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June 3, 2002 (2:18PM)

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May 31, 2002

DOCKET NUMBER
PROPOSED RULE PR 50
(67FR 12488)

David L. Meyer, Chief
Rules and Directives Branch
U.S. Nuclear Regulatory Commission
Mail Stop T-06 D59
Washington, D.C. 20555-0001

**RE: Comments Concerning Incorporation by
Reference of ASME Code Cases (67 Fed. Reg. 12,488)**

Dear Mr. Meyer:

The U. S. Nuclear Regulatory Commission ("NRC") published for comment a proposed rule that would incorporate by reference¹ certain of American Society of Mechanical Engineers ("ASME") Codes Cases, which the NRC has reviewed and found acceptable for use.² As proposed, the specific regulatory guides that list the ASME Code Cases and any limitations or exceptions on the use of the Code Cases would be referenced directly in the NRC's regulations in 10 C.F.R. § 50.55a.

The Licensing and Design Basis Clearinghouse, a consortium of nuclear utilities that follows NRC activities related to licensing and design basis issues, appreciates the opportunity to comment on the proposed rule. Rather than comment on technical issues associated with the Code Cases, the Clearinghouse's comments concern the NRC's process for endorsement of ASME Code Cases. The Clearinghouse endorses comments on the proposed rule filed on behalf of the industry by the Nuclear Energy Institute ("NEI").

The NRC incorporates by reference the ASME Codes for design, construction, installation, inservice inspection, and inservice testing of certain nuclear power plant structures, systems, and components in 10 C.F.R. § 50.55a, "Codes and Standards." Though the NRC (and its predecessor the Atomic Energy Commission) has historically relied upon the ASME Codes, federal agencies' use of codes and standards has been further encouraged by the National

¹ "Incorporation by reference" into an agency's regulations has the legal effect of treating the material so incorporated as if it were published in full in the *Federal Register* (see 5 U.S.C. 552(a)).

² 67 Fed. Reg. 12,488 (March 19, 2002).

Technology and Transfer Act of 1995 (15 U.S.C. § 3701), and its companion guidance, Office of Management and Budget (“OMB”) Circular A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and Conformity Assessment,” to which the NRC committed through its Strategic Plan. ASME Code Cases provide alternatives to the Code requirements specifically identified in each Code Case.

Previously, the NRC endorsed ASME Code Cases through the issuance of regulatory guides without opportunity for public comment. More recently, however, we understand that the Office of General Counsel determined that, because the Code Cases provide alternatives to the regulatory requirements in the ASME Codes, the process for accepting Code Cases must be generally consistent with the rulemaking process, which includes an opportunity for public comment before final agency action.³ This process necessarily delays NRC acceptance of the ASME Code Cases such that licensees must submit requests to use Code Cases as alternatives to the ASME Code requirements during the period from the ASME Code Case issuance to issuance of the regulatory guide revisions that indicate NRC acceptance.⁴

In a February 21, 2002, meeting with the NRC Staff, the NEI Licensing Action Task Force (“LATF”) proposed that the NRC develop an efficient method to approve the use of Code Cases which would meet all of the regulatory process requirements. The Licensing and Design Basis Clearinghouse supports improvements in the timeliness of the NRC’s process, as suggested by the LATF.

The LATF discussed two possible options that the NRC could consider, as well as a parallel effort to amend 10 C.F.R. § 50.55a in a manner that would allow the use of an alternative approach, as necessary. One possible alternative would involve the development of a web site where either (1) the individual Code Cases could be posted for public comment and for subsequent NRC acceptance (identifying any limitations or exceptions on the use of the Code Cases), or (2) revisions to the regulatory guides could be posted for comment each time the NRC proposes to endorse a Code Case. Either method would allow individual Code Cases to be reviewed by the NRC, posted for public comment, and accepted for use by licensees within three-to-six months following the ASME publication of the Code Case, as compared to the three-to-five years between past revisions of the regulatory guides.

We believe that the regulations already allow generic approval of Code Cases as alternatives to the requirements in 10 C.F.R. § 50.55a in accordance with the provisions of 10 C.F.R. § 50.55a(a)(3), which states that alternatives “may be used when authorized by the

³ The NRC Staff and a representative from the Office of General Counsel discussed this process in the NEI Licensing Information Forum, November 1, 2000 (Breakout Session C), in response to questions concerning the NRC’s endorsement of ASME Code Cases.

⁴ The NRC and the ASME discussed this delay and suggestions for improving the process. *See, e.g.*, M. Mayfield (NRC) to J. Ferguson (ASME), “ASME Letter Dated January 12, 2001, Regarding Endorsement of Code Cases,” April 10, 2001.

Director of the Office of Nuclear Reactor Regulation” if the alternatives provide an acceptable level of quality and safety. If so, the NRC’s acceptance on a generic basis could be authorized in a generic communication, such as a Regulatory Issue Summary. If the NRC determines that the current provisions would not allow a generic approval in this manner, we recommend that the NRC undertake rulemaking to provide such a generic approval process similar to 10 C.F.R. § 50.55a(a)(3) that would not require continued rulemaking for endorsement of Code Cases.

As noted above, the NRC may approve the use of ASME Code Cases through licensee plant-specific requests pursuant to 10 C.F.R. § 50.55a(a)(3). To the extent that the NRC has approved a Code Case without any reference to the potential for future limitations or conditions in the regulations, the proposed requirement in 10 C.F.R. § 50.55a(i)(2)(ii) that such licensees must apply any limitations or conditions placed on the Code Case in the NRC’s regulatory guides would appear to negate the NRC’s plant-specific approval. If the NRC intends that its later endorsement of a Code Case would supersede a plant-specific approval, then the NRC’s safety evaluation for approving the alternative should so state. Otherwise, the regulations should clearly allow a licensee to continue to rely on the NRC’s plant-specific approval in lieu of the later endorsement through incorporation by reference until the expiration of the current ten-year interval.

Improving the efficiency of the process to endorse ASME Code Cases would reduce the burden on both licensees and the NRC by reducing the number of requests from individual licensees seeking NRC approval of individual Code Cases. A new approach could provide generic approval earlier in the process, and, thereby, support the NRC goals for improving efficiencies in its regulatory processes.⁵ Process improvements would support the strategy in the NRC’s Strategic Plan for improving efficiencies in its regulatory processes to “identify, prioritize, and modify processes based on effectiveness reviews to maximize opportunities to improve those processes.”⁶

If you have any questions regarding our comments, please contact us.

Sincerely,

Original signed by Patricia L. Campbell

Mark J. Wetterhahn
Patricia L. Campbell
Counsel for the Licensing and Design
Basis Clearinghouse

⁵ NUREG-1614, Vol. 2, Part 2, “Strategic Plan,” Appendix, Fiscal Year 2002 – Fiscal Year 2005.

⁶ *Id.*