

DOCKET NUMBER

PETITION RULE PRM 72-5
(65FR36647)

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NUCLEAR ENERGY INSTITUTE

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August 23, 2000

Ms. Annette L. Vietti-Cook
Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

**Re: Comments on Petition for Rulemaking, Docket No. PRM-72-5;
Proposed Modifications to the NRC Process for Spent Fuel
Storage Cask Certification**

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI)¹ offers the following comments on the subject Petition for Rulemaking in the Nuclear Regulatory Commission's (NRC) Docket No. PRM-72-5. This docket was established by the NRC in response to NEI's letter of April 19, 2000, regarding the NRC's ongoing activities to streamline the process for issuing and amending certificates of compliance (CoC) for spent fuel storage casks for use under the general license provisions in 10 C.F.R. Part 72. NEI's letter was intended to

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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inform the NRC about the nuclear industry's views on the benefits of the NRC's adoption of a streamlined process for issuing and amending CoCs. NEI's letter described the basic elements and criteria to be applied as part of a new approach for the cask certification process. The following comments supplement the proposal described in NEI's April 19, 2000 letter, which is being treated as a Petition for Rulemaking in this docket.

Overview of Proposed Alternative CoC Process

NEI proposed an alternative CoC process that is consistent with the NRC's policy of focusing NRC and licensee resources on potentially safety-significant issues. Consistent with this policy, NEI proposed an alternative CoC process that would eliminate the diversion of limited resources to formalistic rulemaking procedures. Over the past 10 years, the NRC has conducted approximately a dozen rulemakings for initial certification of spent fuel storage casks and two rulemakings for amendments of existing CoCs. Such a large commitment of resources to rulemaking proceedings is no longer necessary in view of the substantial body of experience gained by the NRC and the industry with the approval of cask designs and the generally limited safety significance of the issues. The NRC has already approved 12 different spent fuel storage cask designs under Part 72, and there are some 185 storage casks loaded at 14 reactor sites as of July 2000.

In light of this experience, NEI proposed that the NRC should discontinue its use of notice and comment rulemaking to issue or amend CoCs. In place of rulemaking, a streamlined process for the NRC's consideration of applications for new CoCs and amendments to existing CoCs would be adopted by the NRC. The streamlined process would involve issuing and amending CoCs by order rather than rulemaking. A conforming change would also be made by deleting 10 C.F.R. 72.214, the list of CoCs, from 10 C.F.R. Part 72.

In brief, the process that NEI envisions would have the following elements:

- With respect to applications for initial CoCs, the NRC would publish in the Federal Register a Notice of Receipt and Availability of the application. Following Staff review, a draft CoC along with the NRC's Safety Evaluation Report would be prepared and a notice would be published in the Federal Register allowing a 60-day public comment period. New CoCs would not become effective until after the NRC had evaluated the public comments and published in the Federal Register a notice of its safety findings and an order granting the CoC.

- Criteria would be established by the NRC for determining whether proposed amendments to existing CoCs have or do not have the potential for a significant impact on public health and safety. The specific criteria for this determination and examples of various types of amendments that are likely or not likely to present such potential impacts were set forth in NEI's April 19, 2000 letter and Attachment 3 thereto. Notice of applications for amendments to existing CoCs would be published in the Federal Register for a prior 60-day comment period unless the applicant determined and the NRC agreed that the amendment met the no significant potential impact criteria.
- CoC amendments for which the NRC agreed with the applicant's determination of no significant potential impacts would become effective upon the NRC's publication of that conclusion in the Federal Register. Nevertheless, the NRC's Federal Register notice would solicit public comment on the amendment and no significant impact determination. In this regard only, the process would be analogous to the NRC's Sholly process for issuing reactor operating license amendments in advance of any proceeding upon finding that the amendment involves no significant hazards consideration.²
- All CoC amendments which do not satisfy the no significant potential impact criteria would be subjected to a 60-day prior comment process. Accordingly, such amendments would not become effective until after the NRC had evaluated the public comments and published in the Federal Register the results of that evaluation and the NRC's regulatory findings.
- All initial CoCs or amendments to existing CoCs would be issued by legally binding order by the Director, Nuclear Material Safety and Safeguards.

To implement this proposed alternative process, the NRC would amend Part 72 to incorporate generic procedures, based on the above principles, for issuing and amending CoCs, together with the criteria to determine whether a CoC amendment would have a significant potential impact on public health and safety. As part of the amendment to Part 72, the existing Section 72.214, "List of Approved Spent Fuel Storage Casks," would be deleted.

² As described more fully below, however, the process being proposed by NEI would not imply that a CoC is a license.

NEI's proposal would continue to provide for the current level of public participation in the NRC's process for considering new CoCs and CoC amendments that raise potential safety issues. The NRC would retain the same level of regulatory authority by issuing all new CoCs and amendments to CoCs by order. Accordingly, this new process appropriately enables the NRC to focus its limited resources on safety significant issues, preserves the valuable aspects of notice and comment associated with rulemaking, and maintains the NRC's legal authority, while eliminating the unnecessary burdens of the current practice of listing CoCs in 10 C.F.R. 72.214 by rulemaking.

Reasons for the Proposed Changes

NEI supports the NRC's adoption of a streamlined CoC process to avoid the current and future adverse impacts that result from the lengthy notice and comment rulemaking process currently used for issuing and amending CoCs. Not only does the current process waste resources, it has become unnecessary in view of the extensive experience gained by the NRC with issuing and amending CoCs. The current process also is likely to become a substantial impediment in the future to the orderly certification and deployment of dry spent fuel storage, a result that may adversely affect plant operations. As NEI noted in its April 19, 2000 letter, by the year 2005, as many as 50 plants will require dry cask storage to continue operating or to proceed through decommissioning. Moreover, as licensees increasingly utilize new fuel designs and higher burnup fuel, and as vendors modify cask designs to accommodate minor differences in cask contents unique to particular plants, the number of CoC amendments is expected to rise substantially.³ In fact, by 2001, the fuel discharged from operating plants will exceed the maximum licensed burnup limits of current casks. Although the changes in spent fuel characteristics do not result in substantial safety concerns, the continued application of unnecessary notice and comment rulemaking procedures could inhibit cost-effective alternative fuel use options and impede plant operations if the regulatory process is not capable of dealing with a large number of amendments on a timely basis.

The current process could thus frustrate the intent of Congress, expressed in the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), to expedite the availability of dry storage options at reactor sites. Congress recognized in Section 131 of the NWPA that "the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage

³ Indeed the NRC Spent Fuel Project Office has indicated that in Fiscal Year 1999 there were a total of 133 Part 72 licensing actions, compared with 42 in FY 1997.

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capacity at the site of each civilian nuclear power reactor” 42 U.S.C. 10151(a)(2). The adoption of a more efficient and timely process will implement the intent of Congress by helping to ensure that plants can continue to operate.

Indeed, the Commission, recognizing these concerns, has already directed the Staff to proceed with plans to simplify the process for amending a CoC without rulemaking.⁴ The NRC's Spent Fuel Project Office (SFPO) has already adopted specific improvements to its rulemaking procedures for CoCs, such as eliminating the need for a rulemaking plan and authorizing the Executive Director for Operations to issue new rules. These improvements have somewhat reduced the time required to complete CoC rulemakings. Nevertheless, for the reasons discussed above, a more fundamental change that substantially reduces the time needed to approve CoCs and amendments is required.

NEI's proposal for an appropriate regulatory process furthers the NRC's policy of focusing limited regulatory resources on safety significant actions and preserves the public's ability to participate meaningfully in the regulatory process. The extensive experience gained with the issuance of CoCs and amendments to them demonstrates that the dry spent fuel storage technology has matured to the point where there generally are no new or significant safety issues associated with storage cask designs. This experience also shows that the NRC's regulations in Part 72 relating to CoCs provide reasonable assurance of adequate protection of public health and safety. Finally, the experience with the current process also shows that notice and comment rulemaking is unduly cumbersome, costly and time-consuming.

The Alternative Process Satisfies the Commission's Four Criteria for Regulatory Reform

To ensure that the NRC's transition to a more risk-informed, performance-based regulatory philosophy is implemented consistently in all areas of NRC regulatory responsibility, the Commission has established four criteria for evaluating proposed changes to regulatory requirements. The four criteria are: (1) maintain safety; (2) maintain public confidence; (3) improve the efficiency and effectiveness of regulation; and (4) reduce unnecessary regulatory burden. All four of these criteria are clearly met by the alternative process that the industry recommends for the issuance of new CoCs and amendments to existing CoCs. A demonstration of how these criteria are met follows.

⁴ Staff Requirements Memorandum on SECY-99-069 (April 1, 1999).

- (1) Maintain Safety.** Safety is clearly maintained by the alternative CoC process. For requests for new CoCs and CoC amendments, the current substantive safety requirement in 10 C.F.R. Part 72 will still apply fully. No new CoC or CoC amendment will be issued unless the substantive safety standards of Part 72 are fully met as they must be met now. Removal of the legalistic formalities of the notice and comment rulemaking process for listing CoCs initially granted and for each subsequent amendment and deletion of the list of CoCs from Part 72 will have no effect on the NRC's substantive regulatory decisions. As for the CoC amendments that satisfy the no significant potential impact criteria, those CoC amendments will still be fully subject to the substantive safety standards of Part 72. Moreover, the no significant potential impact criteria will be subject to public scrutiny through promulgation by notice and comment rulemaking to amend Part 72 to incorporate the new generic process. Thus, all proposals for new and amended CoCs will be subjected to appropriate safety criteria under Part 72, which will maintain the current level of safety.

Moreover, by issuing CoCs and CoC amendments by order, the NRC will retain the full measure of legal control that is provided now by issuing CoCs as the outcome of a rulemaking. It is well recognized that agencies may act by rule or by order. It is also well recognized that the procedural differences between rules and orders do not translate into differences in the extent of the NRC's regulatory authority. Orders and rules are both legally binding. The NRC can thus enforce orders to the same extent as rules in order to protect public health and safety. Thus, discontinuance of rulemaking and reliance on orders maintains safety.

- (2) Maintain Public Confidence.** Public confidence will clearly be maintained by the alternative process. Public confidence comes from a transparent, scrutable regulatory process in which the public has an opportunity to participate in a meaningful way. The alternative CoC process includes all of these elements. Indeed, from the public's perspective, there will be no change in the regulatory process because notice and the opportunity to comment will be preserved for all new CoCs and for all CoC amendments. The only change is that prior comment will be appropriately reserved for those CoC amendments that have the potential for a significant safety impact.

The new process is transparent because all the NRC's regulatory actions will still be taken in public. The new process is scrutable because all the NRC's regulatory actions will be explained in public and the NRC will establish by rulemaking the criteria for determining whether a proposed CoC amendment

presents a significant potential impact. The NRC will still respond publicly to public comments on requests for CoCs and CoC amendments published in the Federal Register. The NRC will explain how the no significant potential impact criteria were satisfied for CoC amendments which are found by the NRC to satisfy those criteria. The NRC's Safety Evaluation Reports will explain the technical basis for approving CoCs or CoC amendments.

The public will still be able to participate in the CoC issuance and amendment process in a meaningful way. For those CoC amendments that do not involve a significant impact on the public health and safety, the public will be provided an opportunity to comment on issuance of the CoC amendment upon publication of the Federal Register notice granting the CoC amendment. For initial CoCs and all other CoC amendments that the NRC determines may involve a significant impact on public health and safety, the public will be provided the same opportunity to comment on the proposed action as currently provided by rulemaking proceedings. Thus the new process will allow the NRC to focus in an orderly and disciplined manner on those CoC amendments that may have safety significance. For all these reasons, the alternative process satisfies the NRC's criterion of maintaining public confidence.

- (3) Improve Efficiency and Effectiveness of Regulation. Efficiency and effectiveness of regulation will clearly be improved by the alternative CoC process. The costs and delays of notice and comment rulemaking, which add nothing to the quality of the substantive safety evaluation, will be appropriately eliminated. Regulatory decisions by the NRC will be made in a structured manner and on a prescribed timetable that maintains adequate consideration of the safety issues involved by focusing resources on the technical matters presented. By eliminating delay and the diversion of industry and NRC resources to formalistic procedures which do not add to the quality of the regulatory decision, the NRC will have saved resources which can be applied to the cost-effective processing of the expected increase in requests for CoC amendments. Accordingly, this alternative CoC process satisfies the NRC's criterion of efficiency and effectiveness and furthers the paramount purpose of the NWPA to expedite the availability of dry storage capability.
- (4) Reduce Unnecessary Burden. The alternative process clearly reduces unnecessary regulatory burden in two ways. First, as discussed above, the new process removes the burdensome aspects of rulemaking which are unnecessary because they do not add to the quality of the regulatory decision. Second, as also discussed above, the new process identifies the CoC

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amendment requests which do not present significant potential impacts and subjects those amendment requests to a suitably streamlined review and approval process. Therefore, the alternative process meets the NRC's criterion of reducing unnecessary burden.

NEI's Proposal is Consistent with Legal Requirements

NEI has suggested that the NRC adopt a streamlined procedure that recognizes the legal nature of a CoC. As the United States Court of Appeals for the Sixth Circuit stated in Kelley v. Selin, 42 F.3d 1501, 1518 (6th Cir. 1995), "certification of designs is not identical to the grant of a general license. Certification is a narrower procedure that approves designs in theory while the grant of a license is a broader form of permission." A CoC is the NRC's approval of a cask design as acceptable for use by licensees at reactor sites under a general license. Certification, therefore, is a narrower process than the grant of a license, which, as the court stated, is a broader form of permission. This fundamental difference in the scope of authority between a CoC and a license was recognized in Kelley v. Selin as resulting in correspondingly different procedural requirements for the issuance of a CoC and a license.⁵

A license may be issued by adjudication or rulemaking. A CoC, because it provides a lesser scope of authority than a license, may, therefore, be issued through a correspondingly less formal process. In this regard, the NRC has broad discretion to fashion an appropriate procedure. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

In NEI's view, the appropriately less formal process which meets the needs of the NRC, the nuclear industry, and the public is a modified process of public notice in the Federal Register, coupled with an opportunity for the public to comment on any proposal for a CoC or amendment to a CoC. Under this alternative, all that is removed is the needless formality of issuing a final rule. CoCs would be issued by orders by the Director, Nuclear Material Safety and Safeguards. Holders of CoCs would therefore still be legally bound to the conditions on their CoCs, and modifications to CoCs would still be subjected to appropriate safety criteria, but without the delay inherent in the formal

⁵ In Kelley v. Selin, the court found that because the CoC was added to the NRC's rules by rulemaking, Section 189.a of the Atomic Energy Act applied. Nevertheless, the court held that the notice and comment procedures used to certify the cask design in that case fully satisfied the procedural requirements of Section 189.a.

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rulemaking process. Where an amendment to a CoC would not have the potential to significantly affect public health and safety, the amendment would become effective upon publication in the Federal Register based on the NRC's review in accordance with Part 72. In that case, the NRC would still provide an opportunity for the public to comment on the amendment.⁶

In 1990, rulemaking was considered to be the appropriate process for issuing and amending CoCs because rulemaking provides an opportunity for all interested stakeholders to address the purely generic issues associated with approval of a cask design, while avoiding the more rigid structure of the adjudicatory hearing process which traditionally has been used to address site-specific issues. However, it should be recognized that the previous reliance on rulemaking might have been appropriate when the scope of safety issues associated with the issuance and amendment of CoCs was unknown. The experience of ten years of rulemaking and issuance of CoCs for 12 different cask designs has shown that a formal rulemaking process is no longer necessary.

Alternatives to rulemaking are not limited to only adjudicatory hearings, but rather, as discussed above, include a lesser process that is legally appropriate, consistent with the limited scope of authority conferred by a CoC. Thus, NEI's proposed alternative need not and should not result in adjudicatory hearings. The issuance or amendment of CoCs by orders, coupled with notice and opportunity to comment, is legally adequate and appropriate for considering the types of safety issues presented.

A modified notice and comment process which does not result in rulemaking also is consistent with the Nuclear Waste Policy Act. Three provisions of the NWPA apply to the regulatory aspects of dry cask storage which are the subject of NEI's petition: (1) Section 218(a), regarding demonstration and cooperative programs for storage of spent nuclear fuel; (2) Section 133 regarding licensing procedures for interim at reactor storage of spent fuel; and (3) oral argument in any licensing hearing for the expansion of facilities for the on-site storage of spent fuel. As the following review of these NWPA provisions shows, the limited modifications which NEI has proposed for

⁶ This change would create for general licensees under Part 72 a process similar to that for specific licensees for Independent Spent Fuel Storage Installations ("ISFSI"). For specific licenses, Section 72.46(b)(2) provides that the Director, Office of Nuclear Material Safety and Safeguards, or his designee, may dispense with notice of a proposed amendment to an ISFSI license and "take immediate action on an amendment . . . upon a determination that the amendment does not present a genuine issue as to whether the health and safety of the public will be significantly affected."

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the NRC's current rulemaking process are consistent with the NWPA and Congress's intent to expedite the availability of dry cask storage.

Section 218(a) of the NWPA authorizes the Department of Energy ("DOE") to support the development of technologies for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites. Section 218(a) also authorizes the NRC to approve such technologies by rule. Section 218(a) does not apply to specific applications of that technology at particular nuclear power reactor sites. The use of rulemaking under Section 218(a) was explicitly adopted by Congress to avoid "to the maximum extent practicable, the need for additional site-specific approvals by the Commission." These directions to the NRC were adopted by Congress in recognition of the need for a process which results in the timely establishment of dry cask storage capabilities.

Section 218(a) is limited by its terms to a DOE demonstration program. The direction of Section 218(a) for the NRC to proceed by rulemaking does not apply to the NRC's regulation of dry cask storage because the regulatory process is not being applied to technologies developed with DOE's support under such a demonstration program. Nevertheless, Congress's concern about the timely availability of additional spent fuel storage capacity applies equally to dry cask storage developed in the private sector. Accordingly, an NRC regulatory process which avoids the need for site-specific rulemaking to approve of dry cask storage, to the maximum extent practicable, is consistent with the intent of Congress to address a pressing national need.

Section 133 of the NWPA directs the NRC to establish, by rule, procedures for the licensing of either technology approved by the NRC under Section 218(a) of the NWPA or used at the site of any civilian nuclear power reactor. The NRC has established such procedures by a comprehensive set of rules in 10 C.F.R. Part 72. In particular, 10 C.F.R. Part 72, Subpart K authorizes use of approved storage casks under a general license and 10 C.F.R. Part 72, Subpart L establishes the NRC's criteria for approving cask CoCs.

Section 133 of the NWPA provides the NRC with ample authority to adopt the procedures it deems appropriate to govern the approval of spent fuel storage casks, consistent with the overriding intent of Congress to expedite the availability of dry storage capability. Pursuant to Section 133, the NRC may conduct a rulemaking to modify the current process for issuing or amending CoCs. In the Petition for Rulemaking, NEI has suggested only that the comprehensive regulatory requirements of Part 72 be modified slightly by conducting a rulemaking to codify the new process for issuance and amendments of CoCs and thereby eliminate the NRC's current practice of undertaking full notice and comment rulemaking. All other substantive and

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procedural aspects of the comprehensive set of rules in Part 72 would be retained. Thus, consistent with Section 133 of the NWPA, the NRC would be proceeding by rule to modify the rules that had been adopted previously under Section 133 to establish the CoC regulatory procedures. Nothing in Section 133 of the NWPA suggests that such a modest revision to the rules would be inconsistent with the NRC's authority under the NWPA.

NEI's proposal is also consistent with Section 134(a) of the NWPA. Section 134(a) applies only where the NRC holds a licensing hearing under Section 189.a of the Atomic Energy Act (AEA) on an application for a license to expand spent fuel storage capacity at the site of a nuclear power reactor. In that case, a party to that proceeding may request an oral argument on any matter in controversy, and the NRC must provide such a hearing on any matter which the NRC determines to be in controversy. This provision does not apply to the amendments requested by NEI for the following reasons.

First, because the NRC's current practice does not require such an opportunity for oral argument, the proposed modification also would not provide an opportunity for oral argument. The NRC's current practice of not offering an opportunity for oral argument implies that the NRC has interpreted Section 134(a) as not applying to either the issuance of a CoC as the result of a rulemaking proceeding or to the issuance of a general license for the on-site storage of spent fuel. Such an interpretation would not be modified by the minor change to the generic approval process for CoCs suggested by NEI. Nothing about NEI's proposed change would affect the generic nature of the NRC's regulatory actions or so alter the current regulatory regime as to cause Section 134(a) to become applicable to the issuance or amendment of a CoC.

Second, the totality of Section 134(a) implies that it was intended to apply only to situations in which the NRC had determined to conduct an adjudicatory hearing on a site-specific license to authorize on-site independent spent fuel storage. This implication follows from the references in Section 134(a) to parties and to discovery under the NRC's rules of practice. Any other interpretation would constitute a substantial limitation on the NRC's long-recognized authority to proceed by rule or by some other process when the NRC determines that such rulemaking or other process is appropriate. Had the Congress intended such sweeping changes to the NRC's authority, the Congress would not have explicitly authorized the NRC to proceed by rule in Sections 133 and 218(a) of the NWPA. Accordingly, because Section 134(a) does not apply to the NRC's current process for cask certification, it would equally not apply to the slightly modified process proposed by NEI because nothing in that modified process would result in an adjudicatory hearing.

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Finally, Section 134(a), by its terms, applies only when the NRC proceeds under Section 189.a. of the AEA. For the reasons discussed above, the NRC need not proceed under Section 189.a of the AEA to issue or amend a CoC. Because a CoC has been recognized legally as something less than a license, no license proceeding of any kind needs to be conducted by the NRC to issue a CoC. Accordingly, if the NRC adopts NEI's proposal to no longer apply the legalistic aspects of notice and comment rulemaking to the issuance or amendment of a CoC, the NRC's process related to CoCs would not be subject to Section 189.a of the AEA and, therefore, would not be subject to Section 134(a) of the NWPA.

Conclusion

The alternative regulatory process described in NEI's Petition for Rulemaking provides an appropriate risk-informed, performance-based alternative to the cumbersome notice and comment process currently applied to the consideration of applications for new CoCs and amendments to existing CoCs. This alternative clearly will satisfy the Congress's direction and intent in the NWPA, will be consistent with the Commission's four criteria for regulatory reform, and will enable the NRC to deal effectively with any real safety issues raised by applications for CoCs and CoC amendments. Accordingly, the NRC should proceed to rulemaking to adopt this alternative process.

Sincerely,



Lynnette Hendricks

Cc: Karen D. Cyr, General Counsel