

tornado loads, be evaluated to meet the cask design bases. Specific licensees are currently required, under § 72.122(b)(2), to design ISFSIs to withstand the effects of dynamic loads, such as earthquakes and tornados.

V. Related Regulatory Guide and Standard Review Plans

On July 22, 2002, the NRC published DG-3021, "Site Evaluations and Determination of Design Earthquake Ground Motion for Seismic Design of Independent Spent Fuel Storage Installations and Monitored Retrievable Storage Installations" for public comment (67 FR 48956; July 26, 2002). Regulatory Guide 3.73, *Site Evaluations and Design Earthquake Ground Motion for Dry Cask Independent Spent Fuel Storage and Monitored Retrievable Storage Installations* (formerly DG-3021), provides guidance to licensees for procedures acceptable to the NRC staff for:

- (1) Conducting a detailed evaluation of site area geology and foundation stability;
- (2) Conducting investigations to identify and characterize uncertainty in seismic sources in the site region important for the probabilistic seismic hazard analysis (PSHA);
- (3) Evaluating and characterizing uncertainty in the parameters of seismic sources;
- (4) Conducting PSHA for the site; and
- (5) Determining the DE to satisfy the requirements of 10 CFR Part 72.

This guide describes acceptable procedures and provides a list of references that present acceptable methodologies to identify and characterize capable tectonic sources and seismogenic sources. Section IV.B of this **SUPPLEMENTARY INFORMATION** describes the key elements of the regulatory guide. A document announcing the availability of Regulatory Guide 3.73 will be published in the **Federal Register** in the near future.

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In the future, editorial changes to NUREG-1536, "Standard Review Plan for Dry Cask Storage Systems," and NUREG-1567, "Standard Review Plan for Spent Fuel Dry Storage Facilities," will be made. For example, the standard review plans will be updated to reference the new § 72.103 and Regulatory Guide 3.73.

VI. Summary of Public Comments on the Proposed Rule

This section presents a summary of the public comments received on the proposed rule and supporting documents, the NRC's response to the comments, and changes made in the final rule and supporting documents as a result of these comments.

The NRC received nine comment letters on the proposed rule from eight commenters. The commenters were the Nuclear Energy Institute (NEI), the U.S. Department of Energy (DOE), two nuclear power utilities, three State agencies, and one license applicant for an independent spent fuel storage installation. All the commenters agreed with the proposal to address uncertainty by requiring the use of a PSHA or suitable sensitivity analyses for an ISFSI or MRS in the western U.S., not co-located with an NPP, and in areas of known seismic activity in the eastern U.S. However, commenters were divided on the specific question for public comment related to the appropriate value for the MAPE posed by the Commission in the proposed rule. These comments are summarized in this section under the heading "Related Regulatory Guide." All commenters supported the concept of requiring general licensees to evaluate both dynamic loads and static loads for ISFSI and MRS cask storage pads and areas.

Copies of the public comments are available for review in the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. A review of the comments and the NRC responses follow:

General Comments

Comment 1: A commenter stated that proposed 10 CFR 72.103(f)(1) does not comply with the notice and comment requirements of Section 553 of the Administrative Procedure Act (APA) because of the way the rule is structured. The commenter believes that the proposed rule "is in the guise of a substantive rule," but that the substantive requirements are found in the draft guidance, a document which is not a rule. In the commenter's view,

"the Commission attempts to give concrete form to its proposed rule through an interpretative document, DG-3021, and the Commission thereby circumvents [APA] § 553 notice and comment rulemaking procedures," citing *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). According to the commenter, a significant defect of this structure is that the rule gives no standards against which a licensing board or intervenors may evaluate whether an applicant has complied with the rule and, instead, gives "unbridled and unchecked discretion to the staff in determining the seismic design standard for ISFSIs sited in seismic areas." The proposed rule, in the commenter's view, has no force of law because it has no binding standards and thus is unenforceable. Another commenter disagreed and supported the NRC's view that the rule is substantive and in compliance with the APA.

Response: First, the NRC rejects the claim that the rule is not being promulgated in compliance with § 553 of the APA. Section 553 requires that notice of a proposed rulemaking be published in the **Federal Register**, including the terms or substance of the proposed rule, and that interested persons be given an opportunity to comment. The APA also provides an exception for interpretative rules and general statements of policy enabling those documents to be issued as final rules without prior notice and comment. In this case, the NRC has not availed itself of the exception but rather has issued both the draft guidance and the proposed rule for public comment. Thus, there has been no violation of the notice and comment requirements of Section 553 of the APA even if the guidance were to be considered part of the rule. The *Paralyzed Veterans* case, cited by the petitioner, concerned a guidance document issued by the Department of Justice which had been issued *without* prior notice and comment and raised the issue whether the Government could rely upon the guidance in an enforcement action. The court ultimately found that there was no need for the Government to rely on the guidance to enforce the regulation. Here, the guidance has been issued for comment and the NRC does not contend, as explained below, that the guidance is legally enforceable.

Second, the NRC does not agree that "substantive requirements" have been placed in the guidance document. Regulatory Guide 3.73 (formerly DG-3021) provides information on methods acceptable to the NRC for implementing specific parts of the rule, but it does not place any particular requirements on