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January 18, 2000

Secretary
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0002

DOCKET NUMBER
PROPOSED RULE **PR 72**
(64FR 59677)

Subject: 10 CFR Part 72 Proposed Rule: Clarification and Addition of Flexibility
November 3, 1999 (64 Fed. Reg. 59677) Request for Comments

On behalf of the nuclear energy industry, the Nuclear Energy Institute is pleased to provide comments on the NRC's proposed revisions to 10 CFR Part 72, Clarification and Addition of Flexibility, published November 3, 1999 (64 Fed. Reg. 59677).

We commend the staff for initiating this rulemaking to (1) permit Certificate of Compliance (CoC) applicants to begin fabrication under an NRC-approved quality assurance program prior to issuance of the CoC; (2) eliminate repetitive review of container designs issues, and, (3) eliminate the ambiguity in 10CFR72 regarding the applicability of each section to site-specific licensees, general licensees, and certificate holders.

Based on our review, we have the following comments for the staff's consideration.

1. Fabrication Under an NRC-Approved Quality Assurance Program Prior to Issuance of a COC

Industry fully supports the proposed amendment to permit CoC applicants to fabricate spent fuel containers prior to CoC issuance. This flexibility will greatly assist operating plants as they prepare to store fuel in containers where spent fuel pools are running out of space, and will assist permanently shut down plants to empty and decommission their spent fuel pools. This amendment would provide more consistency in that NRC's existing regulatory program already permits specific applicants to fabricate containers under a NRC-approved quality program prior to CoC issuance.

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The practice of fabrication in advance of issuance of a CoC results in no increase in risk to the public because the applicant cannot load containers that do not conform to the CoC. It is recognized that this practice places the applicant at economic risk if the CoC contains changes not considered at the time the container was fabricated.

2. Exclusion of Container Design Issues from Specific Part 72 License Hearings

The industry fully supports the NRC proposal to exclude container design issues from specific Part 72 license hearings. This revision could have the considerable benefits of eliminating repetitive reviews of container design issues whereby the issue would otherwise be considered in the context of a generic rulemaking to approve a container and then be reconsidered in a specific Part 72 hearing.

Two clarifications are needed. First, a clarification is needed to assure that repetitive reviews will in fact be avoided and that the savings of NRC staff and applicant resources estimated by the NRC (see 64 *Fed. Reg.* at 59683) will in fact be achieved. Second, a clarification is needed to ensure the NRC rules provide a clear statement of where and how issues are to be considered so that issues are directed to the most appropriate process. This clear statement of destination will avoid "orphaning" issues.

The first clarification is that the proposed language be revised so that it clearly applies to container designs, which are in the CoC review process, or will be in the review process as well as those that have already received a CoC. The current wording appears to only consider for exclusion from the specific license hearing those "cask designs issues previously addressed by the Commission when it issued the Certificate of Compliance." The practice of deferring issues brought up in individual license proceedings to generic rulemakings provides the added benefits of a broader review in the context of wider input from the different perspectives of multiple users of the generic provision. The Commission and the courts have widely upheld this practice.

From a practical perspective it is not logical to permit redundant review of issues in a specific license hearing merely because the process for the preferred review in the broader generic context has not yet been completed. Further we can envision a specific Part 72 license application that would not be limited to specific container designs but would be open ended to account for additional or new or improved designs for which generic rulemaking to determine compliance with NRC's pre-established acceptance criteria have not yet been initiated.

For containers that have not yet received CoCs, NRC can meet the stipulation in the proposed rule for addressing the interface issues between containers and the site by using the general acceptance criteria for the design issues.

For example, all NRC approved containers must meet certain criteria to demonstrate that they are acceptable for high seismic areas. Containers not specifically certified to high seismic capability in accordance with NRC approved methodology and acceptance criteria could not be deployed at a site with high seismic characteristics. Ample opportunities are provided in the generic rulemaking for the CoC to comment on NRC's finding that the container meets NRC criteria for withstanding high seismic events. And the specific Part 72 hearing provides ample opportunities to provide input on the seismic activity expected at that site.

The second clarification needed for the proposed amendment is a clear statement in the rule that site-specific hearings are not the appropriate forum to raise container design issues, which are purported to be new, or beyond the scope of NRC's consideration of those issues in the generic rulemaking. To avoid the misimpression that these issues are being "orphaned" the preamble to the final rule should stipulate where and how those issues might be raised. For example, if a cask design issue was not adequately addressed in connection with issuance of the CoC, that issue should be raised in accordance with specific processes in NRC's regulations which were crafted to provide discipline to such reviews.

Specifically, Parts 2.206 and 2.802 delineate the processes whereby the Commission determines whether the public or proceedings are served by initiating new proceedings to amend the Commission's rules. Further, Part 2.758 delineates the process whereby the presiding officer of a hearing may determine that the application of the Commission rules or regulations would not serve the purpose for which the rule or regulation was adopted.

3. Ambiguities Regarding the Applicability of Part 72 Requirements

Two clarifications are needed to eliminate the ambiguity in 10 CFR Part 72 regarding the applicability of each section to site-specific licensees, general licensees, and certificate holders.

The first clarification applies to proposed section 10CFR72.13, which lists those sections in Part, 72 that apply to general licensees. Part 72 allows general licensees to store spent fuel in containers approved under the provisions of Part 72. The containers approved for use by general licensees are listed in 10CFR72.214. Proposed 10CFR72.13 does not include 10CFR72.214. We believe that ambiguity would remain in Part 72 if 10CFR 72.13 does not reference the section listing containers that can be utilized by general licensees.

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The second clarification also addresses 10CFR 72.13. Section 10CFR72.240(a) allows the user of a container approved by the NRC to apply for a container model re-approval as an alternative to application by the certificate holder. Since general licensees are the cask users, we believe 10CFR72.240 should also be listed in 10CFR72.13 as applicable to general licensees.

We appreciate the opportunity to comment on revisions to 10 CFR Part 72 "Clarification and Addition of Flexibility." If you have any questions please contact me at (202) 739-8110 or by e-mail (lxh@nei.org), or Alan Nelson at (202) 739-8110 or by e-mail (apn@nei.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Lynnette Hendricks".

Lynnette Hendricks