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March 31, 2008

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Subject: Nuclear Energy Institute Comments on Draft NRC Regulatory Issue Summary 2007-26, "Implementation of Certificate of Compliance Amendments to Previously Loaded Spent Fuel Storage Casks," 73 Federal Register 2281 (January 14, 2008)

Project Number: 689

The Nuclear Energy Institute (NEI)¹, on behalf of the nuclear energy industry, is pleased to comment on the Nuclear Regulatory Commission's (NRC) Draft Regulatory Issue Summary (RIS) 2007-26 titled "Implementation of Certificate of Compliance Amendments to Previously Loaded Spent Fuel Storage Casks." Industry commends NRC for providing an opportunity for public comment on this draft RIS. By providing opportunities for public input to draft regulatory tools and regulations, the NRC is assuring a sound and predictable regulatory process.

This RIS is intended to inform licensees of the requirements concerning the implementation of changes authorized by a 10 CFR Part 72 dry storage cask Certificate of Compliance (CoC) amendment to a dry storage cask loaded under a previous amendment or the original CoC. The RIS states that a general licensee must request an exemption from the requisite provisions of 10 CFR 72.212 and 72.214 if they wish to operate a cask using an amended CoC different from that under which it was loaded. In describing this position, the RIS presents new interpretations of portions of 10 CFR Part 72 that are contrary to previous industry and NRC practice.

F-RIS = ADM-03

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's 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, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

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add = R.A. Nelson (RAN)

Industry does not concur with the interpretations of 10 CFR Part 72 described in the RIS. Moreover, these interpretations create ambiguity, inconsistency, and unpredictability within the regulation where previously none existed. In addition, the stated position in the RIS that an exemption is required to operate a loaded dry cask storage system under a newer amendment to the CoC contradicts past industry practice that NRC has endorsed through the inspection and enforcement process. Prohibiting the current industry practice, which has always maintained public health and safety, and requiring that a general licensee obtain an exemption request to operate a dry cask storage system under a newer amendment to the CoC does not provide a commensurate safety benefit. Therefore, it is industry's position that the NRC should not issue the RIS in its current form and should endorse the current industry practice.

If NRC continues to pursue the RIS, industry recommends that NRC consider and accommodate industry's comments on the draft RIS prior to issuance. Our comments on, and analysis of, the draft RIS and appropriate supporting documentation are contained in the Enclosure.

Regardless of whether the RIS is issued or not, industry encourages NRC to pursue expeditiously the Commission authorized rulemaking to codify and permit current industry practice. To minimize potential delay, industry encourages NRC to separate this and the other Part 72 rulemaking and pursue direct final rulemaking on this issue. Since public health and safety are maintained by current industry practice, industry requests, in the interim, that general licensees be permitted to continue to operate as they have been without incurring enforcement action or requiring exemptions from the regulations.

After the initial announcement by NRC, slightly less than a year ago, that a RIS was being developed to address this issue, numerous licensees halted their plans to implement a newer amendment to a dry storage cask loaded under an older amendment. Since the draft RIS states that it is NRC's position that the correct regulatory process for performing this action is an exemption request, some of these licensees are planning to submit exemption requests within the next few months. Therefore, if NRC maintains its position that exemptions are necessary, industry requests that NRC process these exemption requests as expeditiously as possible so as to not further delay implementation of newer amendments.

Chief, Rulemaking, Directives and Editing Branch

March 31, 2008

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Please do not hesitate to call me or Dr. Everett L. Redmond II at (202) 739-8122, if you have any questions.

Sincerely,



Steven P. Kraft

c: Mr. Martin J. Virgilio, Deputy Executive Director, NRC
Mr. Michael Weber, Director, NRC
Mr. Eric Leeds, Deputy Director, NRC
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**NUCLEAR ENERGY INSTITUTE (NEI)
SPECIFIC COMMENTS ON DRAFT NRC REGULATORY ISSUE
SUMMARY 2007-26, "IMPLEMENTATION OF CERTIFICATE OF COMPLIANCE
AMENDMENTS TO PREVIOUSLY LOADED
SPENT FUEL STORAGE CASKS"**

Comment No. 1

The draft RIS, in the Intent section, states:

"... Certificate of Compliance (CoC) amendment to a cask loaded under the original CoC or an earlier amendment thereto..."

This phrase, as worded, incorrectly suggests that there is an earlier amendment than the original CoC. Therefore, it is suggested that this wording be changed to read: "Certificate of Compliance (CoC) amendment to a cask loaded under an earlier amendment or the original CoC".

Comment No. 2

The first sentence in the background section of the draft RIS states:

"The NRC initially considered this issue after a general licensee sought clarification about the application of a CoC amendment to a previously loaded cask."

This sentence, as worded, implies that NRC has never previously considered the acceptability of a general licensee operating a cask under a newer amendment to the CoC than the amendment under which it was loaded. However, this sentence does not recognize that the NRC has, through inspection, found this practice acceptable. Below are some examples from a few NRC inspection reports. Therefore, it is suggested that the background section be modified to more accurately reflect past consideration of this issue.

Palisades Inspection Report 72-0007/2000001(DNMS), May 3, 2000

The executive summary states:

"This was a special inspection to review the operability assessment regarding the discovery of unauthorized materials in the Palisades spent fuel casks. Overall, the assessment determined that there is no safety issue with storing different configurations of fuel in the casks. The licensee is going to request an amendment to the Certificate of Conformance and the Safety Analysis Report to include these unauthorized materials."

This paragraph clearly states that the appropriate resolution for the unauthorized contents was a CoC amendment and not an exemption request. Based on the RIS, if a similar situation were to arise today, the only regulatory path available to the licensee would be an exemption request even though in 2000 a CoC amendment was an acceptable regulatory path.

Arkansas Nuclear One NRC Inspection Report 50-313/02-08: 50-368/02-08; 72-13/02-01, September 26, 2002 and

NRC Inspection Report 50-313/03-09: 50-368/03-09; 72-13/03-01, February 7, 2003

Section 1.2 in each of these reports states:

"The spent fuel currently in storage at the ANO ISFSI is stored in VSC-24 casks licensed under the general licensing provisions of 10 CFR Part 72. The current Certificate of

Compliance in use at ANO for the VSC-24 casks is Certificate No. 1007, Amendment 3, dated May 21, 2001."

This paragraph indicates that all casks are being operated under Amendment 3 to CoC No. 1007. However, many of the loaded casks at the time of the inspections were loaded prior to the effective date of Amendment 3 and therefore loaded under an earlier amendment. ANO had used the 10 CFR 72.48 process to modify its 10 CFR 72.212 Report before it began operating the previously loaded casks under Amendment 3. While the inspection reports did not specifically discuss the 10 CFR 72.48 review that was performed to implement the new amendment, the NRC inspection recognized that ANO was operating all casks under Amendment 3 without an exemption. The inspection report also documents compliance of all casks with the technical specifications (TS) in Amendment 3.

Arkansas Nuclear One NRC Inspection Report 050-00313/05-013; 050-00368/05-013; 072-00013/04-002, March 31, 2005

In the inspection notes on page 16 of 18, in category "Tech Spec Surveillance" and topic "Cask Air Ducts Free of Blockage", CoC 1007, Tech Spec 1.3.1, Rev. 4 is referenced. This TS was used during the review of plant records to verify compliance. This reference indicates that all casks are being operated under Amendment 4 to CoC No. 1007. However, many of the loaded casks at the time of the inspections were loaded prior to the effective date of Amendment 4, February 3, 2003, and therefore loaded under an earlier amendment. ANO had used the 10 CFR 72.48 process to modify its 10 CFR 72.212 Report before it began operating the casks under Amendment 4. While the inspection reports did not specifically discuss the 10 CFR 72.48 review that was performed to implement the new amendment, implicitly the NRC inspection recognized that ANO was operating all casks under Amendment 4 without an exemption.

Comment No. 3

The background section of the draft RIS does not provide a context for a general licensee's choice to implement a newer amendment to a cask loaded under an older amendment or the original CoC. Therefore, it is suggested that the RIS be modified to discuss the motivation a general licensee may have for operating a dry storage cask under a newer amendment to a CoC than the one under which it was loaded. Two examples are: (1) a general licensee may want to change surveillance requirements to maintain an adequate level of safety and eliminate unnecessary operational burden and/or dose, (2) if all casks are operated to the same set of requirements, the potential for configuration control and human performance errors is reduced.

Comment No. 4

The draft RIS provides interpretations of different portions of 10 CFR 72. However, it should be noted that 10 CFR 72 does not explicitly prohibit the implementation of a newer amendment to a cask loaded under an older amendment or the original CoC.

Comment No. 5

The background section of the draft RIS states:

"Some licensees have asserted that 10 CFR 72.48 allows them to apply some or all of the changes of a CoC amendment to a previously loaded cask without obtaining express NRC approval."

This sentence is not an accurate reflection of industry practice. Industry is using the 10 CFR 72.48 process to modify the 10 CFR 72.212 Report, as required by 10 CFR 72.212(b)(2)(ii). The modification to the 10 CFR 72.212 Report documents the implementation of the new amendment which was reviewed and approved by the NRC.

Comment No. 6

The draft RIS, in the section entitled Summary of Issue, states:

"The NRC's position is that the phrase "prior to use" means before the cask is loaded with spent nuclear fuel."

This interpretation of "prior to use" implies that a general licensee can only comply with the regulations in 10 CFR 72.212 before the cask is loaded with spent nuclear fuel. It is industry's view that "prior to use" means prior to initial ISFSI operations or implementing a change thereafter (e.g. modifying a procedure, repairing a cask, adopting a later amendment, etc.) and does not explicitly mean that changes can not be made at a later time. As recognized in the next paragraph in the draft RIS, 10 CFR 72.212(b)(2)(ii) provides for changes to the 10 CFR 72.212 Report via the 10 CFR 72.48 process. Since changes (e.g. unloading procedures) may need to be made after a cask is loaded, it is not reasonable to interpret "prior to use" in the sense as discussed in the draft RIS.

Comment No. 7

The draft RIS, in the section entitled Summary of Issue, states:

"The NRC's position is to consider each CoC amendment as a new design basis."

Current NRC practice does not support this position. When a CoC amendment application is submitted to the NRC, the NRC does not conduct the review as if it is a new application. Rather, the CoC amendment presents proposed changes relative to the existing approved CoC and NRC only reviews the proposed changes and issues a safety evaluation report (SER) for only those changes. The FSAR, which describes the design basis and is applicable to the original CoC and all amendments, is then appropriately updated. The updates to the FSAR also include modifications authorized under 10 CFR 72.48.

Comment No. 8

The draft RIS, in the section entitled Summary of Issue, states:

"Each CoC amendment is considered a separate and distinct CoC, accompanied by its own certificate (setting forth terms, conditions, and specifications) and safety evaluation report."

Industry does not consider each CoC amendment a separate and distinct CoC and industry does not believe that the 10 CFR 72 regulations, NRC practices and safety evaluation reports (SER) are consistent with this statement. The following are examples that support this position:

- The NRC SER for a CoC amendment only discusses the proposed changes approved in that amendment and is not applicable to all of the terms, conditions and specifications in the CoC. In industry's view, if each CoC amendment is a "separate and distinct CoC" then the SER for each amendment should apply to every item in that amended CoC. Because SERs approving CoC amendments only address the changes in that amendment, a general licensee must review the SERs for the original CoC and all subsequent amendments when performing its review as required by 10 CFR 72.212(b)(3).
- 10 CFR 72.214 lists the approved CoCs. In this regulation, each CoC is listed followed by the amendment numbers and their effective dates, concluding with the "Certificate Expiration Date" and model number. The certificate expiration date is a single date that is 20 years after the date of the initial certificate effective date. Each amendment to the CoC does not

result in a new or separate and distinct expiration date as one would expect for separate and distinct CoCs.

- 10 CFR 72.246 refers to "issuance of an initial CoC". This phrase implies that subsequent amendments are part of the original CoC and not separate and distinct CoCs.

If each amendment is a separate and distinct CoC, as NRC asserts in the draft RIS, then there are potential inconsistencies with 10 CFR 72 and prior interpretations of 10 CFR 72 regulations may no longer be valid. The following are examples of potential inconsistencies within the regulation.

- 10 CFR 72.232(d) requires notification "at least 45 days prior to starting fabrication of the first spent fuel storage cask under a Certificate of Compliance." This regulation is currently interpreted as applying only to the original CoC and not subsequent amendments.
- 10 CFR 72.248(a)(1) requires each certificate holder to submit an original FSAR to the NRC within 90 days after the spent fuel storage cask design has been approved. This regulation is currently interpreted as applying only to the original CoC. Changes to the FSAR as a result of an amendment are submitted during the next scheduled update to the FSAR.
- 10 CFR 72.212(b)(1)(i) requires notification to the NRC 90 days prior to first storage of spent fuel under the general license. This regulation is currently interpreted as being applicable only before the first cask is loaded at the site regardless of the CoC version used for loading.

In addition to potential inconsistencies within the regulation, there are potential inconsistencies within the CoCs. For example, a CoC may require that a dry run be conducted by the licensee prior to the first use of the system. This requirement is currently interpreted as applying only to the first use of a CoC. Dry runs are not typically redone when a licensee begins loading casks under a newer amendment than previously used at the site.

If the draft RIS is issued, industry encourages NRC to consider and address, in the RIS, these potential inconsistencies.

Comment No. 9

The draft RIS, in the section entitled Summary of Issue, states:

"Section 72.48(c) does not expressly refer to previously loaded casks."

It is correct that 10 CFR 72.48(c) does not expressly refer to previously loaded casks. However, 10 CFR 72.48(c) does not explicitly refer to the condition of the cask at all (either unloaded or loaded). Industry has always interpreted 10 CFR 72.48(c) as applying to loaded and unloaded casks and have performed numerous 10 CFR 72.48 reviews for loaded casks (examples include procedure changes and minor cask modifications).

When a general licensee performs a 10 CFR 72.48 review and determines that a modification to the CoC is necessary in order to implement the change, 10 CFR 72.48(c)(2) provides the licensee with the following instruction: "... a general licensee shall request that the certificate holder obtain a CoC amendment pursuant to 72.244, prior to ...". Because 10 CFR 72.48(c)(2) does not explicitly or implicitly state that this regulation is only applicable to casks that have not been loaded, industry has interpreted this regulation to be applicable to casks under all conditions (loaded or unloaded). A number of general licensees have followed this regulation and requested the certificate holder to

obtain a CoC amendment which the general licensees have subsequently implemented for casks loaded under an earlier CoC amendment or the original CoC.

Industry recommends that the draft RIS be modified to recognize that 10 CFR 72.48 is applicable to both loaded and unloaded casks. If the RIS provides this recognition, the need for an exemption would be obviated and the RIS could discuss the use of 10 CFR 72.48 to modify the 10 CFR 72.212 Report to implement the amendment received through the instruction of 10 CFR 72.48(c)(2).

Comment No. 10

The draft RIS, in the section entitled Backfit Discussion, states:

"This RIS does not impose a regulatory staff position or interpretation of the Commission's rules that is either new or different from a previously applicable position."

The information presented in Comment No. 2 indicates that the regulatory staff position outlined in the draft RIS is in fact different from the previous regulatory staff position documented through inspection. Therefore, industry considers the position outlined in the draft RIS as a backfit and requests that NRC perform a backfit analysis per 10 CFR 72.62.

Doris Mendiola

From: Angelina Buan
Sent: Tuesday, April 01, 2008 11:05 AM
To: Michael Lesar; Doris Mendiola
Cc: Kenny Nguyen; Michael Collins; Susan Hicks; Melissa Rieta
Subject: E080331t173002 FROM djames@entergy.com (ADM-OFFICE OF THE ADMINISTRATION)
Attachments: E080331t173002_0CAN030801.pdf; E080331t173002.xfd

Mike Lesar/Doris Mendiola,

The attached Office of Admin Document submitted by djames@entergy.com was received via EIE. This document will not be added to ADAMS.

thanks,
Angelina