

December 23, 2004

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Luis A. Reyes */RA Ellis W. Merschoff Acting For/*
Executive Director for Operations

SUBJECT: FIRE PROTECTION RULE 10 CFR 50.48(c) (NFPA 805 RULE)
INTERIM ENFORCEMENT DISCRETION POLICY EXTENSION

By letter dated July 7, 2004, the Nuclear Energy Institute (NEI) requested additional enforcement discretion regarding the final rule amending 10 CFR 50.48. This rule became effective on July 16, 2004, and allows licensees to adopt 10 CFR 50.48(c), a voluntary risk-informed, performance-based alternative to current fire protection requirements. The agency concurrently revised the Commission's Enforcement Policy to provide interim enforcement discretion during a "transition" period. The interim enforcement discretion policy includes provisions to address (1) noncompliances identified during the licensee's transition process and, (2) existing identified noncompliances. One of the criteria that must be met to exercise discretion for existing noncompliances is that the licensee must submit a letter of intent to adopt 10 CFR 50.48(c) within 6 months of the effective date of the final rule. Therefore, the current deadline for the letter of intent to allow discretion for existing noncompliances is January 16, 2005. NEI's letter proposed an extension of about a year for licensees to submit the letter of intent.

In accordance with the current Commission-approved Enforcement Policy, for noncompliances identified as part of the transition to 10 CFR 50.48(c), the enforcement discretion period begins upon the receipt of a letter from the licensee stating their intention to adopt 10 CFR 50.48(c) and it would remain in effect for up to two years. Furthermore, when the licensee submits a license amendment request to complete the transition to 10 CFR 50.48(c), the enforcement discretion will continue until the NRC approval of the license amendment request.

The current deadline for the letter of intent to allow discretion for existing noncompliances is January 16, 2005. Therefore, if a licensee submits a letter of intent on or before January 16, 2005, the enforcement discretion would remain in effect until January 15, 2007. NEI requested that the agency extend the deadline for the letter of intent from

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January 16, 2005, to December 31, 2005. According to NEI, the primary basis for this request is to accommodate the licensee planning and budgeting for transition to 10 CFR 50.48(c). NEI also stated that, "The net effect of this enforcement discretion provision, as currently written, is that few if any licensees will consider adopting 10 CFR 50.48 (c) in the near term."

The staff has considered NEI's request in light of possible safety implications, the NRC's regulatory philosophy to provide incentives for licensees to move to risk-informed, performance-based fire protection requirements, and the NRC's need to put long standing fire protection issues on a closure path.

When the enforcement discretion policy was issued, the decision was made to limit the time allowed to submit a letter of intent to six months for existing noncompliances to prevent undue delays in either restoring compliance to 10 CFR 50.48(b) or establishing compliance to 10 CFR 50.48(c). The staff did not consider the challenges imposed on the licensees in budgeting and planning. After receiving NEI's request to extend the time allowed for the letter of intent by one year, the staff reevaluated potential safety concerns associated with a one year extension to existing noncompliances. The staff has concluded that granting NEI's request does not adversely affect public health and safety because:

- Enforcement discretion does not apply to the risk-significant issues, which under the Reactor Oversight Process would be evaluated as Red.
- Enforcement discretion does not apply to issues that would be categorized as Severity Level I.
- The licensee is required to adopt compensatory measures until compliance is either restored in accordance with 10 CFR 50.48(b) or achieved per 10 CFR 50.48(c), and
- Licensees would be identifying and addressing new issues during the transition process that otherwise would likely not be identified.

In addition to allowing licensees adequate time for budgeting and planning to adopt NFPA 805, this extension will also allow licensees to consider the draft Regulatory Guide (RG) and the probabilistic risk assessment (PRA) and fire modeling tools in their decision. This RG and the PRA were issued for public comment in October 2004. The fire modeling tools will be issued for public comment in Summer 2005.

Therefore, I recommend that you approve publication of a *Federal Register* notice (Attached) announcing the modification to the Enforcement Policy to extend the deadline for the letter of intent for existing noncompliances from January 16, 2005, to December 31, 2005.

SECY, please track.

Attachment: *Federal Register* Notice

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*See previous concurrence

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