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PROPOSED RULE **72**  
(64FR 59677)

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January 18, 2000

AD.

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Attention: Rulemakings and Adjudications Staff

**Re: Proposed Rulemaking, 10 CFR Part 72  
"Clarification and Addition of Flexibility"  
64 Fed. Reg. 59677 (1999)**

Dear Sirs:

On November 2, 1999, the Nuclear Regulatory Commission (NRC) published in the Federal Register proposed amendments to 10 C.F.R. Part 72. 64 Fed. Reg. 59677 (1999). The proposed amendments would clarify those sections of Part 72 which apply to activities associated with general licenses, specific licenses, and Certificates of Compliance (CoC). The proposed amendments would also allow CoC applicants to begin cask fabrication under an NRC-approved quality assurance program prior to issuance of the CoC. Finally, the proposed amendments would eliminate repetitive reviews of cask design issues in hearings on applications for specific Part 72 licenses which reference NRC-approved cask designs.

On behalf of Private Fuel Storage, L.L.C. (PFS), we are pleased to submit the following comments. PFS is the applicant for a specific license under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation on the Skull Valley Indian Reservation in Tooele County, Utah. PFS' application currently references two spent fuel storage cask designs for which applications had been filed for CoC's pursuant to Subpart L of Part 72, the HI-STORM 100 cask system designed by Holtec International and the TranStor Storage Cask System of BNFL Fuel Solutions Corporation.

PFS welcomes the attention which the Commission continues to give to the Part 72 process. The generic licensing approach reflected in Part 72 provides an important mechanism for the NRC to carry out its radiological health and safety responsibilities in an efficient and effective manner.

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PFS supports the proposed amendment adding § 72.13 so as to resolve the ambiguity as to which provisions of Part 72 apply to specific licenses, which apply to general licenses, and which apply to CoC's. We would, however, suggest that the list of sections applicable to general licensees be amended to include 10 C.F.R. §§ 72.214 and 72.240(a). PFS also supports the proposed amendments to §§ 72.140 and 72.234, which would permit CoC applicants to begin fabrication of spent fuel storage casks, under an NRC-approved quality assurance plan, prior to issuance of the CoC.

With respect to the third aspect of the proposed rulemaking, PFS supports avoiding repetitive reviews of cask design issues in those Part 72 specific license hearings involving cask designs which are the subject of CoC's. We believe, however, that this aspect of the proposed rulemaking should be clarified in two respects. First, the proposed language should be revised so that it clearly applies to cask designs which are in the CoC review process, as well as those that have already received a CoC. Second, the proposed amendment should also make clear that site-specific hearings are not the appropriate forum to seek to raise cask design issues which an intervenor claims were not considered in the CoC review process. These clarifications will assure that repetitive reviews will in fact be avoided and that the savings of NRC Staff and applicant resources estimated by the NRC (see 64 Fed. Reg. at 59683) will in fact be achieved.

The CoC process was created to provide a means for evaluating and approving the designs for spent fuel storage casks that would be more efficient, expeditious and economic than a site-specific licensing of the cask design each time its use was proposed. By providing for a single review of the cask design, with the opportunity for public participation in the review process, culminating in the issuance of a formal rule approving the design, the NRC has been able to achieve the benefits of generic consideration, while avoiding the inefficiencies of repetitive evaluations in case-by-case adjudications. The Commission has successfully adopted similar generic approval mechanisms in other areas as well – Part 71 (transportation casks and packages); Part 52 (standard design certifications), Part 51 (license renewal environmental reviews, § 51.53(c); need for power, § 51.36(b); waste confidence, § 51.23; nuclear fuel cycle impacts, §§ 51.51 and 51.52). These types of generic approvals have received explicit approval by the courts. See, e.g., Baltimore Gas and Electric Co. v. Natural Resources Defense Council, 462 U.S. 82 (1983); Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992). It is a basic principle of administrative law that an agency's choice to proceed by rulemaking or

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by case-specific adjudication is within the agency's discretion. Mobil Oil Exploration & Production Southwest, Inc. v. United Distribution Cos., 498 U.S. 211, 228 (1991); Heckler v. Campbell, 461 U.S. 458, 467 (1983); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); FPC v. Texaco, Inc., 377 U.S. 33, 44 (1964). That principle has been specifically applied to the Commission. Kelley v. Selin, 42 F.3d 1501, 1511 (6<sup>th</sup> Cir.), cert. denied 515 U.S. 1159 (1995); Morningside Renewal Council v. AEC, 482 F.2d 234, 239 (2d Cir. 1973), cert. denied, 417 U.S. 951 (1974); Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974).

The first requested clarification is to make sure that repetitive cask design issue reviews are avoided in those site-specific licensing cases where the CoC review is still underway. As written, proposed § 72.46(e) could be read to preclude repetitive reviews only where the CoC had already been issued ("cask design issues previously addressed by the Commission when it issued the Certificate of Compliance"). There will be cases where the site-specific licensing proceeding and the CoC review are proceeding in parallel. Since the site-specific license cannot be issued until the CoC for the design referenced in the site-specific application has also been issued, there is no safety issue involved with eliminating repetitive cask design reviews in the site-specific hearing. Such safety issues can still be raised in the CoC proceeding and will be resolved in that proceeding. Those issues need not be repetitively reviewed and resolved in the parallel site-specific proceeding. Allowing those issues to be raised in both proceedings would create the specter of inconsistent results as well as duplicative and wasteful use of resources by the NRC Staff and applicants.

Deferring consideration of issues from site-specific proceedings to generic proceeding is well established in NRC and judicial case law. This is the case even when the generic proceedings are still in progress. Commission decisions have long held that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 9 A.E.C. 79, 85 (1974); accord Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 N.R.C. 59, 85-86 (1985); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 179 (1998). The Commission has recently reaffirmed this rule of law. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 345 (1999).

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The courts have taken the same position. Union of Concerned Scientists v. AEC, 499 F.2d at 1081 (no due process violation for excluding regulatory challenge from administrative proceedings where a rulemaking proceeding is underway). Columbia Broadcasting Coalition v. FCC, 505 F.2d 320, 325 (D.C. Cir. 1974) (during pendency of rulemaking, agency may refuse to consider issue in individual case unless specific abuse shown). It would make no sense, and would be wholly counter-productive to the aims expressed by the Commission in the proposed rulemaking, to allow the redundant review in a site-specific proceeding of cask design issues which are within the scope of the CoC proceeding, merely because the CoC proceeding happened not to be completed prior to the site-specific proceeding. Logic, NRC precedent, and federal case law all suggest that cask design issues should not be reviewed in site-specific proceedings whether the CoC is issued prior to, during, or after the site-specific licensing proceeding.

The second aspect of proposed § 72.46(e) which requires clarification concerns the possibility that the proposed rule could be read to exclude from site-specific proceedings only those generic cask design issues which were explicitly addressed in the CoC proceeding. The NRC's CoC review will encompass all safety issues which the Commission in its expert judgment determines are needed to adequately protect the public health and safety. Members of the public are entitled to raise in the CoC process any questions that they may have with respect to the cask design and the NRC will address those concerns in the course of the review or in the rulemaking process that follows. What would be inefficient and inappropriate would be for an intervenor in a site-specific licensing process to be able to raise a cask design issue, claiming that it should be litigated in the site-specific proceeding because the NRC allegedly did not address (or did not adequately address) the issue in the CoC proceeding. If a cask design issue was, in fact, not addressed in connection with the issuance of the CoC, the proper mechanism to raise that issue after the CoC is issued would be by filing a request for action pursuant to 10 C.F.R. § 2.206, or a petition to amend the rule adopting the CoC pursuant to 10 C.F.R. § 2.802. Alternatively, an attempt to raise in a site-specific proceeding a cask design issue involving a cask which had received a CoC, could be made subject to 10 C.F.R. § 2.758, which establishes the process for handling challenges to NRC regulations in individual licensing proceedings. Regardless of which procedural route is used, the final rule and its accompanying statement of considerations should make clear that cask design issues involving casks which are the subject of issued or pending CoC's should not be litigated in site-specific proceedings. It would make no sense, and would be inconsistent with the prior NRC precedent described above, to allow

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assertions that an NRC generic decision was incomplete or inadequate to be raised and litigated in a site-specific hearing. Unless this is made clear, the rule as proposed may open a loophole which can significantly undermine the valuable policies underlying the proposed rule.

To accomplish both of these clarifications, we recommend that the proposed 10 C.F.R. § 72.46(e) be revised to read as follows:

“(e) If an application for (or an amendment to) a specific license issued under this part incorporates by reference information on the design of a spent fuel storage cask for which NRC approval pursuant to Subpart L of this part has been issued or is being sought, the scope of any public hearing held to consider the application will not include any cask design issues.”

The statement of considerations accompanying the final rule would make clear (as made clear in connection with the proposed rule, 64 Fed. Reg. 59678) that design interface issues between the cask design and site specific characteristics (e.g., meteorological, seismological, radiological, and hydrological) may be raised as issues at a site-specific hearing.

Thank you for the opportunity to provide these comments. If you have any comments or questions, we would be happy to discuss these with you.

Very truly yours,



Jay E. Silberg