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Rules and Directives
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35 W. WACKER DRIVE
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312-558-5600

200 PARK AVENUE
NEW YORK, NY 10166-4193
212-294-6700

444 FLOWER STREET
LOS ANGELES, CA 90071-2911
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1204 GENEVA, SWITZERLAND
41-22-317-7575

21 AVENUE VICTOR HUGO
75116 PARIS, FRANCE
33-1-53-64-82-82

April 12, 2001

66 FR 11611

2/26/01

(3)

David L. Meyer, Chief
Rules and Directives Branch
Division of Administrative Services
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Comments on NRC's Draft Regulatory Guide DG-1087

Dear Mr. Meyer,

The following comments are submitted on behalf of the Nuclear Utility Backfitting and Reform Group ("NUBARG")¹ in response to a recent *Federal Register* notice and request for comments concerning a proposed revision to an NRC regulatory guide, Draft Regulatory Guide DG-1087, "Evaluating the Habitability of a Nuclear Power Plant Control Room During a Postulated Hazardous Chemical Release."² DG-1087 represents a revision to Regulatory Guide ("RG") 1.78, "Assumptions for Evaluating the Habitability of a Nuclear Power Plant Control Room During a Postulated Hazardous Chemical Release" (June 1994). The NRC also proposes to use DG-1087 to revise and replace RG 1.95, "Protection of Nuclear Power Plant Control Room Operators Against an Accidental Chlorine Release" (January 1977).

NUBARG's submittal of this letter is not intended as a comment on the technical aspects of the proposed revisions to RG 1.78 and RG 1.95, or the technical content of draft DG-1087. Rather, we wish to point out a potential generic concern arising from the following statement in DG-1087, which indicates that the NRC apparently intends to apply the revised regulatory guide *only to license renewal applications*:

¹ NUBARG is a consortium of utilities, operating a substantial number of U.S. nuclear power reactors. NUBARG was formed in the early 1980s and actively participated in the development of the NRC's backfitting rule in 1985. NUBARG subsequently has monitored the NRC's implementation of the backfitting rule and NRC regulatory reform efforts.

² See 66 Fed. Reg. 11,611 (2001).

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David L. Meyer
April 12, 2001
Page 2

Except in those cases in which an applicant or licensee proposes an acceptable alternative method for complying with specified portions of the NRC's regulations, the method to be described in the revised guide reflecting public comments will be used in the evaluation of applications to renew operating licenses.³

As discussed in more detail below, NUBARG believes it would be extremely difficult for the Commission to apply the requirements of this regulatory guide only to the subset of current or future license renewal applicants.⁴ Since the baseline document is being revised for license renewal purposes, it would leave a void for ongoing Part 50 licensees. It is reasonable to conclude that this void would be filled with the license renewal version of this guidance. In this light, the stated NRC approach is inconsistent with the NRC backfit rule and ignores the fact that the new or revised staff positions reflected in the final regulatory guide, if applied to a specific licensee, must be justified according to the provisions of 10 C.F.R. § 50.109.⁵

As related to regulatory guides, requirements for backfitting considerations are reflected in an internal NRC Staff communication to the Committee to Review Generic Requirements ("CRGR"), which states: "New generic positions in documents, such as generic letters, bulletins, and *regulatory guides*, whether affecting power reactors or nuclear materials facilities/activities, are to be considered and justified as backfits before they are issued" (*emphasis added*).⁶ Additionally, NUBARG believes that applying this revised regulatory guide

³ DG-1087, Section D, "Implementation," p. 13. NUBARG also is concerned that the NRC's proposed implementation approach (e.g., the NRC will use the method described in the final revised regulatory guide to evaluate license renewal applications unless the applicant affirmatively proposes an alternative compliance method) will effectively impose a plant-specific backfit upon licensees without a backfit analysis.

⁴ NUBARG also maintains that the NRC has not conducted the proper backfitting analysis to justify imposing the final regulatory guide upon current Part 50 reactor licensees. The comments herein are not intended to imply that the regulatory guide be imposed upon all current or renewed reactor licensees.

⁵ "Backfitting is defined as the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or *the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position.*" 10 C.F.R. § 50.109(a)(1) (*emphasis added*).

⁶ William D. Travers to Chairman Meserve and Commissioners Dicus, Diaz, McGaffigan, and Merrifield, "Notification of the Revised Charter of the Committee to Review Generic Requirements," November 8, 1999, Appendix C, fn. 2.

David L. Meyer
April 12, 2001
Page 3

only to renewal applicants would be contrary to the NRC's policy and regulations for license renewal reviews.

Application of DG-1087 License Renewal Applicants

As background, NRC regulations in 10 C.F.R. Part 54 set forth the requirements for renewal of nuclear power plants operating licenses. As part of the license renewal process, applicants must perform an integrated plant assessment to identify certain safety-related structures, systems, and components ("SSCs") that are subject to an aging management review. 10 C.F.R. § 54.21(a). In addition, applicants must evaluate time-limited aging analyses. 10 C.F.R. § 54.21(c). Each renewed license issued by the NRC will contain the conditions necessary to help ensure that those SSCs subject to review in accordance with Section 54.21, and those SSCs associated with any time-limited aging analyses, will "continue to perform their intended functions for the period of extended operation." 10 C.F.R. § 54.33.

While NUBARG maintains that the NRC has not conducted the requisite backfitting analysis to impose requirements on any current Part 50 licensees, the NRC's proposal to apply the final version of the revised regulatory guide only to NRC license renewal applicants would lead to confusion regarding its regulatory intent. First, no explanation is provided for the agency's apparent decision to apply the revised regulatory guide only to a subset of Part 50 licensees. If nuclear safety or occupational safety concerns have prompted the NRC in this case to "update specifications of toxicity limits based on more recent data . . . , to bring risk insights into the process, and to make the guidance more performance-based," (DG-1087, p. 2), then such concerns presumably apply to all (not merely some) reactor licensees. On the other hand, if the NRC has some other rationale for limiting the application of the revised regulatory guide to license renewal applicants, that logic is not obvious from the subject matter of this guidance document, nor is it clear from the text of the document.

From the perspective of the NRC's license renewal regulations, the suggestion that the revised DG-1087 guidance should apply only to renewal applicants is, in our view, inconsistent with the "first principle of license renewal." This principle, developed and discussed by the NRC Staff in connection with its promulgation of the license renewal rule, continues to be an accepted tenet of regulatory interpretation. That principle, as articulated by the NRC in the Supplementary Information accompanying promulgation of the 1995 amendments to 10 C.F.R. Part 54, is as follows:

[W]ith the possible exception of the detrimental effects of aging on the functionality of certain plant systems, structures, and components in the period of extended operation and possibly a few other issues related to safety only during extended operation, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable

David L. Meyer
April 12, 2001
Page 4

level of safety so that operation will not be inimical to public health and safety or common defense and security⁷

This principle of license renewal was developed by the Commission as a regulatory insulation or protection for license renewal applicants. By incorporating this concept into the license renewal rule, the Commission contemplates that license renewal applicants will be subject to NRC requirements beyond their current licensing basis ("CLB") *only* when the NRC's review of a renewal application identifies detrimental aging effects that impact the functionality of certain SSCs at that particular plant.⁸ The detection of such aging effects, or the detection of the "few other issues related to safety only during extended operation," is necessarily a plant-specific activity. Thus, absent such plant-specific findings, the license renewal rule does *not* contemplate that the NRC may impose additional requirements outside of a facility's CLB as a prerequisite to obtaining a Part 54 renewed license.

In sum, to impose additional generic requirements upon license renewal applicants which are outside of their current licensing bases, the NRC must (to be consistent with Part 54) take such actions only when they are based on plant-specific findings and/or rulemaking. To our knowledge, no such facility-specific findings have been made by the Commission in connection with the proposed revision of DG-1087. Moreover, any such additional requirements must be imposed *by the provisions of 10 C.F.R. Part 54*. The proposed implementation scheme for DG-1087 does not satisfy this criterion, either, because there is no clear nexus between Part 54 considerations and the subject matter of the draft regulatory guide. Rather, it appears that the NRC may be attempting to "bootstrap" renewal applicants' compliance with this revised guidance simply by requiring it in the language of the draft regulatory guide.

The argument that DG-1087 also should apply only to license renewal applicants when it is finalized also is defective from the perspective of the NRC's license renewal regulations. NUBARG recognizes the NRC's determination that the provisions of the backfit rule, 10 C.F.R. § 50.109, do not apply to the license renewal rule.⁹ The Commission's stated rationale for this conclusion was that, at the time the 1995 amendments to Part 54 were promulgated, there were no license renewal applicants. Thus, the amendments only affected "prospective applicants for license renewal," and there were no "valid licensee or applicant expectations that may be changed regarding the terms and conditions for obtaining a renewed

⁷ 60 Fed. Reg. 22,461, 22,464 (1995).

⁸ Otherwise, the NRC has concluded that the existing NRC regulatory process will "continue to mitigate the effects of aging to provide an acceptable level of safety" during the period of extended operation. *Id.*

⁹ See 60 Fed. Reg. at 22,490 (Supplementary Information accompanying the 1995 amendments to 10 C.F.R. Part 54).

David L. Meyer
April 12, 2001
Page 5

operating license” because of the amendments.¹⁰ Put another way, the NRC found that regulatory stability—the primary impetus for the backfit rule—was not threatened by the imposition of 10 C.F.R. Part 54.

Regardless of this limitation, however, if NRC chooses to impose additional requirements that will affect only that subset of Part 50 reactor licensees who apply for Part 54 licenses, those requirements must be imposed consistent with the first principle of license renewal—which, as noted above, the NRC has failed to do. NRC commentary explaining the 1995 renewal rule supports NUBARG’s position on this point. In response to an industry suggestion that backfit protection was needed, the Staff stated:

The industry’s desire [as presented in comments on the proposed revisions to Part 54] for a special provision in the rule that would impose backfit-style requirements on the Commission’s review is neither necessary nor appropriate. The intent of the license renewal rule is clear—to ensure that the effects of aging on functionality of certain systems, structures, and components are adequately managed in the period of extended operation. The Commission does not intend to impose requirements on a licensee that go beyond what is necessary to adequately manage aging effects.¹¹

While acknowledging the industry’s concerns that disagreements may arise between an applicant and the NRC as to what is or is not considered “adequate,” the NRC points out that the “renewal process is designed such that a renewal applicant proposes the alternative it believes manages the effects of aging for those structures and components defined by the rule.”¹² This position is consistent with the provisions of the backfitting rule that discuss alternative ways to achieve compliance with NRC requirements.¹³ This regulatory scheme makes it clear that licensees applying for renewal may continue to comply with the plant’s current licensing basis for control room habitability, unless specific aging concerns are identified through a plant’s evaluation of time-limited aging analysis in accordance with 10 C.F.R. § 54.21. Accordingly, the statement in Section D of DG-1087 is inappropriate and appears to impose a backfit that the NRC has not justified in accordance with 10 C.F.R. § 50.109.

¹⁰ *Id.*

¹¹ 60 Fed. Reg. 22,461 (1995).

¹² *Id.*

¹³ “If there are two or more ways to achieve compliance with a license or the rules or orders of the Commission, or with written licensee commitments, or there are two or more ways to reach a level of protection which is adequate, then ordinarily the applicant or licensee is free to choose the way which best suits its purposes.” 10 C.F.R. § 50.109(a)(7).

David L. Meyer
April 12, 2001
Page 6

NUBARG is also concerned that the lack of clear guidance in the regulatory guide as to applicability could result in the NRC inappropriately imposing the guidance in the final regulatory guide upon licensees through plant-specific licensing actions. Such a result could occur if NRC inspectors inappropriately use the regulatory guide for inspection of a licensee's systems or safety analyses for control room habitability, or if NRC technical reviewers inappropriately use the guidance to review license amendments, regardless of the plant's current licensing basis. If the draft regulatory guide is revised, as recommended below, to clearly indicate that its implementation is not required, nor applicable to Part 50 licensees' current licensing basis (*i.e.*, that a plant's current licensing basis continues to provide an acceptable level of quality and safety for compliance with NRC regulatory requirements), then NUBARG's concern in this regard will be alleviated.

In further explanation, the NRC has recently revised a number of regulatory guides. NUBARG is concerned on a generic basis that the NRC staff may inappropriately apply the revised guidance in these regulatory guides to licensees during review of licensing actions or NRC inspections. Where the NRC did not conduct a backfitting analysis for the new staff positions in a particular revised regulatory guide, NUBARG views any imposition of the revised guidance upon a licensee as an example of a plant-specific backfit. Therefore, it is especially important that the NRC clarify the intended application of regulatory guides to preclude inappropriate application on a plant-specific basis when the guidance has not been justified as a generic backfit.

Recommendations

To reflect the appropriate application and implementation of the regulatory guide, NUBARG recommends that DG-1087 be modified to:

- indicate that the alternative method of complying with General Design Criterion ("GDC") 19, "Control Room," provided in the final regulatory guide will not be imposed on current operating plants, including the plants that pursue license renewal, and
- explain that the NRC continues to consider the revision of the regulatory guide referenced in a plant's licensing basis an "acceptable alternative method for complying with" GDC 19, for both current operating plants and those plants being evaluated for license renewal.

On a more generic basis, NUBARG also recommends that the NRC ensure that future revisions to regulatory guides do not appear to impose unjustified backfits by clarifying the intended application of the new guidance. We suggest that language similar to other NRC regulatory guides be used to revise Section D, "Implementation," indicating that the guidance in the final regulatory guide will apply only to the construction and licensing of future plants, or currently-licensed plants for which the licensee voluntarily commits to follow the guidance. The following language is extracted from Section D of Regulatory Guide 1.105, "Setpoints for Safety-Related Instrumentation," Revision 3, December 1999:

WINSTON & STRAWN

David L. Meyer
April 12, 2001
Page 7

Except in those cases in which an applicant proposes an acceptable alternative method for complying with specified portions of the NRC's regulations, the methods described in this guide will be used in the evaluation of submittals in connection with applications for construction permits, operating licensees, and combined licenses. It will also be used to evaluate submittal from operating reactor licensees who voluntarily propose to initiate system modifications if there is a clear nexus between the proposed modifications and this guidance.

Please contact us if you have any questions.

Sincerely,
Original signed by T. Poindexter

Thomas C. Poindexter
Kathryn M. Sutton

Counsel for the Nuclear Utility Backfitting
and Reform Group

cc: J. Murphy, Chairman
Committee to Review Generic Requirements

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