

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NEW REACTORS
WASHINGTON, DC 20555-0001

April 20, 2012

**NRC REGULATORY ISSUE SUMMARY 2012-05:
CLARIFYING THE RELATIONSHIP BETWEEN 10 CFR 72.212 AND
10 CFR 72.48 EVALUATIONS**

ADDRESSEES

All general licensees under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 72, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste," Subpart K, "General License for Storage of Spent Fuel at Power Reactor Sites." (The U.S. Nuclear Regulatory Commission (NRC) issues general licenses, as defined in 10 CFR 72.210, "General License Issued," for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," or 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants.")

INTENT

The NRC is issuing this regulatory issue summary (RIS) to clarify the NRC staff's technical position on existing regulatory requirements, specifically the relationship between the agency's regulation in 10 CFR 72.48, "Changes, tests and experiments," and 10 CFR 72.212, "Conditions of General License Issued under 10 CFR 72.210," with respect to when evaluations pursuant to 72.48 are required. This RIS requires no action or written response on the part of an addressee.

BACKGROUND INFORMATION

Pursuant to 10 CFR 72.212(b)(5), general licensees must perform written evaluations (1) before using a cask and (2) before applying the changes authorized by an amended certificate of compliance (CoC) to a previously loaded cask. In the past, a general licensee only used the written evaluation to demonstrate the suitability of a selected cask design at its site before its first use. The current rule, 10 CFR 72.212(b) allows general licensees to apply changes authorized by a CoC amendment as codified by NRC in 10 CFR 72.214, "List of Approved Spent Fuel Storage Casks," to a previously loaded cask without express NRC approval provided that the licensee demonstrates through a written evaluation, that the loaded cask then conforms to the CoC amendment codified in the list of approved spent fuel storage casks set forth in 10 CFR 72.214. Therefore, general licensees can also use the written evaluation to demonstrate the conformance of a loaded cask to a newer CoC amendment.

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If the evaluation identifies conditions at the site that are not bounded by the applicable cask final safety analysis report (FSAR), general licensees can select one of the following options:

- Do not use the cask design or the amendment. Select another cask design that is bounding.
- Request an exemption.
- Ask the CoC holder to submit an amendment request that, if approved, would result in a CoC and support FSAR revision that bound the site conditions.
- Evaluate the conditions that are not bounded by the FSAR under 10 CFR 72.48 to determine whether the general licensee can use the cask design/system that does not envelope/bound the site parameters.

The regulation at 10 CFR 72.48 permits “a licensee or certificate holder to make changes in the facility or spent fuel storage cask design as described in the FSAR (as updated), make changes in the procedures as described in the FSAR (as updated), and conduct tests or experiments not described in the FSAR (as updated)” without prior NRC approval as long as the criteria in 10 CFR 72.48(c) are satisfied.

SUMMARY OF ISSUE

In several recent instances general licensees were observed using 10 CFR 72.212 evaluation reports alone to accept conditions outside of the FSAR even though the same evaluation identified that site conditions were not bounded by cask parameters. However, licensees failed to perform 10 CFR 72.48 evaluations that supported the acceptance of the deviation.

Section 72.212(b)(5) requires the general licensee to perform a written evaluation before using a cask and before applying the changes authorized by an amended CoC to a previously loaded cask. Section 72.212(b)(6) requires the general licensee to review the Safety Analysis Report referenced in the CoC or amended CoC and the related NRC Safety Evaluation Report, prior to use of the general license, to determine whether or not the reactor site parameters, including analyses of earthquake intensity and tornado missiles, are enveloped by the cask design bases considered in these reports. Section 72.212(b)(7) requires the general licensee to evaluate any changes to the written evaluations required by paragraphs (b)(5) and (b)(6) of 10 CFR 72.212, using the requirements of 10 CFR 72.48. The change authority granted in 10 CFR 72.48 requires a general licensee to determine whether prior NRC approval is necessary before changes can be made to the cask FSAR. A 10 CFR 72.212 evaluation alone is not sufficient to address a needed change to the FSAR scope. Pursuant to 10 CFR 72.212(b)(7), a 10 CFR 72.48 evaluation must also be performed. The 10 CFR 72.212 evaluation may identify the need to perform additional evaluations under 10 CFR 72.48 for authority to change the FSAR. In other words, a general licensee does not satisfy the change authority requirements in Part 72 if it performs an analysis or written evaluation to load, store, operate, or accept conditions outside of the FSAR without first satisfying the criteria of a 10 CFR 72.48 evaluation.

NRC has identified that a statement in the Nuclear Energy Institute (NEI) Guidance 96-07, Appendix B, “Guidelines for 10 CFR 72.48 Implementation,” has in some cases contributed to the confusion on the timing of the 10 CFR 72.48 process with respect to the 10 CFR 72.212 process. Paragraph B1.2.2 of the NEI guidance states, in part, that “the design and licensing

bases evolve in accordance with Subpart G requirements up to the time that an ISFSI license or spent fuel storage cask CoC is received, and 10 CFR 72.48 is not applicable until after that time. Both Subpart G and 10 CFR 72.48 apply following receipt of an ISFSI license, or issuance of a spent fuel storage cask CoC, or implementation of 10 CFR 72.212 evaluations.” The last portion of the statement, which states that the 10 CFR 72.48 process is not applicable until the 10 CFR 72.212 evaluations are implemented, is incorrect because it is inconsistent with NRC’s interpretation of its regulations. The NRC staff has discussed this observation with NEI, and NEI has indicated that it will clarify this guidance to be consistent with NRC’s regulations in a forthcoming update to NEI 96-07.

BACKFIT DISCUSSION

This RIS requires no action or written response by general licensees for ISFSIs. The RIS reiterates, without substantive change, the requirements of 10 CFR 72.48 and 10 CFR 72.212 with respect to written evaluations and the need for NRC review and approval of certain changes to the FSARs of NRC-approved casks by general licensees. Therefore, the RIS does not contain a new or changed staff position or an interpretation of these two regulations that would constitute backfitting as defined in 10 CFR 72.62. Moreover, 10 CFR 72.212 was recently revised in a notice and comment rulemaking. See 76 FR 8872 (February 16, 2011). The backfitting issues associated with the underlying rule were addressed in the *Federal Register* Notice for the final rule amending that section (see 76 FR 8872, at 8889). Inasmuch as this RIS does not set forth any “interpretation” of the newly-amended regulation, any applicable backfitting issues associated with this RIS were addressed in the underlying rulemaking, and the issuance of this RIS does not require a further backfitting discussion beyond that already provided in the final rule. For these reasons, the positions stated in this RIS, even if “imposed” by the NRC on general licensees for ISFSIs (e.g., by order or through regulatory action on a license amendment application) do not constitute backfitting under 10 CFR 72.62.

The NRC notes that the only relevant backfitting provision applicable to this RIS (and which forms the basis for the backfitting discussion in the previous paragraph) is the backfitting provision applicable to ISFSIs, 10 CFR 72.62. This is because this RIS is directed to entities holding general licenses for ISFSIs with respect to activities licensed under a Part 72 ISFSI general license, and addresses activities authorized under their ISFSI general license. Although entities holding general ISFSI licenses under Part 72 also (by law) hold utilization facility licenses (*i.e.*, nuclear power plant licenses) issued pursuant to Atomic Energy Act of 1954, as amended, this RIS is not directed to these entities in their status as nuclear power plant licensees, nor does the RIS address activities directly authorized by their facility licenses. The backfitting provisions in 10 CFR 50.109 and the analogous issue finality provisions in 10 CFR Part 52 apply to entities in their capacity and status as nuclear power plant licensees. Hence, these backfitting and issue resolution provisions are not applicable to this RIS addressing holders of general licenses for ISFSIs and activities authorized under such general licenses.

FEDERAL REGISTER NOTIFICATION

A notice of opportunity for public comment on this RIS was not published in the *Federal Register* because it is informational and pertains to an NRC staff position that does not represent a departure from current regulatory requirements and practice.

CONGRESSIONAL REVIEW ACT

The NRC has determined that this RIS is not a rule as designated by the Congressional Review Act (5 U.S.C. 801–886) and, therefore, is not subject to the Act.

PAPERWORK REDUCTION ACT STATEMENT

This RIS does not contain new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0132.

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Please direct any questions about this matter to the technical contact listed below or to the appropriate regional office.

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