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U.S. Nuclear Regulatory Commission  
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Alexandria, Virginia 22304

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Secretary, U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attn: Rulemaking and Adjudications Staff



### 10 CFR 72 Clarification and Addition of Flexibility, Final Rule

The NRC issued a final rule, 10 CFR Part 72, Clarification and Addition of Flexibility, in the Federal Register (Vol. 65, No. 162) on August 21, 2000. Virginia Power had commented on the proposed rule in a December 17, 1999 letter. Our comment pointed out an apparent discrepancy between what the NRC had previously stated in a November 12, 1998 letter to Virginia Power and what §72.180 requires concerning the applicability of §73.51 to site specific licensees. The NRC's November 12, 1998 letter had stated that §73.51 was not applicable to the North Anna or Surry ISFSIs. 10 CFR 72.180 clearly states that §73.51 applies. We had previously discussed this concern with the NRC during an ISFSI status meeting on May 4, 1999.

The NRC's response to Comment A.1 in the Summary of Public Comments on the Proposed Rule stated that §73.51 does not apply to those ISFSIs that are collocated at an operating reactor site, and that the physical protection measures for those ISFSIs are implemented through §73.55. This appears to be a new requirement for ISFSIs with a site specific license. It provides different security requirements for ISFSIs based on the location of the facility and directly conflicts with license conditions for site specific licensees, the applicability section of §73.51, Subpart H of Part 72 (specifically §72.180), as well as other comments in the supporting discussion for this final rule. The final rule appears to implement an unevaluated backfit for all site specific licensees that are collocated with an operating power reactor.

License conditions for both North Anna and Surry ISFSIs require that Virginia Power comply with 10 CFR 72, Subpart H. 10 CFR 72.180 is part of Subpart H and was revised as part of the final rule issued in the May 15, 1998 Federal Register. This section currently states that "The licensee shall establish, maintain, and follow a detailed plan for physical protection as described in §73.51 of this chapter." Therefore, the North Anna and Surry ISFSI license conditions require that the ISFSI security plans comply with 10 CFR 73.51. In addition, the Surry ISFSI SER dated May 1986 and the North Anna ISFSI SER dated June 30, 1998 state that the NRC found that Part 72 Subpart H was satisfied.

As stated in Subpart H of Part 72, the applicability section of §73.51, and the supporting discussion for the subject final rule, site specific licensees are required to comply with §73.51 for physical security measures (not §73.55). 10 CFR 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," applies to power reactors and is required to be followed by licensees storing spent fuel at an ISFSI under a Part 72 general license, with some specified exceptions, but is not applicable to site specific licensees as described in Part 72. In fact the new rule

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adds §72.13(b) to specifically state that §72.180 (which requires security plans to be consistent with §73.51) applies to site specific licensees.

The proposed rule for §73.51 was issued in the Federal Register on August 15, 1995. The proposed rule stated that it would apply to licensees who stored spent fuel under a Part 72 specific license at an ISFSI, a monitored retrievable storage (MRS) installation or a nuclear power reactor that had permanently ceased reactor operations licensed pursuant to Part 50. In contrast, the final rule for 10 CFR 73.51 deleted the applicability to nuclear power reactors.

The NRC's response to comment A.1 also stated the NRC's practice has been that a specific Part 72 licensee, who is also a Part 50 license holder does not have to comply with the security plan requirements of §73.51. This was based on a quote from the supporting discussion for the May 15, 1998 final rule that established §73.51. That quote was "The Commission notes that a licensee having a Part 50 license does not fall within the scope of the final rule [on §73.51] ..." This quote was incomplete and thereby misapplied and out of context.

The complete quote from the supporting discussion is "The Commission notes that a licensee having a Part 50 license does not fall within the scope of the final rule. The commission believes it is premature to bring these licensees under the provisions of the final rule because continued protection for spent fuel in storage pools at Part 50 sites is currently under study by the NRC." This quote is repeated again in the supporting discussion, then later shortened to the first sentence. Therefore, it contextually appears that "a licensee having a Part 50 license" is referring to Part 50 licensees that stored spent fuel in pools which were removed from the applicability of the rule during issuance of the final rule, and not Part 72 specific licensees. Part 72 specific licensees are licensed such that they could operate the ISFSI totally independent of Part 50 regardless of their location, which makes the location of these facilities irrelevant.

Furthermore, the new rule appears to be inconsistent with Section III of the §73.51 supporting discussion (May 15, 1998), Summary of Specific Changes Made to the Proposed Rule as a Result of Public Comment. This section stated that it was an acceptable alternative to use the hardened alarm station sited at an adjacent operating power reactor instead of having a hardened alarm station within the protected area of the ISFSI. Therefore, it appeared that the rule applied to ISFSIs sited adjacent to a power reactors.

Based on the NRC's discussion supporting the new rule that §73.51 does not apply to site specific licensees collocated with an operating power reactor, and since §73.55 was not written to apply to site specific ISFSI licensees, there appears to be no requirements in Parts 72 or 73 that delineate specific physical security requirements for site specific licensees collocated at an operating power reactor. The NRC's November 12, 1998 letter stated that the North Anna and Surry ISFSI security requirements were those contained in the NRC approved security plan, and that the staff was proposing rulemaking for clarification. It should be noted that this letter did not mention §73.55. The consequences

of this position is that the lack of regulatory requirements in Part 73 for site specific ISFSIs collocated with an operating power reactors inhibits a licensees' ability to make changes to their security plan without prior NRC approval. 10 CFR 72.186 allows licensees to make such changes if the safeguards effectiveness is not decreased. Generic Letter 95-08 clarifies that a plan change does not "decrease the effectiveness" of the plan if the change does not decrease the ability of the physical protection system or organization as described in regulation. However, if the only basis for compliance is an approved ISFSI security plan, no change can be assessed for a reduction of effectiveness, since any change could constitute a reduction in effectiveness. Generically, the measure of the "decrease in the effectiveness" is directly tied to the compliance with regulation.

As we assess implementation of the final rule, we conclude that the physical security requirements for the ISFSIs appear to have been significantly upgraded to those that are contained in §73.55 without the appropriate backfit analysis as required by §72.62. This rule change affects all site specific licensees that are collocated with an operating power reactor. We request that the NRC reevaluate the Part 72 final rule issued in the August 21, 2000 Federal Register. We believe that since §73.55 applies to operating power reactors, these requirements are not appropriate for a site specific ISFSI. We believe that the appropriate level of security for all site specific licensees is §73.51, as currently stated in the applicability section of §73.51 and our current Part 72 licenses. We specifically request that NRC reevaluate the new rule, and if the current position is maintained that the NRC perform the obligatory backfit analysis prior to enforcing this new rule.

If you need further information, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. Renz', with a large, sweeping flourish extending to the right.

William F. Renz, Acting Manager  
Nuclear Licensing and Operations Support