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Draft Letter to the Nuclear Energy Institute Regarding the Clarification of Regulatory Paths for Lead Test Assemblies

**Comment On:** NRC-2018-0109-0002

Draft Letter to Nuclear Energy Institute Regarding Clarification of Regulatory Paths for Lead Test Assemblies

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## General Comment

Further evidence that the draft letter to NEI provides a new interpretation of 10 CFR 50.46 are recent industry documents that acknowledge the need for exemptions for LTAs with cladding or fuel pellet materials different than specified in

10 CFR 50.46. One example is a Westinghouse Report (prepared under contract to the Department of Energy) titled

Development of LWR Fuels with Enhanced Accident Tolerance Final Technical Report, dated October 30, 2015:

[http://www.iaea.org/inis/collection/NCLCollectionStore/\\_Public/47/046/47046013.pdf](http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/47/046/47046013.pdf)

Section 3.5 of the report, Future Regulatory Actions, states, in part, that:

Prior to full scale implementation of ATF [accident tolerant fuel], changes to a number of regulations will be required.

While Phase 1 and 2 can be completed with the use of exemption requests, to move towards a more efficient loading

process and implementation plan, rulemaking will be needed to remove the references to zirconium-based cladding and

UO<sub>2</sub> pellets. In particular, rulemaking will be required to modify the requirements contained in 10 CFR 50.46 and

10 CFR 50, Appendix K.

Section 6 of the report, Phase 2 - Lead Test Assembly Activities, states in, part, that:

Similar to the LTR [lead test rod] process, exemption requests from NRC regulations regarding cladding and fuel pellet material will be required during the LTA phase. As with the LTRs, these exemption requests will need to be filed 2 years in advance of LTA load.

The bottom line is that the NRC's letter to NEI provides a new interpretation of 10 CFR 50.46 that is not supported by the language and history of the rule. To argue otherwise is not credible.

There are a number of decisions of the Commission, the Atomic Safety and Licensing Appeal Board Panel, and the Atomic Safety and Licensing Board Panel that weigh in on the issue of how the specific language in a rule and agency practice should be considered in interpretation of the NRC regulations. Specifically, Section 6.21.5, Agency's Interpretation of its Own Regulations, in NUREG-0386, Digest 16, United States Nuclear Regulatory Commission Staff Practice and Procedure Digest, Commission, Appeal Board and Licensing Board Decisions, July 1972 September 2010, cites the following decisions pertinent to this issue:

Agency practice, of course, is one indicator of how an agency interprets its regulations. See *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 408 (1961) *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-6, 43 NRC 123, 129 (1996); *Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning)*, CLI-01-2, 53 NRC 2, 13 (2001); *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-99-10, 49 NRC 318, 324 (1999); *Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning)*, CLI-01-2, 53 NRC 2, 14 (2001).

Where NRC interprets its own regulations and where those regulations have long been construed in a given way, the doctrine of *stare decisis* will govern absent compelling reasons for a different interpretation; the regulations may be modified, if appropriate, through rulemaking procedures. *New England Power Co. (NEP Units 1 & 2), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)* ALAB-390, 5 NRC 733, 741-42 (1977).

In the Perry decision (CLI-96-13, 44 NRC 315, 1996), the Commission (44 NRC 315 at 325) stated that:

The Staff is certainly free to change rule interpretations if appropriate. But the staff may not adopt an interpretation unsupported by the language and history of the rule.

Based on the above, it is concluded that exemption requests should continue to be the path forward, until the necessary rulemaking is completed.

This NRC draft letter to NEI should not be issued.