

RULEMAKING ISSUE NOTATION VOTE

June 21, 2001

SECY-01-0110

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: INITIATION OF NRR-SPONSORED RULEMAKING: ASME BPV AND OM
CODE CASES

PURPOSE:

To obtain Commission approval to proceed with rulemaking to amend 10 CFR 50.55a, "Codes and Standards," in accordance with the attached rulemaking plan, Option 1. This rulemaking will amend NRC regulations in Section 50.55a of Part 50 to Title 10 of the *Code of Federal Regulations* (10 CFR 50.55a) to incorporate by reference the regulatory guides (RGs) that address the use of code cases prepared for the American Society of Mechanical Engineers (ASME) *Boiler and Pressure Vessel Code* (BPV Code) and the ASME *Code for Operation and Maintenance of Nuclear Power Plants* (OM Code).

BACKGROUND:

New editions of the ASME BPV and OM Codes are issued every 3 years and addenda to the editions are issued annually. It has been the Commission's policy to update 10 CFR 50.55a to incorporate the ASME Code editions and addenda by reference. Section 50.55a was last amended on September 22, 1999, to incorporate by reference the 1995 edition of these codes, up to and including the 1996 addenda (64 FR 51370). Code cases, which are published quarterly, are generally alternatives to the requirements of the ASME BPV Code and OM Code. It has been the NRC staff's practice to review these code cases and find them either acceptable, conditionally acceptable, or unacceptable for use by NRC licensees. These code cases are then listed in periodically revised RGs, together with information on their

CONTACT:

Harry Tovmassian
NRR/DRIP/RGEB
301-415-3092

acceptability. Footnote 6 to 10 CFR 50.55a refers to the RGs listing code cases determined by the staff to be “suitable for use.” No specific date or version of the RGs is indicated in Footnote 6. In past practice, these RGs have not been approved by the Office of the Federal Register (OFR) for incorporation by reference in the *Code of Federal Regulations*.

DISCUSSION:

Because the current practice of generally referencing the RGs addressing ASME Code cases in Footnote 6 to 10 CFR 50.55a may not fully satisfy the notice and comment provisions of the Administrative Procedure Act (APA), the staff is proposing to include these Code cases in the Commission’s regulations by formally incorporating the RGs by reference. The staff intends to obtain approval from the OFR to incorporate the RGs addressing ASME Code cases by reference. The formal requests will be made when the proposed and final rules are forwarded to the OFR for publication in the *Federal Register*. OFR guidance on incorporation by reference states that, absent unusual circumstances, publications prepared by a Federal agency are not eligible for incorporation by reference. However, the staff believes that unusual circumstances exist in this case. In particular, the large number of code cases that must be listed and the number of modifications, limitations and exceptions to the code cases that must be published as part of the endorsement would add considerably to the bulk of 10 CFR Part 50. Furthermore, there is no other list of ASME Code cases with applicable modifications, limitations, and exceptions that could be incorporated by reference in lieu of the RGs. On January 30, 2001, the staff and OGC met with Mr. Michael White, a senior attorney from the OFR, to obtain the OFR’s preliminary views on the staff’s proposal. Based on these discussions, the staff believes that the OFR will find that extraordinary circumstances exist in this case and will approve the RGs for incorporation by reference.

The NRC staff requests authorization to initiate the proposed rulemaking to incorporate by reference the RGs addressing the ASME Code cases in 10 CFR 50.55a and to remove the general reference to those RGs in Footnote 6 of 10 CFR Part 50. This would formalize a code case approval process that has been used for over twenty years. The rulemaking plan is attached.

Over the past several years, NRC licensees have expressed concern that the NRC process for reviewing and approving code cases is slow and, therefore, they have the additional burden of submitting relief requests to use code cases not yet approved. To improve the efficiency of the process for endorsement of ASME Code cases, the staff plans to proceed as follows for this and future updates, unless otherwise directed by the Commission. First, the staff will review code cases and revise the RGs periodically to indicate code cases approved for use by NRC licensees. (This is simply a continuation of past practice.) The staff will issue the draft RGs for comment, and will respond to the comments prior to issuance of the final RGs. Second, the staff will conduct rulemaking to incorporate the revised RGs by reference into 10 CFR 50.55a. The staff will complete each rulemaking within a short time of the issuance of the applicable final RGs. Where these rulemakings do not involve significant questions of policy, I plan to authorize them in accordance with the rulemaking authority delegated under NRC Management Directives 6.3 and 9.17. To expedite the issuance of subsequent rules, the staff will conduct such routine rulemakings without preparing a specific rulemaking plan. The need to conduct

these rulemakings is determined strictly by the schedule for revision of the associated RGs. I believe that these actions will expedite the NRC process for reviewing and approving ASME Code cases.

RESOURCES:

The staff estimates that approximately 1.0 FTE of staff resources will be expended on this rulemaking. The resources are included within the current budget for FY 2001 and FY 2002. Resource requirements related to review of ASME Code cases and preparation of the applicable RGs have been evaluated and approved in the current budget by a separate process.

COORDINATION:

The Office of the General Counsel has no legal objection to the rulemaking plan.

The Office of the Chief Financial Officer has reviewed the rulemaking plan for resource implications and has no objections.

RECOMMENDATIONS:

It is recommended that the Commission:

1. Approve
 - a. The staff's recommendation to proceed with the rulemaking plan to amend 10 CFR 50.55a as described in the attached rulemaking plan, Option 1, and
 - b. The staff's recommendation to proceed with future rulemakings to update 10 CFR 50.55a to incorporate by reference RGs addressing ASME Code cases without first preparing a rulemaking plan.

2. Note that
 - a. The staff will conduct this and subsequent similar rulemakings related to the ASME Code and code cases that do not involve significant policy questions in accordance with the rulemaking authority delegated to the EDO under Management Directives 6.3 and 9.17, and

- b. The staff will initiate the subject rulemaking upon receipt of the staff requirements memorandum.

/RA/

William D. Travers
Executive Director
for Operations

Attachment: Rulemaking Plan

Accession Number: ML011450170
Template SECY-012

* See previous concurrence

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The Commissioners

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- b. The staff will initiate the subject rulemaking upon receipt of the staff requirements memorandum.

/RA/

William D. Travers
Executive Director
for Operations

Attachment: Rulemaking Plan

ATTACHMENT
RULEMAKING PLAN

Rulemaking Plan

Incorporation by Reference of ASME BPV and OM Code Cases

10 CFR Part 50.55a

Regulatory Issue:

The American Society of Mechanical Engineers (ASME) develops and publishes the *Boiler and Pressure Vessel Code* (BPV Code), which contains requirements for design, construction, inservice inspection, and inservice testing of nuclear power plant components, and the *Code for Operation and Maintenance of Nuclear Power Plants* (OM Code), which contains requirements for inservice testing of significant pumps and valves. In response to code user requests, the ASME also publishes BPV and OM Code cases that provide alternatives to the code requirements.

The NRC staff practice has been to review ASME BPV and OM Code cases, assess the acceptability of each, and issue regulatory guides (RGs) providing its conclusions on the acceptability of the code cases. The staff has generally referenced these RGs in Footnote 6 of Section 50.55a of Title 10 of the *Code of Federal Regulations* (10 CFR 50.55a).¹ However, specific incorporation by reference by the Office of the Federal Register (OFR) of these RGs has not previously been prepared. The NRC deemed these code cases acceptable (some with limitations) for licensees to implement as alternatives to the requirements in the ASME BPV and OM Codes. The staff has found some code cases unacceptable and has noted their unacceptability in the RGs. The staff revises these RGs as new code cases are published. However, the reference to RGs in Footnote 6 does not give the revision numbers of the RGs.

The NRC incorporates by reference various portions of the ASME BPV and OM Code requirements in 10 CFR Part 50. Since code cases are usually alternatives to ASME requirements and not interpretations of how the requirements may be met, it is not permissible to use the RG process to approve licensee implementation of alternatives to these requirements. The approval to use these code cases must be granted on a plant-specific basis or through rulemaking.

Existing Regulatory Framework:

Section 50.55a requires that structures, systems, and components of boiling and pressurized water reactors meet the requirements of certain sections of the ASME BPV Code and OM Code. Footnote 6 of 10 CFR 50.55a states that code cases approved by the NRC in several regulatory guides are suitable for use as alternatives to corresponding requirements in the ASME Codes. As previously noted, this practice would be appropriate if the RGs were solely

¹ Footnote 6 of 10 CFR 50.55a reads as follows: "ASME Code cases that have been determined suitable for use by the Commission staff are listed in NRC Regulatory Guide 1.84, 'Design and Code Case Acceptability—ASME Section III Division 1,' NRC Regulatory Guide 1.85, 'Materials Code Case Acceptability—ASME Section III Division 1,' and NRC Regulatory Guide 1.147, 'Inservice Inspection Code Case Acceptability—ASME Section XI Division 1.' The use of other Code cases may be authorized by the Director of the Office of Nuclear Reactor Regulation upon request pursuant to § 50.55a(a)(3)."

interpretive in nature; that is, if they explained how the ASME Code requirements can be met. However, in most cases, the code cases listed in the RGs provide alternatives to the ASME Code requirements that are acceptable or conditionally acceptable to the NRC. Although the RGs are issued for public comment, general reference to the RGs addressing the ASME Code cases in Footnote 6 of 10 CFR 50.55a could be viewed as contrary to the requirements of the Administrative Procedure Act (APA), which requires that the public be given the opportunity to review, comment, and receive appropriate consideration of their comments prior to the imposition of Federal regulations.

How the Regulatory Problem Will Be Addressed by Rulemaking:

The staff believes that the proper method for permitting licensees to use code cases as alternatives to ASME BPV Code and OM Code requirements is to incorporate by reference the RGs which list acceptable, conditionally acceptable, and unacceptable code cases in the *Code of Federal Regulations*. This would give the code cases the same legal status as the portions of the ASME BPV and OM Codes that are currently incorporated by reference in 10 CFR 50.55a. The rulemaking part of this effort would be accomplished by making the following revisions to Section 50.55a:

1. A new paragraph (i) containing the language of incorporation by reference would be added to 10 CFR 50.55a. This paragraph would identify each regulatory guide by title and revision number.
2. Footnote 6 would be removed in its entirety. Note that Footnote 6 also contains the statement that the use of other code cases may be authorized by the Director of the Office of Nuclear Reactor Regulation. However, this provision is also contained in 10 CFR 50.55a(a)(3). Thus, its deletion from Footnote 6 will have no impact.
3. There are currently 12 references to Footnote 6 in 10 CFR 50.55a. Because each footnote reference would be deleted, a cross-reference to the appropriate portions of proposed paragraph (i) would be added with a statement that pursuant to 10 CFR 50.55a(i), licensees may use the code cases that the NRC has found to be acceptable or conditionally acceptable as alternatives to the provisions in the ASME BPV and OM Codes.

Rulemaking Options:

The staff has identified two options. Most staff papers include a *status quo* option for the Commission's consideration; in this case, this would be considered a non-rulemaking option. However, the staff is not recommending that the Commission consider this option because maintaining the *status quo* might involve litigative risk and could be interpreted as a violation of the APA. Option 1 is to pursue a rulemaking to incorporate by reference the RGs on the NRC-approved code cases. The second option is to remove Footnote 6 and references, thereto, in 10 CFR 50.55a and stop generic approval of ASME Code cases. This would require licensees to submit relief requests in order to obtain NRC approval to use each code case as an alternative to the code requirements.

Option 1: Incorporate the Regulatory Guides by Reference into 10 CFR Part 50

Option 1 would establish a process of periodic rulemakings to incorporate by reference the latest regulatory guides which list all acceptable, conditionally acceptable, and unacceptable ASME Code cases in 10 CFR 50.55a. This option would provide a sound regulatory basis for NRC's approval of the generic use of code cases by licensees as alternatives to the provisions of the ASME Codes as incorporated by reference in the NRC regulations. Under this option, the staff would prepare periodic rulemakings to keep the regulations current with the latest versions of the regulatory guides. Based on consultations with officials from the OFR, this approach would meet OFR guidelines for incorporation of documents by reference in the regulations.

Option 1 would meet the NRC goal of maintaining safety by continuing to provide NRC approval of new ASME Code cases. It would reduce unnecessary regulatory burden by eliminating the need for licensees to submit plant-specific relief requests and for NRC to review those submittals.

Option 1 would also increase public confidence by indicating the NRC's acceptance of code cases as alternatives to the provisions of the ASME Codes.

This rulemaking and subsequent updates will involve some additional burden to the NRC. The staff will explore the feasibility of issuing direct final rules to update the revision numbers of the revised RGs that address code cases.

Option 2: Discontinue Review and Approval of Code Cases on a Generic Basis

Option 2 would discontinue the review and approval of ASME Code cases for generic use by licensees. The staff would review individual relief requests by licensees for use of a code case as an alternative to the requirements in the ASME BPV or OM Code. This option would require a rulemaking to remove Footnote 6 from 10 CFR 50.55a.

Under Option 2, the staff would review requests to use ASME Code cases on a plant-specific basis. However, the staff would not prepare rulemakings to incorporate by reference the RGs listing NRC-approved code cases. Some code cases are eventually incorporated into the ASME Code. The staff would review the provisions in those code cases as they are incorporated in the code during the periodic rulemakings to incorporate by reference the latest ASME Code editions and addenda in the NRC regulations.

Option 2 would continue to maintain safety. However this option would result in additional regulatory burden because each licensee would need to submit a request for relief to apply an ASME Code case.

Option 2 might have an adverse effect on public confidence through a possible perception that NRC has a nonuniform approach to reviewing and approving the use of ASME Code cases. Also, the process for approving individual relief requests would not provide an opportunity for public involvement.

Conclusions:

The staff believes that Option 1 is a legally sound approach and will eliminate the litigative risk associated with the *status quo*. This option is responsive to the industry request for "generic approval" of ASME BPV and OM Code cases and makes more efficient use of NRC and licensee resources by eliminating the need for plant-specific reviews. It also provides an opportunity for public involvement. For these reasons, the staff proposes to proceed with Option 1.

Impact(s) on Licensees:

Option 1 is similar to the process the NRC has used for many years to generally endorse code cases. Licensees support the generic endorsement of code cases. However, the rulemaking process is not as streamlined as the regulatory guide development process. Licensees will still need to submit relief requests to use newly issued code cases which have not yet been incorporated by reference by rulemaking. But the net impact upon the licensees should be zero.

Benefits:

The proposed rulemaking does not change NRC's requirements in a substantive manner. Instead of generally referencing the relevant RGs, NRC will incorporate the RGs by reference in the regulations and give them the same legal status as the portions of the ASME Code that are incorporated by reference. The main benefit is that the process that allows licensees to apply alternatives to certain requirements will be placed on firm legal ground.

Office of the General Counsel (OGC) Legal Analysis:

The proposed rulemaking will seek OFR approval to incorporate by reference regulatory guides which list ASME Code cases which the NRC staff has determined to be acceptable alternatives to compliance with provisions of ASME Code editions and addenda which have been incorporated by reference into 10 CFR 50.55a. These code cases are listed in regulatory guides. Footnote 6 in 10 CFR 50.55a simply refers to the RGs as listing those code cases which have been determined by the staff to be "suitable for use." No specific date or version of the RGs is specified, and these RGs were not approved by OFR for incorporation by reference. Several years ago, OGC identified a legal concern with the staff's practice: most ASME Code cases provided *alternatives to compliance* with the provisions of ASME Codes, rather than *interpretations* of the provisions. Since 10 CFR 50.55a mandates the use of the applicable ASME Code edition or addenda, a generic "approval" of an alternative to compliance with the ASME Code edition or addenda essentially constitutes rulemaking, which should be subject to the notice and comment provisions of the APA. Although notices of availability of RGs for public comment are currently published by the NRC in the *Federal Register*, this process has departed from the APA-required procedure for rulemaking, since the staff did not always provide a response to public comments received on proposed RGs, as would be the case for final rules. In addition, the notices of availability for the RGs are published in a separate section of the *Federal Register* under "Notices," as opposed to the sections entitled, "Proposed Rules," and "Final Rules." Conceivably, a person could assert that he or she received insufficient notice to comment on a proposed RG inasmuch as the notice was not published in the "Proposed Rules" section of the *Federal Register*. A person could also assert (perhaps less

successfully), that publication of the availability of the final RGs in the “Notices” section of the *Federal Register* did not give adequate notice to the public of the “adoption” of the RGs as substantive (as opposed to interpretive) rules. For these reasons, the staff has accepted OGC’s advice that the regulatory guides listing NRC-approved ASME Code cases should be incorporated by reference into Part 50 through rulemaking.

OFR guidance on incorporation by reference states that, absent unusual circumstances, publications prepared by a Federal agency are not eligible for incorporation by reference. The staff believes that unusual circumstances exist because of: (i) the large number of code cases which would add considerably to the bulk of 10 CFR Part 50; (ii) the number of modifications, limitations, and exceptions would have to be published as part of the endorsement (analogous to the modifications, limitations, and exceptions for to various code editions and addenda); and (iii) the ASME has no master list prepared of all code cases adopted by ASME and approved by the NRC. On January 30, 2001, the staff met and OGC with a senior official from OFR to obtain a preliminary indication of whether OFR would consider the regulatory guides eligible for incorporation by reference. Based on this meeting the staff is confident that OFR will consider them eligible.

The proposed rule may require preparation of an environmental assessment (EA), as it appears that none of the categorical exclusion in 10 CFR 51.22(c)(2) applies to this rulemaking. Accordingly, OGC believes that an EA may need to be prepared. OGC does not believe that the proposed rule will constitute a backfit as defined in Section 50.109(a)(1). The proposed rule will permit licensees to voluntarily adopt alternatives to compliance with current ASME Code provisions that have been mandated by 10 CFR 50.55a. Accordingly, the proposed rulemaking represents a voluntary relaxation of current requirements and is not a backfit. In addition, the proposed rulemaking applies prospectively to changes initiated by licensees. The Commission has indicated in various rulemakings that the Backfit Rule does not protect the prospects of a potential applicant, nor does the rule apply to actions initiated by a licensee. For these reasons, OGC concludes that the Backfit Rule does not apply to this proposed rulemaking.

It is unclear whether the rule is a “major rule” under the Small Business Regulatory Enforcement Fairness Act, since it is unknown at this time whether the rule is likely to have a \$100 million impact upon nuclear power plant licensees, collectively. If the rule is not a major rule, then the mandated 60-day period prior to effectiveness of major rules is not applicable.

The proposed rule will require licensees to maintain records of compliance with the requirements of the code cases. It is OGC's understanding that some code cases directly address the need for documentation of certain activities. Accordingly, the proposed rulemaking may require Office of Management and Budget review for purposes of the Paperwork Reduction Act.

The proposed rulemaking would endorse code cases which provide technical alternatives to compliance with the ASME Code. Inasmuch as these code cases are developed by the ASME, their incorporation by reference into Section 50.55a is consistent with the requirements of the National Technology Transfer and Advancement Act of 1995. However, the proposed rulemaking should solicit public comment on the availability of other consensus standards and the practicality of endorsing them.

OGC has determined there are no known bases for legal objection to the contemplated rulemaking, subject to resolution of the issues involving compliance with NEPA and the Paperwork Reduction Act.

Agreement State Implementation Issues:

There are no Agreement State implementation issues associated with the proposed rulemaking. Under the "Policy Statement of Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the *Federal Register* on September 3, 1997 (62 FR 46517), Part 50 is classified as compatibility category "NRC." The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act or provisions of Title 10 of the *Code of Federal Regulations*.

Category of Rule:

This rulemaking best fits under the category of "Codification of Regulatory Practice." The ASME Code cases have been endorsed without formal incorporation by reference through the OFR. This rulemaking will codify the approval for licensees to use ASME Code cases as alternatives to ASME BPV and OM Code requirements. The staff does not believe that this rulemaking will have a significant impact on licensees' costs. The staff will reassess this issue during the development of the proposed rule and a determination as to whether this is a major rule will be finalized.

Backfit Analysis:

The proposed rulemaking would permit licensees to voluntarily use ASME BPV and OM Code cases in lieu of the BPV Code and OM Code. Licensees are at liberty to continue to comply with these Codes if they wish. The Backfit Rule does not apply to this rulemaking. Therefore, a backfit analysis will not be prepared for this rulemaking because these amendments do not involve any provision that would impose backfit as defined in 10 CFR Chapter 50.109(a)(1).

Supporting Documents Needed:

The staff will assess the need for a Paperwork Reduction Act clearance package for Office of Management and Budget review and approval. The staff also will assess the need for an EA and possibly an environmental impact statement if none of the categorical exclusions in 10 CFR 51.22(c) apply. Although the use of NRC-approved code cases is voluntary, the staff may prepare a qualitative regulatory analysis. Also, draft and final regulatory guides will need to be published concurrent with the draft and final rule.

Issuance by Executive Director for Operations or Commission:

In the past, the RGs containing NRC-approved code cases were published with the approval of the Director of the Office of Nuclear Regulatory Research. Approval for the periodic updates of 10 CFR 50.55a to incorporate by reference updated editions and addenda of the ASME BPV

and OM Codes have been by the authority of the Executive Director of Operations. Because this action has no significant resource implications and involves no policy issues, the staff proposes that this action, as well as follow-on rulemakings incorporating future versions of the RGs, be approved and issued for publication by the Executive Director for Operations under his delegated authority and that the RGs continue to be approved by the Director of the Office of Nuclear Regulatory Research.

Interoffice Management Steering Group:

No interoffice management steering group is necessary for this rulemaking.

Public/Industry Participation:

Although industry comment on this rulemaking is expected, significant opposition is not anticipated. The industry has expressed a desire to have timely regulator approval of ASME Code cases. Significant public interest in this rulemaking is not expected. Therefore, the staff does not intend to hold any workshops or public meetings on this proposed rule.

Resources:

Approximately 1.0 FTE of staff resources is anticipated to complete this rulemaking which can be accomplished within the current budget for FY 2001 and FY 2002.

NRR Lead: Harry S. Tovmassian, Program Manager
Generic Issues, Environmental, Financial and Rulemaking Branch
Division of Regulatory Improvement Programs

OGC Contact: Geary Mizuno, Senior Attorney

Technical Contact: Thomas G. Scarbrough
Mechanical and Civil Engineering Branch
Division of Engineering, NRR

Wallace E. Norris
Materials Engineering Branch
Division of Engineering Technology, RES

Contractual Assistance: None expected

Schedule:

Proposed Rule to EDO 9 months after rulemaking plan is approved

Final Rule to EDO 12 months after proposed rule is published in the *Federal Register*