

March 2, 1999

Dr. Carl J. Paperiello, Director  
Office of Nuclear Material Safety and Safeguards  
U.S. Nuclear Regulatory Commission  
Two White Flint Center  
Washington, D.C. 20555-0001

**REFERENCE: Letter from Craig Obey, OSHA to Carl Paperiello**

Dear Dr. Paperiello:

The Nuclear Energy Institute (NEI)<sup>1</sup> has reviewed the February 1, 1999 letter sent to you by Mr. Craig Obey, Director, Office of Intra-Governmental Affairs at the Occupational Safety and Health Administration (OSHA) relating to the proposed 10 CFR Part 70 rulemaking. We would like to provide you with our views on the comments contained in that letter.

OSHA's letter expresses concern that the NRC's proposed handling of chemical hazards considerations in the draft Part 70 rule will "preempt" OSHA "from enforcing any of its standards, rules or other requirements with respect to chemical hazards at [Part 70] facilities." According to OSHA, this would include its Process Safety Management regulations, as well as other OSHA regulations governing dangerous chemicals or hazardous working conditions. OSHA also states that a "generic NRC requirement for work site hazard analyses or safety programs" (i.e. presumably the

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<sup>1</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. 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, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Integrated Safety Analyses (ISA) and resulting safety programs) “would be even more preemptive of OSHA.” The basis for

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OSHA’s concern about NRC preemption of OSHA requirements is Section 4(b)(1) of the Occupational Safety and Health Act (OSH Act), which does indeed expressly exempt from OSHA’s jurisdiction “working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” The letter also suggests that the NRC rely on the “law itself” and “how [it] has been interpreted by the courts,” rather than the OSHA/NRC MOU.

The NRC recently posted on its Part 70 Website suggested changes to the chemical hazards portions of the draft rule. Those suggested changes were prepared largely in response to specific comments submitted by NEI. When we presented those comments to the NRC, we were mindful not only of Section 4(b)(1) of the OSH Act, but also of judicial decisions interpreting that provision. The NRC/OSHA MOU is, in our view, consistent with the statutory allocation of jurisdiction between the NRC and OSHA, and serves as a useful frame of reference for discussing these issues. We did not intend to, nor do we believe that the NRC’s suggested changes to the draft rule would, encroach in any way on OSHA’s traditional authority over non-radiological chemical hazards at NRC licensed facilities. On the contrary, our comments and the NRC Staff’s suggested changes in fact would have the effect of eliminating the very concern expressed in OSHA’s letter.

As you know, prior drafts of the Part 70 revisions were criticized by NEI because they appeared to suggest that the NRC had authority over purely non-radiological hazardous chemicals that could have no impact on radiological safety. Had the rule been promulgated in this manner, OSHA would have had a legitimate concern that the rule would unintentionally “preempt” OSHA regulations.

However, our comments, and your recent suggested modifications to the draft rule, make clear that the rule encompasses: (1) the hazards of NRC-licensed materials; and (2) non-radiological hazards that may affect the safety of NRC-licensed materials; but not (3) purely chemical hazards or other potentially hazardous working conditions that are within OSHA’s province. By revising and clarifying these parameters of the rule, the NRC has appropriately limited its role so as not to intrude on OSHA’s traditional authority. This would include OSHA’s Process Safety

Management rules, its Permissible Exposure Limits (PELs), and other OSHA requirements.

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Similarly, the NRC requirement to perform “work site hazard analyses” (i.e. the ISA) would not preempt OSHA requirements. While licensees will need to determine whether any non-radiological chemicals present at their sites could affect the safety of NRC-licensed materials, the NRC would not impose any restrictions on the use or handling of such chemicals unless, through the ISA, it was determined that they could have such an effect. (In doing so, the NRC would actually be regulating the safety of the licensed material itself, rather than regulating the “direct” hazards of the non-radiological chemicals). Similarly, we understand that the intended references to ERPGs and AEGLs in the SRP are only intended to provide “acceptable standards” for radiological chemicals that may be listed in the ERPGs or AEGLs, and would not preclude application of the OSHA PELs. Nor do we believe that OSHA would be precluded from addressing workplace hazards arising out of the decommissioning process -- so long as it does not attempt to regulate the hazards of licensed material subject to NRC jurisdiction.

We believe that the Staff’s suggested changes to the chemical hazards portions of the draft rule are appropriate and would not preempt any legitimate OSHA authority over non-radiological conditions at licensed Part 70 facilities. We again encourage you to incorporate the suggested modifications into the proposed rule.

Sincerely,

Marvin S. Fertel

cc: The Honorable Shirley A. Jackson, Chairman, NRC  
The Honorable Greta J. Dicus, Commissioner, NRC  
The Honorable Nils J. Diaz, Commissioner, NRC  
The Honorable Edward McGaffigan, Jr., Commissioner, NRC  
The Honorable Jeffrey S. Merrifield, Commissioner, NRC  
Dr. William D. Travers, Executive Director for Operations, NRC  
Mr. Craig Obey, Occupational Safety and Health Administration