it would seem that the error was not "material" for purposes of Section 50.9.

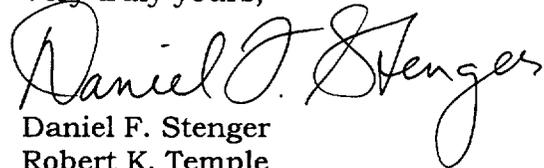
For the future, the NRC should consider the need for revisions to Section 50.9 in light of the new oversight process or, at a minimum, to issue an enforcement guidance memorandum (EGM) to clarify the NRC's position on this matter. At the time it was adopted, Section 50.9 never contemplated a regulatory process that required the submittal of extensive PI data, on which the NRC would base the assessment of plant performance. Accordingly, the NRC should consider revising Section 50.9, or issuing an EGM, to establish more meaningful criteria for evaluating when an error in PI data submitted for the oversight process is a violation of the completeness and accuracy standard.

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Conclusion

The new oversight process holds great promise to be a more predictable and stable process for regulatory oversight, while reducing unnecessary regulatory burden. The comments provided are intended to help improve the process and ensure that the process is implemented as intended. We urge the NRC to continue to refine the process in light of the comments noted above and to continue to exercise diligence in managing the implementation of the new program.

Very truly yours,

A handwritten signature in black ink that reads "Daniel F. Stenger". The signature is written in a cursive style with a large, looped initial "D".

Daniel F. Stenger
Robert K. Temple
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