

January 24, 2000

SECY-00-0018

FOR: The Commissioners

FROM: William D. Travers /RA/
Executive Director for Operations

SUBJECT: SIMPLIFICATION OF THE RULEMAKING PROCESS FOR 10 CFR
PART 72 CERTIFICATE OF COMPLIANCE RULEMAKINGS

PURPOSE:

To inform the Commission of the steps the staff has taken to expedite the rulemaking process for both new and amended Certificates of Compliance (CoCs).

BACKGROUND:

In SECY-98-188, the staff proposed a simplification of the rulemaking process for CoC rulemaking to expedite the approval process. These steps included the elimination of the rulemaking plan, use of standard formats, issuance of CoC rules under the Executive Director for Operations' authority, and the intent to use a direct final rulemaking process. In the September 3, 1998, Staff Requirements Memorandum (SRM), the Commission approved the staff's proposals for simplifying the rulemaking process and instructed the staff to seek public comments in the Federal Register notice on the next CoC rulemaking regarding the proposal to begin using a direct final rule process. In SECY-99-069, the staff informed the Commission that the staff was evaluating simplifying the process for amending a CoC. In the SRM dated April 1, 1999, the Commission directed the staff to proceed with plans to simplify the process for amending a CoC without the need for rulemaking.

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DISCUSSION:

As part of the Federal Register notice on the proposed rule to add the Holtec HISTAR 100 cask system to the listing of approved cask systems in 10 CFR 72.214 for use by general licensees, the staff invited comments on the Commission's intent to use the direct final rule process for future CoC rulemakings. Only three of the nine commenters addressed the direct final rule question: two commenters were opposed and one in favor. However, there were a significant number of comments, more than 170, on the proposed rule itself, indicating that CoC rulemakings are not yet considered routine and noncontroversial by the public. Based on the number and type of comments that were received on the proposed rule, the staff concluded that it is not appropriate to use a direct final rule approach for additions to the CoC listing at this time. The staff plans to reassess this issue in the future after gaining additional experience with new listings. However, the staff plans to use a direct final rule approach for amendments to the existing cask systems in the listing, unless we have reason to believe that a particular amendment will be controversial. An amendment is limited in scope and does not reopen the entire cask design to comment. Therefore, the staff does not anticipate routinely receiving significant adverse comments on amendments. The staff will also reevaluate this policy after gaining additional experience with direct final rules for amendments.

The staff has made substantial improvements to shorten the rulemaking process and make it more efficient and effective. To streamline the internal rulemaking process, the staff has developed standard language that has been concurred in by all offices and will be used for CoC rulemakings that add new cask systems to the listing. This has allowed the staff to reduce time for office concurrence from three weeks (as specified in Management Directive 6.3) to one week. The staff is also developing standard language for amendments that will similarly reduce the review time for amendments. Schedules for cask review are coordinated with the Rulemaking and Guidance Branch (RGB) IMNS/NMSS such that the CoC rulemaking packages are now ready to issue for concurrence when the Spent Fuel Project Office (SFPO) NMSS completes the preliminary safety evaluation report and the proposed CoC. This will further streamline the process and has successfully eliminated an additional one to three weeks. We have also assigned additional resources to the CoC rulemakings.

Working groups are formed to more efficiently process the comments received on a proposed rule. The working group, composed of technical review and rule development staff, evaluates comments received and develops a schedule based on the number and content of the comments. Responsibilities for comment resolution are clearly defined and items requiring management involvement are promptly identified at the start of the comment resolution process. Time for comment resolution by the SFPO technical staff is now specifically included in SFPO resource planning and scheduling to maintain a predictable date for CoC issuance.

The staff has evaluated the possibility of eliminating the rulemaking process for amendments to CoCs but, for the reasons explained below, has decided not to pursue this course. Section 218(a) of the Nuclear Waste Policy Act of 1982 authorizes the U.S. Nuclear Regulatory Commission (NRC) to approve spent fuel storage technologies by rulemaking for use at reactor sites. Approved technologies may be used under a general license without the need for a site-specific approval. When NRC adopted the generic process in 1990 for the review and approval of dry cask storage technologies, the Commission stated that ... "casks ...[are to] be approved

by rulemaking and any safety issues that are connected with the casks are properly addressed in that rulemaking rather than in a hearing procedure” (July 18, 1990; 55 FR 29182). Rulemaking is a more efficient process for resolving generic issues than case-by-case adjudication of such issues at specific sites. Although amendments were not specifically addressed in 1990, the same rationale applies to amendments. By eliminating the rulemaking process for amendments, any issues raised by the amendment could be subject to a hearing process and the efficiencies obtained in resolving generic issues in one proceeding could be lost. If a hearing were necessary for an amendment, greater staff resources could be needed and more time could be required for resolution of issues than for a rulemaking. Because of this, it is not clear that eliminating the rulemaking for amendments would actually reduce unnecessary burden for the industry or the staff. The staff believes that it is more efficient to resolve the public concerns within the administrative record of a rulemaking than through a potentially prolonged hearing process.

Another factor considered by the staff is the recent promulgation of a modified rule (10 CFR 72.48, “Changes, Tests, and Experiments”; October 4, 1999; 64 FR 53582) that will allow CoC holders to make design changes (currently only a licensee can make such changes) without the prior approval of the NRC. The rule is effective April 5, 2001. This could significantly reduce the number of amendments in the future, thereby reducing unnecessary industry and staff burden. The staff is also working with industry to simplify the technical specifications. Once complete, this could further reduce the number of amendments.

The staff has also reviewed a suggestion from NEI. NEI suggested that the proposed rule be published on receipt of the CoC applications, to expedite the rulemaking process. Under the NEI proposal, public comments would be requested on the applicant’s initial safety analysis report, and the public would not have the benefit of NRC review, findings and conclusions. The staff does not believe that this is a viable solution, because the proposed CoC and the preliminary safety evaluation report (SER) provide the basis for adding the cask system to the listing. To date, the majority of the comments received on proposed CoC rulemakings are on the CoC and SER. The CoC and SER are part of the administrative record for the rulemaking. Publication of the proposed rule without the staff’s SER could result in a perception by the public that staff approval is pro forma. In fact, during the staff review, generally many changes are made to the Safety Analysis Report (SAR). If the proposed rule were to be published at the time of receipt of the application, it would have to be republished at the completion of the draft SER/CoC because these documents form the basis for the rulemaking. Hence, no time would be saved. In fact, the staff burden would be increased because of the need to prepare a second notice and prepare responses to the public comments on two proposed rules. Staff has discussed these issues with NEI.

The staff believes that the recent steps taken to streamline the CoC rulemaking process will provide a more efficient and effective internal process and result in more timely approvals of CoCs. Combining the staff’s internal changes with the addition of 10 CFR 72.48, the staff believes that the unnecessary burden for the industry and the staff will be reduced while maintaining safety. After reviewing the alternatives and the changes that have been made to the internal processes, the staff has determined that the existing rulemaking process is currently the best approach. Therefore, the staff is not pursuing the elimination of rulemaking for amendments to CoCs at this time. However, the staff will continue to hold discussions with the

stakeholders in an effort to find ways to further streamline the CoC rulemaking process. The staff has scheduled a meeting with NEI for February 8 and 9, 2000, and this is a principal item for discussion.

COORDINATION:

The Office of the General Counsel has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection. The Office of the Chief Information Officer has reviewed the Commission Paper for information technology and information management implications and concurs in it.

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Edited by E. Kraus 11/30/99 ***SEE PREVIOUS CONCURRENCE**

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MEMO TO: The Commissioners

FROM: William D. Travers

SUBJECT: SIMPLIFICATION OF THE RULEMAKING PROCESS FOR PART 72
CERTIFICATE OF COMPLIANCE RULEMAKINGS

ORIGINATOR: Merri Horn
SECRETARY: Theresa Lee Kendall
