

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150-AG15

Clarification and Addition of Flexibility

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations on spent fuel storage to specify those sections of 10 CFR Part 72 that apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a certificate of compliance (CoC). These amendments are consistent with past NRC licensing practice to eliminate any ambiguity for these persons by clarifying which portions of Part 72 apply to their activities. The final rule eliminates the necessity for repetitive reviews of cask design issues in a licensing proceeding on applications for specific Part 72 licenses, where previously approved cask designs, or designs under Commission review, have been incorporated by reference into the application. Also, the final rule eliminates repetitive reviews in those cases where the site-specific licensing proceeding and a CoC review and certification (i.e., rulemaking) are proceeding in parallel. Lastly, this rule allows an applicant for a CoC to begin cask fabrication under an NRC-approved quality assurance (QA) program before the CoC is issued.

EFFECTIVE DATE: (30 days from the date of publication in the Federal Register).

FOR FURTHER INFORMATION CONTACT: Anthony DiPalo, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6191, e-mail AJD@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Commission's regulations at 10 CFR Part 72 were originally designed to provide specific licenses for the storage of spent nuclear fuel in an independent spent fuel storage installation (ISFSI) (45 FR 74693; November 12, 1980). In 1990, the Commission amended Part 72 to include a process for approving the design of spent fuel storage casks and issuing a CoC (Subpart L) and for granting a general license to reactor licensees (Subpart K) to use NRC-approved casks for the storage of spent nuclear fuel (55 FR 29181; July 18, 1990). Although the Commission intended that the requirements imposed in Subpart K for general licensees be used in addition to, rather than in lieu of, appropriate existing requirements, ambiguity exists as to which Part 72 requirements, other than those in Subparts K and L, are applicable to general licensees and certificate holders, respectively.

In addition, the Commission has identified two aspects of Part 72 where it is desirable to reduce the regulatory burden and provide additional flexibility to applicants for a specific license or a CoC.

First, the Commission anticipates receipt of several applications for a specific license that will propose using storage cask designs previously approved by NRC under the provisions of Subpart L of Part 72 (i.e., cask designs that have been issued a CoC and are listed in § 72.214). Section 72.18, "Elimination of repetition," permits an applicant to incorporate by reference information contained in previous applications, statements, or reports filed with the NRC, including cask designs approved under Subpart L. Section 72.46 requires that in an application for a specific license under Part 72, the Commission shall issue or cause to be issued a notice of proposed action and opportunity for a license hearing (i.e., a licensing proceeding) in accordance with 10 CFR Part 2. Under current Part 72 regulations, the adequacy of the design of these previously approved casks could be at issue during a § 72.46 licensing proceeding for a specific license application (i.e., issues on the cask design which have been previously addressed by the Commission, including resolution of public comments, could be the subject of a licensing proceeding).

Second, § 72.234(c), which was part of the 1990 amendments to Part 72, prohibits an applicant for a CoC from beginning fabrication of a spent fuel cask before the NRC issues a CoC for the cask design. However, an applicant for a specific license is currently allowed to begin fabrication of spent fuel storage casks before the license is issued. At the time the 1990 rule was proposed, a commenter suggested that a fabricator (i.e., applicant for a CoC) be allowed to take the risk of beginning fabrication before the receipt of the CoC. However, in the final rule, the Commission took the position, "[i]f a vendor has not received the certificate, then the vendor does not have the necessary approved specifications and may design and fabricate casks to meet incorrect criteria" (55 FR 29185; July 18, 1990).

Since 1990, the Commission has reviewed and approved several cask designs. These reviews and follow-up requests for additional information have established the NRC's

expectation as to how its criteria for cask design and fabrication should be met. In January 1997, the NRC published NUREG-1536, "Standard Review Plan for Dry Cask Storage Systems," informing CoC applicants of its expectations in reviewing cask designs. Since then, the Commission has granted several exemptions from § 72.234(c) allowing applicants to begin fabrication before issuance of the CoC. Additional exemption requests from § 72.234(c) requirements are anticipated.

The Commission published a proposed rule in the Federal Register (64 FR 59677; November 3, 1999). The comment period ended January 18, 2000, and eight comment letters were received on the proposed rule. These comments and responses are discussed in the "Summary of Public Comments on the Proposed Rule" section.

Discussion

Clarification:

This final rule eliminates the regulatory uncertainty that currently exists in Part 72 by adding a new section § 72.13 that specifies which Part 72 regulations apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC. To aid users of Part 72 in understanding § 72.13, the NRC has created a Table of Applicability for Part 72 regulations (Table). For each section, paragraph, or subparagraph, the Table identifies whether the regulation applies to a general licensee, specific licensee, applicant for a specific license, certificate holder, and/or an applicant for a CoC. The Table is available for review in the NRC's Public Electronic Reading Room on the NRC's website (<http://www.nrc.gov>) under Accession Number **ML003722095**.

Flexibility:

First, the final rule eliminates the necessity for repetitious reviews of cask design issues during a § 72.46 licensing proceeding for issues the Commission has previously considered, or is considering, during the cask design review and certification process (i.e., rulemaking). The Commission anticipates receipt of several applications, for specific ISFSI licenses, that will propose using storage cask designs either previously approved by the NRC under Subpart L or currently under consideration. Applicants for a specific license presently have the authority under § 72.18 to incorporate by reference into their application, information contained in previous applications, statements, or reports filed with the Commission, including information from the Safety Analysis Report on a cask design either previously approved or currently under review by the NRC for certification under the provisions of Subpart L. The Commission believes that both of these situations should be excluded from the scope of a specific licensing proceeding. This is because the public has the opportunity during the Subpart L approval process to comment on the adequacy of the cask design. The opportunity of the public to comment on cask designs will not be affected by this rulemaking. However, design interface issues between the referenced cask design and specific site characteristics (e.g., meteorological, seismological, radiological, and hydrological), or changes to the cask's approved design, must be addressed by the applicant in its application and may be raised as potential issues in the licensing proceeding. Furthermore, the rights of the public to petition the Commission under §§ 2.206 and 2.802 to raise new safety issues on the adequacy of the cask design will not be adversely impacted by this rulemaking.

Second, the final rule permits an applicant for approval of a spent fuel storage cask design under Subpart L to begin fabrication of casks at its risk before the NRC has approved the cask design and issued the CoC. Currently, an applicant for a CoC is not permitted under

§ 72.234(c) to begin cask fabrication until after the CoC is issued. Applicants for a specific license, and their contractors, are currently allowed to begin fabrication of casks before the Commission issues their license. However, general licensees and their contractors (i.e, the certificate holder) are not allowed to begin fabrication before the CoC is issued. Consequently, this final rule eliminates NRC's disparate treatment between general and specific licensees. The Commission and the staff have previously determined that exemptions from the fabrication prohibition in § 72.234(c) are authorized by law and do not endanger life or property, the common defense, or security and are otherwise in the public interest. The Commission anticipates that additional cask designs will be submitted to the NRC for approval and expects that these designs will be similar in nature to those cask designs that have already been approved. Absent this final rule, the Commission expects that additional exemption requests to permit fabrication would also be received. This final rulemaking eliminates the need for such exemption requests.

Additionally, the final rule revises the quality assurance regulations in Subpart G of Part 72 to require that an applicant for a CoC, who voluntarily wishes to begin cask fabrication, must conduct cask fabrication activities under an NRC-approved QA program. Currently, applicants for a CoC are required by § 72.234(b) to conduct design, fabrication, testing, and maintenance activities under a QA program that meets the requirements of Subpart G. Prior NRC approval of the applicant's QA program is not required by § 72.234(b). However, § 72.234(c) currently precludes cask fabrication until after the CoC is issued. The Commission believes the revised provision in the final rule is a conditional relaxation to permit fabrication before the CoC is issued. Because NRC staff would approve the applicant's QA program as part of issuance of a CoC, staff approval of the QA program before fabrication is a question of timing (i.e., when the program is approved), rather than imposing a new requirement for

approval of a program. The Commission expects that any financial or scheduler risks associated with fabrication of casks before issuance of the CoC would be borne by the applicant. The Commission believes the final rule is not a backfit because § 72.62 applies to licensees after the license is issued and does not apply to applicants prior to issuance of the license. The final rule requires that a cask for which fabrication was initiated before issuance of the CoC must conform to the issued CoC before the cask may be used.

The final rule also requires an applicant for a specific license, who voluntarily wishes to begin fabrication of casks before the license is issued, to conduct fabrication under an NRC-approved QA program. Currently, an applicant for a specific license may begin cask fabrication before the license is issued. Additionally, the licensee is required by § 72.140(c) to obtain NRC approval of its QA program before spent fuel is loaded into the ISFSI. The Commission does not believe this final rule imposes a separate requirement on applicants for a specific license, rather this rule requires different timing on when the NRC approves a QA program.

This final rule also revises § 72.140(d) to allow a licensee, applicant for a license, certificate holder, and applicant for a CoC to use an existing Part 50, 71, or 72 QA program that was previously approved by the NRC, in lieu of submitting a new QA program. The Commission expects that a new, or in lieu, QA program used by these persons will comply with the requirement of Part 72, Subpart G. This would apply to either a new QA program or an existing program used in lieu of submitting a new QA program.

As a result, the final rule requires both licensees and certificate holders to accomplish any fabrication activities under an NRC-approved QA program. The Commission believes the final rule's increase in flexibility and change in timing of approval of a QA program is not a backfit.

Summary of Proposed Rule Amendments

The changes to the sections discussed below were proposed when the rule was published for public comment on November 3, 1999, (64 FR 59677). These proposed changes were intended to: (1) eliminate the regulatory uncertainty that now exists in Part 72 and explicitly specify which regulations apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC; (2) eliminate the necessity for repetitious reviews in a specific license hearing of cask design issues that the Commission previously considered during approval of the cask design; (3) permit an applicant for approval of a spent fuel storage cask design to begin cask fabrication, at its own risk, before the NRC has issued the CoC; and (4) require that NRC approval of the quality assurance program be obtained before cask fabrication can commence.

Section 72.13 Applicability.

It was proposed that a new section be added to Part 72 to identify those sections of Part 72 that apply to specific licenses, general licenses, and Certificates of Compliance. No changes to the underlying regulations would result from this amendment, as it is intended for clarification only.

Section 72.46 Public hearings.

It was proposed that a new paragraph (e) be added to this section to indicate that the scope of any licensing proceeding for an application for a specific ISFSI license, shall not include any issues that were previously resolved by the Commission during the approval process of the design of a spent fuel storage cask when the application incorporates by

reference information on the design of an NRC-approved spent fuel storage cask. The Commission considers rereview of cask design issues that have been previously resolved as an unnecessary regulatory burden on applicants causing unnecessary expenditure of staff and hearing board resources. For example, the cask's previously reviewed and approved thermal, criticality, and structural designs could not be raised as issues in a hearing. However, design interface issues between the approved cask design and specific site characteristics (e.g., meteorological, seismological, radiological, and hydrological) or changes to the cask's approved design must be addressed by the applicant in its application and may be raised as issues at a potential hearing.

The proposed provisions would not limit the scope of either the staff's review of the application, or of a licensing proceeding, for new cask design issues that were not considered by the Commission during previous approval of the cask design. In addition, the rights of the public to petition the Commission under §§ 2.206 or 2.802 to raise new safety issues on the adequacy of the cask design would not be affected by this proposed provision.

Section 72.86 Criminal penalties.

It was proposed that paragraph (b) of this section list those Part 72 regulations for which criminal sanctions may not be issued because the Commission considers these sections to be nonsubstantive regulations issued under the provisions of § 161(b), (i), or (o) of the *Atomic Energy Act of 1954* (AEA). Substantive regulations are those regulations that create duties, obligations, conditions, restrictions, limitations, and prohibitions (see final rule on "Clarification of Statutory Authority for Purposes of Criminal Enforcement" (57 FR 55062; November 24, 1992)). The Commission considers that the new § 72.13 would not be a substantive regulation, issued under the provisions of § 161(b), (i), or (o) of the AEA.

Therefore, proposed paragraph (b) of this section added § 72.13 to indicate that willful violations of this new section would not be subject to criminal penalties.

Section 72.140 Quality assurance requirements.

It was proposed that paragraph (c)(1) be revised to add applicants for a specific license and applicants for a CoC. Paragraph (c)(2) would be revised to add the requirement that an applicant for a specific license shall obtain NRC approval of its QA program before beginning fabrication or testing of a spent fuel storage cask. Paragraph (c)(3) would be revised to indicate that an applicant for a CoC shall obtain NRC approval of its QA program before beginning fabrication or testing of a spent fuel storage cask. These proposed revisions would result in consistent treatment of general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC. These revisions would also ensure that the NRC has reviewed and approved a QA program before commencement of any fabrication or testing activities.

The proposed rule included a revised paragraph (d) to clarify the use of previously approved QA programs by a licensee, applicant for a license, certificate holder, and applicant for a CoC. The Commission expects these persons to notify the NRC of their intent to use a QA program previously approved by the NRC under the provisions of Parts 50, 71, or 72.

Section 72.234 Conditions of approval.

The proposed rule included a revised paragraph (c) that would permit an applicant for a CoC to begin fabrication of spent fuel storage casks (under an NRC-approved QA program), at the applicant's own risk, before the NRC issues the CoC. The proposed revision also requires that a cask fabricated before the CoC was issued conform to the issued CoC before spent fuel

is loaded. Consequently, the Commission expects that any risks associated with fabrication (e.g., rewelding, reinspection, or even abandonment of the cask) would be borne by the applicant. Requiring an applicant to conform a fabricated cask to the issued CoC would not be subject to the backfit review provisions of § 72.62.

Section 72.236 Specific requirements for spent fuel storage cask approval.

The introductory text in this section before paragraph (a) was proposed as a conforming change to § 72.234(c) to indicate that all of the requirements in this section would apply to both certificate holders and applicants for a CoC.

Summary of Public Comments on the Proposed Rule

The Commission received eight comment letters on the proposed rule. The commenters included five NRC licensees, one applicant for an NRC license, one NRC Part 72 certificate holder, and the Nuclear Energy Institute (NEI) representing industry. All commenters favored the proposed rule, but with the addition of some changes.

Copies of the public comments are available for review in the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC 20003-1527.

A review of the comments, not necessarily in the order received, and the Commission's responses follow.

A. Clarification of Which Sections of Part 72 Apply to Specific Licensees, General Licensees, and Certificate Holders.

Comment A.1: One commenter, a licensee, believes that § 72.180 should not apply to a specific licensee. The commenter noted that § 72.180 requires licensees to have a physical protection plan that meets the requirements of § 73.51. The commenter also indicated that NRC staff had previously determined that the provisions of § 73.51 were not applicable to site-specific licensees, as in the case of the North Anna or Surry ISFSIs, who also possess a Part 50 reactor license. This clarification was documented in a letter from the NRC to Virginia Power, dated November 12, 1998.

Response: The NRC agrees with the commenter that § 73.51 does not apply to those ISFSIs that are collocated at an operating reactor licensee's site. This is because adequate physical protection measures are implemented through § 73.55 requirements at operating nuclear power plant sites. However, for those ISFSIs that are not collocated at a nuclear power plant site, NRC believes that the requirements of § 73.51 apply. Therefore, § 72.13 (b) indicates that § 72.180 applies to specific ISFSI licensees. Section 72.180 requires that an ISFSI licensee implement a physical protection plan as described in § 73.51.

Notwithstanding this response, the NRC agrees that the commenter has identified an area of the current regulations where further clarification is warranted. In a 1998 final rule, "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," the NRC revised § 72.180 to state, in part, "The licensee shall establish, maintain, and follow a detailed plan for physical protection as described in § 73.51 of this chapter..." (63 FR 26955; May 15, 1998). The NRC also added a new § 73.51 that stated, in part:

(a) *Applicability.* Notwithstanding the provisions of §§ 73.20, 73.50, or 73.67, the physical protection requirements of this section apply to each licensee that

stores spent nuclear fuel and high-level radioactive waste pursuant to paragraphs (a)(1)(i), (ii), and (2) of this section. This includes—

(1) Spent nuclear fuel and high-level radioactive waste stored under a specific license issued pursuant to part 72 of this chapter:

(i) At an independent spent fuel storage installation (ISFSI) or ...

However, the NRC stated in the Statement of Consideration (SOC) for the May 15, 1998, final rule, Section II.5, second comment, “The Commission notes that a licensee having a Part 50 license does not fall within the scope of the final rule [on § 73.51]....” (63 FR 26957). Based on the language of the SOC, the NRC’s practice has been that a specific Part 72 licensee, who is also a Part 50 license holder, does not have to comply with the security plan requirements of § 73.51.

The NRC will consider revising § 73.51 in a subsequent rulemaking to clarify that a ISFSI licensee, who is also a Part 50 reactor licensee, may follow the security plan requirements of either § 73.51 or § 73.55.

Comment A.2: Three commenters - a licensee, NEI, and an applicant for a license - believe that § 72.214 should apply to general licenses. The commenters noted that Part 72 allows general licensees to store spent fuel in containers that are approved under the provisions of Part 72 and are listed under § 72.214. The commenters believe that ambiguity would remain in Part 72 if § 72.13 does not reference that § 72.214 can be used by general licensees.

Response: The NRC agrees with the commenters that because a general licensee must choose a spent fuel storage cask design listed under § 72.214, applying this section to

general licensees will reduce regulatory confusion. Therefore, § 72.13(c) is revised in this final rule to include § 72.214.

Comment A.3: Three commenters - a licensee, NEI, and an applicant for a license - believe that § 72.240(a) should apply to general licenses. Section 72.240(a) allows the user of a cask design approved by the NRC to apply for reapproval (i.e., renewal) of a cask design, as an alternative to an application for renewal by the certificate holder. Therefore, the commenters believe that § 72.240(a) should also apply to general licenses and be listed in § 72.13(c).

Response: The NRC agrees with the commenters that a general licensee can currently apply for reapproval of a CoC under § 72.240(a). Therefore, § 72.13(c) is revised in this final rule to include § 72.240(a).

Comment A.4: One commenter, a licensee, believes that §§ 72.44(b)(1) and 72.50(a) should be revised to eliminate applicability of these sections to a general license. Sections 72.44(b)(1) and 72.50(a) both require NRC consent in writing before a license is transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly. Sections 72.44(b)(1) and 72.50(a) are inconsistent with § 72.210. Section 72.210 provides for a general license to be issued to persons authorized to possess or operate nuclear power reactors under 10 CFR Part 50. It follows that if a transfer of the license to possess or operate a nuclear power reactor is approved under § 50.80, the general license issued under § 72.210 is also transferred without additional action.

Response: The NRC disagrees with the commenter and believes that §§ 72.44(b)(1) and 72.50(a) apply to general and specific Part 72 licensees. A Part 72 general license issued to a “person” is a separate and legally distinct authority from a Part 50 reactor license, even if

issued to the same “person.” NRC believes confusion arises on this issue because possession of a Part 50 license is a required condition for automatic issuance of a Part 72 general license under § 72.210. NRC also believes that licensees can reduce their regulatory burden by submitting a single application for NRC review and approval to transfer a Part 50 license and Part 72 general license to a new owner. While this application includes two legally separate regulatory actions, NRC will consolidate the reviews and approvals to reduce industry burden.

Comment A.5: One commenter, a licensee, believes that §§ 72.44(b)(2) and 72.60(a) should be revised to eliminate applicability of these sections to a general license.

Sections 72.44(b)(2) and 72.60(a) both state that a license is subject to amendment, revision, or modification by reason of amendments to the Atomic Energy Act of 1954 (AEA), as amended, or by reason, rules, or regulations, or orders issued in accordance with the Act or any amendment thereto. Sections 72.44(b)(2) and 72.60(a) are inconsistent with § 72.210. Section 72.210 issues a general license to persons authorized to possess or operate nuclear power reactors under Part 50. Section 50.54(e) contains a similar requirement to that of §§ 72.44(b)(2) and 72.60(a). A general license issued by § 72.210 is subject to amendment, revision, or modification by reason of amendments to the AEA, as amended, or by reason, rules, or regulations through § 50.54(e).

Response: The NRC disagrees with the commenter and believes that §§ 72.44(b)(2) and 72.60(a) apply to general and specific Part 72 licensees. The NRC has the authority to modify, suspend, or revoke all, or part, of the general license being used by a Part 72 licensee to receive title to, own, or store power reactor spent fuel in an ISFSI. The NRC may order this action either as an enforcement sanction taken in response to a licensee’s failure to comply

with Part 72 regulations or because of passage of legislation that amends the AEA or the *Nuclear Waste Policy Act of 1982* (i.e., the statutory bases for the Part 72 regulations).

Comment A.6: One commenter, a licensee, believes that § 72.44(b)(3) should be revised to eliminate applicability of this section to a general license. Section 72.44(b)(3) requires: “Upon request of the Commission, the licensee shall, at any time before expiration of the license, submit written statements, signed under oath or affirmation, if appropriate, to enable the Commission to determine whether or not the license should be modified, suspended, or revoked.” Section 72.44(b)(3) is inconsistent with § 72.210. Section 72.210 provides for a general license to be issued to persons authorized to possess or operate nuclear power reactors under Part 50. Section 50.54(f) contains a similar requirement to that of § 72.44(b)(3). It follows that a general license issued under § 72.210 is subject to providing requested information through § 50.54(f).

Response: The NRC disagrees with the commenter and believes that § 72.44(b)(3) currently applies to general and specific Part 72 licensees. The NRC has the authority under the AEA to require any licensee to submit written statements to the Commission to determine if the license should be suspended, modified, or revoked. [See also Comments A.4 and A.5.]

Comment A.7: Two commenters, both licensees, believe that § 72.44(e) should be revised to eliminate applicability of this section to a general license. Section 72.44(e) requires: “The licensee shall make no change that would decrease the effectiveness of the physical security plan prepared pursuant to § 72.180 without the prior approval of the Commission. A licensee desiring to make such a change shall submit an application for an amendment to the license pursuant to § 72.56. A licensee may make changes to the

physical security plan without prior Commission approval, provided that such changes do not decrease the effectiveness of the plan. The licensee shall furnish to the Commission a report containing a description of each change within 2 months after the change is made, and shall maintain records of changes to the plan made without prior Commission approval for a period of 3 years from the date of the change.”

Sections 72.180 and 72.56 apply only to a specific license and do not apply to a general license. Therefore, applying § 72.44(e) to a general license is inconsistent with the remainder of the proposed rule. Additionally, § 72.44(e) is inconsistent with § 72.212(b)(5) in Subpart K which invokes the requirements of § 73.55 and the change control requirements of § 50.54(p).

Response: The NRC agrees with the commenters. As stated in the proposed rule (and as discussed in Comment A.1), § 72.180 applies only to Part 72 specific licensees. Because § 72.44(e) refers to changes to a physical security plan prepared pursuant to § 72.180, this paragraph cannot apply to general licensees. Therefore, § 72.13(c) is revised in this final rule to exclude § 72.44(e).

Comment A.8: One commenter, a licensee, believes that § 72.44(f) should be revised to eliminate applicability of this section to a general license. Section 72.44(f) requires, in part: “A licensee shall follow and maintain in effect an emergency plan that is approved by the Commission.” Section 72.44(f) is inconsistent with § 72.212(b)(6) in Subpart K which requires: “Review the reactor emergency plan, quality assurance program, training program, and radiation protection program to determine if their effectiveness is decreased and, if so, prepare the necessary changes and seek and obtain the necessary approvals.” Section 50.54(q) contains the change control requirements for the emergency plan. Section 72.13 should be revised to eliminate applicability of § 72.44(f) to a general license.

Response: The NRC disagrees with the commenter and believes that § 72.44(f) applies to Part 72 general and specific licensees. As stated in the proposed rule, § 72.32(c) and (d) apply to both general and specific licensees. Specifically, § 72.32(c) permits a Part 72 licensee who is located on the site, or within the exclusion area, of a nuclear power reactor to use an emergency plan that meets the requirements of § 50.47 to satisfy the requirements of § 72.32. The emergency plan referred to in § 72.212(b)(6) for a general licensee originates in § 50.47. Consequently, there is no inconsistency between §§ 72.32 and 72.212. Additionally, similar to Comment A.4, changes to an emergency preparedness plan, that affects both a collocated ISFSI and a Part 50 reactor, can be made under a single submittal to reduce industry burden. NRC will consolidate its reviews and approvals of these changes to reduce industry burden.

Comment A.9: One commenter, a licensee, believes that § 72.52(c) should be revised to eliminate applicability of this section to a general license. Section 72.52(c) states: “Any Creditor so secured may apply for transfer of the license covering spent fuel by filing an application for transfer of the license pursuant to § 72.50(b). The Commission will act upon the application pursuant to § 72.50(c).” Section 72.50(b) and (c) are designated in § 72.13 as applying only to a specific license and not applying to a general license. Therefore, applying § 72.52(c) to a general license is inconsistent with the remainder of the proposed rule. Additionally, § 72.210 issues a general license to persons authorized to possess or operate nuclear power reactors under Part 50. If a transfer of the license to possess or operate a nuclear power reactor is approved under Part 50, the general license issued by § 72.210 is also transferred without additional action. Section 72.13 should be revised to eliminate applicability of § 72.52(c) to a general license.

Response: The NRC agrees with the commenter. As stated in the proposed rule, § 72.50(b) applies only to Part 72 specific licensees. Because § 72.52(c) refers to a creditor applying for transfer of a license pursuant to § 72.50(b), applying § 72.52(c) to general licensees would be inconsistent with the remainder of the proposed rule. Therefore, § 72.13(c) is revised in this final rule to exclude § 72.52(c).

Comment A.10: One commenter, a licensee, believes that § 72.54(f) through (m) should be revised to eliminate applicability of this section to a general license. Section 72.54(d) through (m) is designated as applying to a general license. Applying any of § 72.54, “Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas,” to a general license is inconsistent with existing Subpart K requirements in § 72.218, “Termination of licenses.” Section 72.218 relies upon requirements contained in Part 50 which are adequate to ensure that spent fuel is disposed of properly and that decommissioning is completed so that the license may be terminated.

Response: The NRC agrees with the commenter. Section 72.218(a) requires that a general licensee shall notify the NRC of the licensee’s program for management and removal of spent fuel in accordance with § 50.54(bb). The timing of the notification required by § 50.54(bb) is different from that required by § 72.54(d). Because a general licensee cannot be required to comply with two differing requirements on the same subject and § 72.218 is specifically directed to general licensees, the NRC agrees that § 72.54(d) through (m) do not apply to a general licensee. Therefore, § 72.13(c) is revised in this final rule to exclude § 72.54(d) through (m).

Comment A.11: One commenter, a licensee, believes that § 72.60(b) should be revised to eliminate applicability of this section to a general license. Section 72.60(b) enumerates

reasons that a license may be modified, revoked, or suspended in whole, or in part.

Section 72.60(b) is inconsistent with § 72.210. Section 72.210 issues a general license to persons authorized to possess or operate nuclear power reactors under Part 50.

Section 50.100 requirements are similar to those of § 72.60(b). Section 72.13 should be revised to eliminate applicability of § 72.60(b) to a general license.

Response: The NRC disagrees with the commenter and believes that § 72.60(b) applies to general and specific Part 72 licensees. The NRC has the authority under the AEA to modify, suspend, or revoke all, or part, of the general license being used by a Part 72 licensee to receive, transfer, or possess power reactor spent fuel. The purpose of this authority is the same as described in Comment A.5.

Comment A.12: One commenter, a licensee, believes that § 72.60(c) should be revised to eliminate applicability of this section to a general license. Section 72.60(c) states, in part: “Upon revocation of a license, the Commission may immediately cause the retaking of possession of all special nuclear material contained in spent fuel held by the licensee.” Section 72.60(c) is inconsistent with § 72.210. Section 72.210 issues a general license to persons authorized to possess or operate nuclear power reactors under Part 50. Section 50.101 requirements are similar to those of § 72.60(c).

Response: The NRC disagrees with the commenter and believes that § 72.60(c) applies to general and specific Part 72 licensees. Associated with the NRC authority under the AEA to modify, suspend, or revoke all, or part, of the general license is the authority to order the recapture of any special nuclear material contained in spent fuel possessed by a general licensee. The Commission may take such action in cases of extreme importance to the

national defense and security or to the health and safety of the public. (See also Comments A.5 and A.11.)

Comment A.13: One commenter, a licensee, believes that § 72.80(f) should be revised to eliminate applicability of this section to a general license. Section 72.80(f) states: “If licensed activities are transferred or assigned in accordance with § 72.44(b)(1), the licensee shall transfer the records required by §§ 20.2103(b)(4) and 72.30(d) to the new licensee and the new licensee will be responsible for maintaining these records until the license is terminated.” Section 72.80(f) is inconsistent with § 72.210. Section 72.210 issues a general license to persons authorized to possess or operate nuclear power reactors under Part 50. If a transfer of the license to possess or operate a nuclear power reactor is approved under § 50.80, the general license issued by § 72.210 is also transferred without additional action. Section 50.71 requires that records be retained until the facility license is terminated unless otherwise specified.

Response: The NRC disagrees with the commenter and believes that § 72.80(f) applies to general and specific Part 72 licensees. As stated in the proposed rule (and as discussed in Comment A.4), §§ 72.44(b)(1) and 72.30(d) apply to both general and specific Part 72 licensees. Therefore, a general licensee can comply with the requirements to transfer required records to the new licensee.

Comment A.14: One commenter, a certificate holder, believes that § 72.62 should be revised to apply to certificate holders. Section 72.62 provides specific criteria to be met if the Commission is to require the backfitting of changes to structures, systems, and components of an ISFSI or changes to the procedures or organization required to operate an ISFSI.

Section 72.13 excludes the applicability of § 72.62 to certificate holders. The commenter believes that without backfit protection, certificate holders are subject to new requirements that may provide little safety benefit or are excessively costly to implement.

Response: The NRC believes this comment is beyond the scope of the proposed rule. As discussed in Comment A.1, § 72.13 only clarified which sections of Part 72 apply to specific licensees, general licensees, and certificate holders; it did not change the current scope or intent of these individual sections. The current language in § 72.62 only refers to Part 72 licensees (i.e., specific and general licensees). Consequently, revising § 72.13 to indicate that § 72.62 applies to certificate holders would also require adding certificate holders to the language of § 72.62.

Comment A.15: One commenter, a licensee, believes that § 72.44(d) should not apply to general licensees. Section 72.44(d) states in part, “[e]ach license authorizing in the receipt, handling, and storage of spent fuel or high-level radioactive waste under this part must include technical specifications ...” The commenter believes that the technical specifications are a component of a Part 72 ISFSI specific license or a Part 72 CoC; however, they are not part of a Part 72 ISFSI general license. The commenter noted that in issuing the general license provisions in Subpart K (55 FR 29181; July 18, 1990), the NRC did not require submission of an application to receive a general license. Therefore, technical specifications, that are to be submitted as part of a license application, cannot be part of a general license.

Response: The NRC agrees with the commenter. The Part 72, Subpart K general license is issued in accordance with the provisions of § 72.210. Section 72.210 does not contain any technical specifications; however, “license conditions” for this general license are contained in § 72.212. Specifically, § 72.212(b)(7) states, in part, “[t]he licensee shall comply

with the terms and conditions of the certificate.” The CoC for a cask design contains technical specifications for its use. Consequently, a general licensee is required to comply with the CoC’s technical specifications associated with the cask design it is using, rather than submitting separate technical specifications under § 72.44(d). Therefore, § 72.13(c) is revised in the final rule to exclude § 72.44(d).

Comment A.16: One commenter, a licensee, believes that § 72.192 should not apply to general licensees. Section 72.192 states that, “[t]he applicant for a license under this part shall establish a program for training, proficiency testing, and certification of ISFSI or MRS personnel. This program must be submitted to the Commission for approval with the license application.” The commenter noted that § 72.6(a) indicates that a general license is effective *without the filing of an application to the Commission* [emphasis original]. Therefore, the commenter believes that applying § 72.192 to a general license creates conflicting regulations.

Response: The NRC agrees with the commenter that a general licensee is not required to submit an application. Consequently, a general licensee would not have to submit a training program for NRC approval “with the license application.” Therefore, § 72.13(c) is revised in the final rule to exclude § 72.192.

B. Eliminate Repetitive Reviews of Cask Design Issues in Licensing Proceedings on Applications for Specific Part 72 Licenses Which Reference NRC-Approved Quality Assurance Programs Before Issuance of a CoC.

COMMENT B.1: Three commenters, a licensee, NEI, and an applicant for a license, support avoiding repetitive reviews of cask design issues in a Part 72 specific license hearing

where the previously-approved cask design has been incorporated by reference into the application. However, the commenters believe that this aspect of the proposed rulemaking should be clarified. The commenters indicated that, as written, § 72.46(e) could be read to preclude repetitive reviews only where the CoC had already been issued (i.e., “cask design issues *previously* addressed by the Commission when it *issued* the CoC”) [emphasis original].

The commenters indicated that there will be cases where the site-specific license proceeding and the CoC review are proceeding in parallel. Because the site-specific license cannot be issued until the CoC for the design referenced in the site-specific application has also been issued, there are no safety issues involved with eliminating repetitive cask design reviews in the site-specific licensing proceeding. These safety issues can still be raised in the CoC review process. Those issues need not be repetitively reviewed and resolved in the parallel site-specific licensing proceeding. The commenters believe that allowing those issues to be raised in both of these proceedings would create the specter of inconsistent results as well as duplicative and wasteful use of resources by the NRC staff and applicants. The commenters also stated that, “[t]he NRC’s CoC review will encompass all safety issues which the Commission, in its expert judgment, determines are needed to adequately protect public health and safety.”

The commenters argued that “[i]t is a basic principle of administrative law that an agency’s choice to proceed by rulemaking or by case specific adjudication is within the agency’s discretion.” Furthermore, “[d]eferring consideration of issues from site-specific [licensing] proceedings to a generic proceeding [i.e., rulemaking] 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.” Therefore, the commenters concluded that “[l]ogic, 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.”

Response: The NRC agrees with the commenters that NRC precedent and Federal case law identified by the commenter support the position that cask design issues should not be reviewed in a site-specific licensing proceeding whether the CoC is issued before, during, or after the site-specific licensing proceeding. The NRC agrees that cask design issues can be adequately raised by the public in the context of the Part 72 rulemaking process approving the design and that the NRC staff can still adequately review, evaluate, and disposition any such issues during this process. As stated in the proposed rule, the opportunity of the public to comment on cask designs will not be affected by this rulemaking. However, design interface issues between the referenced cask design and specific site characteristics (e.g., meteorological, seismological, radiological, and hydrological), or changes to the cask’s approved design, must be addressed by the applicant in its application and may be raised as potential issues at a licensing proceeding. Therefore, in the final rule, § 72.46(e) has been revised to read as suggested by the commenter.

Finally, the NRC agrees with the commenters that if an applicant chooses to incorporate by reference in its application for a specific license a cask design that has not yet been approved by the NRC, then the NRC will not issue the specific license to the applicant — assuming that all other NRC review and approval actions have been completed — until after the referenced cask design has been added to the list of approved cask designs contained § 72.214.

Comment B.2: Three commenters, a licensee, NEI, and an applicant for a license, while agreeing with the proposed § 72.46(e) also indicated that the NRC should clarify in the Statements of Consideration for the final rule the process for requesting changes to an approved cask design. The commenters believe that if a cask design issue was, in fact, not addressed in connection with the issuance of the CoC, the proper mechanism to raise that cask design issue after the CoC was issued would be to file either a request for action with the Commission pursuant to § 2.206, or a petition to amend the rule adopting the CoC pursuant to § 2.802. Alternatively, an attempt to raise a cask design issue involving a cask which had received a CoC, in a site-specific proceeding, could be made subject to § 2.758, which establishes the process for handling challenges to the NRC regulations in individual licensing proceedings.

Response: The NRC agrees with the commenters that for a cask design currently under NRC review, individuals who wish to raise issues on the cask design may do so during the review process or by commenting on the cask design when the proposed rule to approve the design is published for public comment in the Federal Register. After a cask design is approved by rulemaking, individuals who wish to raise new issues should do so via the petition provision contained in either § 2.206 or § 2.802. Finally, the NRC also agrees that individuals may challenge NRC regulations in an individual licensing proceeding under the provisions of § 2.758.

C. Permitting CoC Applicants to Begin Fabrication Under an NRC-approved QA Program Before Issuance of the CoC.

COMMENT: Two commenters, NEI and an applicant for a license, supported allowing applicants for a CoC to begin cask fabrication before issuance of a CoC, if fabrication is done under an NRC-approved quality assurance program. The commenters believe that the practice of fabrication in advance of issuance of a CoC results in no increase in risk to the public, because an applicant cannot load casks that do not conform to the issued CoC. The commenters further recognized that this practice places the applicant at economic risk if the CoC contains changes not considered at the time the cask was fabricated.

RESPONSE: No response required.

Summary of Final Amendments to the Proposed Rule

In § 72.13, paragraphs (a), (b), and (d) remain unchanged from the proposed rule amendments. Paragraph (c) is changed to incorporate §§ 72.214, 72.240(a) and to exclude §§ 72.44(d) and (e), 72.52(c), 72.54(d) through (m), and 72.192, and is revised to read as follows:

(c) The following sections apply to activities associated with a general license: §§ 72.1; 72.2(a)(1), (b), (c), and (e); 72.3 through 72.6(c)(1); 72.7 through 72.13(a) and (c); 72.30(c) and (d); 72.32(c) and (d); 72.44(b) and (f); 72.48; 72.50(a); 72.52(a), (b), (d), and (e); 72.60; 72.62; 72.72 through 72.80(f); 72.82 through 72.86; 72.104; 72.106; 72.122; 72.124; 72.126; 72.140 through 72.176; 72.190; 72.194; 72.210 through 72.220, and 72.240(a).

In § 72.46, paragraph (e) is 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.

Sections 72.86, 72.140, 72.234, and 72.236, remain unchanged from the proposed rule amendments.

Criminal Penalties

For the purposes of Section 223 of the Atomic Energy Act (AEA), the Commission is issuing the final rule to amend 10 CFR 72.140, 72.234, and 72.236 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement.

Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the Federal Register on September 3, 1997 (62 FR 46517), this final rule is classified as Category NRC. Compatibility is not required for Category NRC regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of Title 10 of the Code of Federal Regulations.

Voluntary Consensus Standards

The *National Technology Transfer Act of 1995* (Pub. L. 104-113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. The NRC is amending its regulations on spent fuel storage in those sections of 10 CFR Part 72 that apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a certificate. This final rule eliminates the necessity for repetitious Part 72 specific licensing proceeding reviews of cask design issues that the Commission previously considered, or is considering, and resolved during approval of the cask design. This final rule also allows an applicant for a CoC to begin cask fabrication at its risk before the CoC is issued. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in the categorical exclusion in 10 CFR 51.22(c)(2) and (3). This action represents amendments to the regulations which are corrective or of a minor or nonpolicy nature and do not substantially modify the existing regulations. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule would decrease the burden on licensees by eliminating the requirement to request an exemption to begin cask design before a license is issued, and by allowing all licensees and CoC holders to reference previously-approved QA programs. The public burden reduction for this information collection would average 200 hours per exemption request. However, because no burden has previously been approved for exemption requests and no licensees are expected to reference previously approved QA programs in the foreseeable future, no burden reduction can be taken for this rulemaking. Existing requirements were approved by the Office of Management and Budget, approval number 3150-0132.

Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

Statement of the Problem and Objective:

The Commission's regulations at 10 CFR Part 72 were originally designed to provide specific licenses for the storage of spent nuclear fuel in ISFSIs (45 FR 74693; November 12, 1980). In 1990, the Commission amended Part 72 to include a process for approving the

design of spent fuel storage casks and issuance of a CoC (Subpart L); and for granting a general license to reactor licensees (Subpart K) to use NRC-approved casks for storage of spent nuclear fuel (55 FR 29181; July 17, 1990). Although the Commission intended that the requirements imposed in Subpart K for general licensees be used in addition to, rather than in lieu of, appropriate existing requirements, ambiguity exists as to which of the Part 72 requirements, other than those in Subpart K, are applicable to general licensees and certificate holders, respectively. This final rule will resolve that ambiguity.

In addition, the Commission has identified two aspects of Part 72 where it would be desirable to reduce the regulatory burden for applicants, NRC staff, and hearing boards and to afford additional flexibility to applicants for a specific license or CoC.

First, this final rule will eliminate the necessity for repetitious reviews of cask design issues in a Part 72 specific licensing proceeding (§ 72.46), where the previously-approved cask design has been incorporated by reference into the application. In addition, repetitive reviews will also be eliminated in those cases where the site-specific licensing proceeding and CoC review are proceeding in parallel. The Commission anticipates receipt of several applications, for specific ISFSI licenses, that will propose using storage cask designs previously approved by the NRC. Applicants for a specific license presently have the authority under § 72.18 to incorporate by reference into their application, information contained in previous applications, statements, or reports filed with the Commission, including information from the Safety Analysis Report for a cask design previously approved by the NRC under the provisions of Subpart L. The Commission believes previously-reviewed cask design issues should be excluded from the scope of a license proceeding. This is because the public had the right to question the adequacy of the cask design, during the approval process under Subpart L. The right of the public to comment on cask designs would not be affected by this rulemaking. For new cask

design issues, this rulemaking would not limit the scope of the staff's review of the application or of license hearings. For example, a cask's previously-reviewed and -approved thermal, criticality, and structural designs could not be raised as issues in a hearing. However, design interface issues between the approved cask design and specific site characteristics (e.g., meteorological, seismological, radiological, and hydrological) or changes to the cask's approved design must be addressed by the applicant in its application and may be raised as issues at a potential hearing. In addition, for the situation previously mentioned, where the CoC review is proceeding in parallel with the site-specific license proceeding, there is no safety issue involved with eliminating repetitive cask design reviews, since the site-specific license cannot be issued until the CoC for the design referenced in the site-specific application has also been issued. Allowing those issues to be raised in both the licensing proceeding and CoC review process could create the specter of inconsistent results as well as duplicative and wasteful use of resources by the NRC staff and applicants. Furthermore, the NRC's CoC review will encompass all safety issues which the Commission determines are needed to adequately protect public health and safety. Deferring consideration of these issues from site-specific proceedings to a generic proceeding is well established in NRC precedent and Federal case law which suggests that cask design issues should not be reviewed in site-specific proceedings regardless whether the CoC is issued before, during, or after the site-specific licensing proceeding.

The NRC notes that, for a cask design currently under NRC review, individuals who wish to raise issues on the cask design may do so during the review process or by commenting on the cask design when the proposed rule to approve the design is published for public comment in the Federal Register. After a cask design is approved by rulemaking, individuals who wish to raise new issues should do so via the petition provision contained in either §§ 2.206 or 2.802.

Individuals who wish to challenge NRC regulations in an individual licensing proceeding can do so under the provisions of § 2.758.

Second, the final rule permits an applicant for approval of a spent fuel storage cask design under Subpart L to begin fabrication of casks before the NRC has approved the cask design and issued the CoC. Currently, an applicant for a CoC is not permitted under § 72.234(c) to begin cask fabrication until after the CoC is issued. Applicants for a specific license, and their contractors, are currently allowed to begin fabrication of casks before the Commission issues their license. However, general licensees and their contractors (i.e, the certificate holder) are not allowed to begin fabrication before the CoC is issued. Consequently, this final rule would eliminate NRC's disparate treatment between general and specific licensees. The Commission and the staff have previously determined that exemptions from the fabrication prohibition are authorized by law and do not endanger life or property, the common defense or security, and are otherwise in the public interest. The Commission anticipates that additional cask designs will be submitted to the NRC for approval and expects that these designs will be similar in nature to those cask designs that have already been approved. The Commission also expects that exemption requests to permit fabrication would also be received. Therefore, this rulemaking would eliminate the need for such exemption requests.

This final rule also revises the QA regulations in Subpart G of Part 72 to require that an applicant for a CoC, who voluntarily wishes to begin cask fabrication before issuance of the cask CoC, must conduct cask fabrication under an NRC-approved QA program. Currently, applicants for a CoC are required by § 72.234(b) to conduct design, fabrication, testing, and maintenance activities under a QA program that meets the requirements of Subpart G. Prior NRC approval of the applicant's QA program is not required by § 72.234(b). However, § 72.234(c) precludes cask fabrication until after the CoC is issued. The Commission believes

this final rule is a conditional relaxation to permit fabrication before the CoC is issued. Because NRC staff would approve the applicant's QA program as part of the issuance of a CoC, staff approval of the QA program before fabrication is a question of timing (i.e., when the program is approved, as opposed to imposing a new requirement for approval of a program). The Commission expects that any financial or schedule risks associated with fabrication of casks before issuance of the CoC would be borne by the applicant. The Commission believes that the final rule is not a backfit because § 72.62 applies to licensees after the license is issued and does not apply to applicants before issuance of the license or CoC. This rule requires that a cask, for which fabrication was initiated before issuance of the CoC, must conform to the issued CoC before it may be used.

This final rule also requires an applicant for a specific license, who voluntarily wishes to begin fabrication of casks before the license is issued, to conduct fabrication under an NRC-approved QA program. Currently, an applicant for a specific license is required by § 72.140(c) to obtain NRC approval of its QA program before spent fuel is loaded into the ISFSI. The Commission does not believe this final rule will impose a separate requirement, rather it would require different timing on when the QA program is approved.

This final rule also revises § 72.140(d) to allow a licensee, applicant for a license, certificate holder, and applicant for a CoC to use an existing Part 50, 71, or 72 QA program that was previously approved by the NRC.

As a result of this final rule, both licensees and certificate holders are required to accomplish any fabrication activities under an NRC-approved QA program. The Commission believes this final rule's increase in flexibility and change in timing of approval of a QA program are not a backfit.

The Commission expects that any risks associated with fabrication (e.g., rewelding, reinspection, or even abandonment of the cask) would be borne by the applicant. In particular, the NRC will require that a cask fabricated before the CoC was issued conform with the issued CoC before spent fuel is loaded in the cask. Requiring an applicant to conform a fabricated cask to the issued CoC would not be subject to the backfit review provisions of § 72.62.

Identification and Analysis of Alternative Approaches to the Problem:

- *Option 1* - Conduct a rulemaking that would address the regulatory problems as described above.

First, this final rulemaking specifies the sections in Part 72 that apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC. This eliminates the need to resolve, on a case-by-case basis, questions on which Part 72 sections are applicable to those activities. The final rule is administrative in nature and, other than the cost of rulemaking, would have no impact.

Second, this rulemaking reduces the regulatory burden on applicants, staff, and hearing board resources relating to any § 72.46 licensing proceedings involving cask design issues associated with an application for a specific license, where the cask design has been previously approved by the NRC or is currently under review.

Elimination of the need for repetitious reviews of cask design issues and licensing hearings on these same cask design issues together would save 1.0 FTE of applicant effort and 0.1 FTE of staff effort for each specific license application received. NRC expects to review two applications in 2000, three applications in 2001, and four

applications each in 2002 and 2003. While applicants for a license are currently allowed to incorporate by reference information on cask design information, this rulemaking reduces applicant burden associated with providing additional information on the cask design and responding to licensing board contentions on issues which have been previously reviewed and resolved.

Third, this rulemaking also provides increased flexibility to applicants for a CoC by allowing them to begin cask fabrication, before the CoC is issued. This rulemaking reduces the burden on applicants for a CoC associated with submission of requests for exemption from § 72.234(c). Certificate holders have requested these exemptions to take advantage of favorable business conditions (i.e., they want to begin fabrication of casks as soon as possible to meet their contract obligations). Elimination of the need for submission and review of exemption requests from the cask fabrication requirement of § 72.234(c) will save 0.1 FTE of applicant effort and 0.1 FTE of staff effort, for each exemption request not received. Without this action, NRC expects that two requests for exemption from § 72.234(c) will be received each year in 2000 and beyond. This rulemaking also eliminates the disparate treatment of general and specific licensees under Part 72, with respect to fabrication of spent fuel storage casks. This rulemaking also reduces staff burden associated with review of such exemption requests. Because a certificate holder is currently required by § 72.140(c)(3) to obtain NRC approval of its QA program before commencing fabrication, and the staff is currently required to review and approve these programs, no increase in applicant burden or staff resources will occur with respect to the final change to § 72.140(c)(3). However, the timing of the staff review and approval of the QA program would change.

The impact of this option consists primarily of a reduction in regulatory burden on an applicant for a specific license, a reduction in regulatory burden and increase in regulatory flexibility for an applicant for a cask design, and a reduction in the expenditure of NRC resources involved in reviewing applications for a specific license, supporting license hearings, and reviewing requests for exemption from § 72.234(c). This option will result in the expenditure of NRC resources to conduct this rulemaking.

- *Option 2 - No action.*

The benefit of the no action alternative is that NRC resources will be conserved because no rulemaking will be conducted. The impact of this alternative is that the regulatory problems described above would not be addressed. Instead, applicant and staff resources will continue to be expended on repetitious reviews of previously-approved cask designs, conducting licensing hearings on previously-approved cask design issues, and processing requests for exemption from § 72.234(c), to allow fabrication of casks.

Estimation and Evaluation of Values and Impacts:

The clarification of which Part 72 sections apply to specific licensees, applicants for a specific license, general licensees, certificate holders, and applicants for a CoC alone will have no impact other than the cost of rulemaking, because this action is administrative in nature.

The elimination of repetitious reviews of cask design issues in a Part 72 specific license proceeding (§ 72.46) and parallel CoC reviews will save 1.0 FTE of applicant effort and 0.1 FTE of staff effort for each license application received. NRC expects to review two applications in 2000, three applications in 2001, and four applications each in 2002 and 2003.

The elimination of the need for submission and review of exemption requests from the cask fabrication requirement of § 72.234(c) will save 0.1 FTE of applicant effort and 0.1 FTE of staff effort, for each exemption request not received. Without this action, NRC expects that two requests for exemption from § 72.234(c) will be received each year in 2000 and beyond.

Presentation of Results:

The recommended action is to adopt the first option because it will set forth a clear regulatory base for Part 72 general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC.

The recommended action will eliminate the need for repetitious licensing proceeding adjudication of cask design issues that the Commission has previously reviewed in approving the cask design, or is currently reviewing, when an applicant for a specific license has incorporated by reference a cask design that has been approved, or is under review, by the Commission under the provisions of Subpart L. This is because the public has the right to question the adequacy of the cask design during the approval process under Subpart L. The right of the public to comment on cask designs will not be affected by this rulemaking. This final rule also eliminates repetitive reviews in those cases where the site-specific licensing proceeding and CoC review are proceeding in parallel. In addition, the rights of the public to petition the Commission under §§ 2.206 and 2.802 to raise new safety issues on the adequacy of the cask design would not be affected by this rulemaking. The Commission considers rereview of cask design issues which have been previously evaluated and dispositioned as an unnecessary regulatory burden on applicants and an unnecessary expenditure of staff and hearing board resources. For example, the cask's previously-reviewed and -approved thermal, criticality, and structural designs could not be raised as issues in a hearing. However, design

interface issues between the approved cask design and specific site characteristics (e.g., meteorological, seismological, radiological, and hydrological) or changes to the cask's approved design must be addressed by the applicant in its application and may be raised as issues at a potential hearing. Therefore, this action has no safety impact.

The recommended action will permit an applicant for approval of a spent fuel storage cask design under Subpart L to begin fabrication of casks before the NRC has approved the cask design and issued the CoC. Currently, an applicant for a CoC is not permitted under § 72.234(c) to begin cask fabrication until after the CoC is issued. Applicants for a specific license, and their contractors, are currently allowed to begin fabrication of casks before the Commission issues their license. However, general licensees and their contractors (i.e., the certificate holder) are not allowed to begin fabrication before the CoC is issued. Consequently, this final rule will eliminate NRC's disparate treatment between general and specific licensees. In addition to allowing an applicant for a CoC to begin fabrication of a cask before issuance of the CoC, comments would be requested on the need for a general licensee to also begin fabrication of a cask before the CoC is issued. The Commission and the staff have previously determined that exemptions from the fabrication prohibition are authorized by law and do not endanger life or property, the common defense or security, and are otherwise in the public interest. The Commission anticipates that additional cask designs will be submitted to the NRC for approval and expects that these designs will be similar in nature to those cask designs that have already been approved. The Commission also expects that exemption requests to permit fabrication will also be received. Therefore, this rulemaking will eliminate the need for such exemption requests.

This final rule is revising the QA regulations in Subpart G of Part 72 to require that an applicant for a CoC, who voluntarily wishes to begin cask fabrication, must conduct cask

fabrication under an NRC-approved QA program. Currently, applicants for a CoC are required by § 72.234(b) to conduct design, fabrication, testing, and maintenance activities under a QA program that meets the requirements of Subpart G. Prior NRC approval of the applicant's QA program is not required by § 72.234(b). However, § 72.234(c) precludes cask fabrication until after the CoC is issued. The Commission believes this final rule is a conditional relaxation to permit fabrication before the CoC is issued. Because NRC staff will approve the applicant's QA program as part of issuance of a CoC, staff approval of the QA program before fabrication is a question of timing (i.e., when the program is approved, as opposed to imposing a new requirement for approval of a program). The Commission expects that any financial or scheduler risks associated with fabrication of casks before issuance of the CoC will be borne by the applicant. The Commission believes that the final rule is not a backfit because § 72.62 applies to licensees after the license is issued and does not apply to applicants before issuance of the license or CoC. This rule requires that a cask, for which fabrication was initiated before issuance of the CoC, must conform to the issued CoC before it may be used.

This final rule requires an applicant for a specific license, who voluntarily wishes to begin fabrication of casks before the license is issued, to conduct fabrication under an NRC-approved QA program. Currently, an applicant for a specific license is required by § 72.140(c) to obtain NRC approval of its QA program before spent fuel is loaded into the ISFSI. The Commission does not believe this final rule will impose a separate requirement, rather it will require different timing on when the QA program is approved.

This final rule also revises § 72.140(d) to allow a licensee, applicant for a license, certificate holder, and applicant for a CoC to use an existing Part 50, 71, or 72 QA program that was previously approved by the NRC. In addition, the Commission expects that any existing

QA program which is used by these persons, in lieu of submitting a new Part 72 QA program, will fully comply with the requirements of Part 72, Subpart G.

As a result of this final rule, both licensees and certificate holders are required to conduct any fabrication activities under an NRC-approved QA program. The Commission believes this final rule's increase in flexibility and change in timing of approval of a QA program is not a backfit.

The Commission expects that any risks associated with fabrication (e.g., rewelding, reinspection, or even abandonment of the cask) will be borne by the applicant. In particular, the NRC will require that a cask fabricated before the CoC was issued conform with the issued CoC. Requiring an applicant to conform a fabricated cask to the issued CoC will not be subject to the backfit review provisions of § 72.62.

The total cost of this rulemaking to the NRC is estimated at 1.9 FTE. The total savings to the NRC for this rulemaking is estimated at 1.3 FTE over a 4-year period (2000 through 2003). The total savings to applicants is estimated at 13.0 FTE over a 4-year period. Therefore, this action is considered to be cost beneficial to applicants and will improve the efficiency and effectiveness of the NRC. Consequently, the Commission believes public confidence in the safe storage of spent fuel at independent spent fuel storage installations will not be adversely affected by this rulemaking.

Decision Rationale:

The rationale is to proceed with this final rulemaking. This rulemaking will save both staff and applicant resources as discussed above.

The clarification of the provisions of Part 72 and their application to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a CoC is administrative in nature and has no safety impacts.

The elimination of the need for repetitious license hearings on cask design issues, that the NRC has previously reviewed, or is currently reviewing, and approved in an application for a CoC, including those instances where the site-specific licensing proceeding and CoC review are proceeding in parallel, will have no safety impacts. The public's right to comment on cask design issues, through the Subpart L cask approval process, will remain unchanged.

The flexibility to begin cask fabrication before the NRC issues the CoC, when combined with the requirement that cask fabrication must be performed under an NRC-approved QA program, will have no safety impacts.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule clearly specifies which sections of Part 72 apply to general licensees, specific licensees, applicants for a specific license, certificate holders, and applicants for a certificate and allows these persons to determine which Part 72 regulations apply to their activity. This clarification eliminates the ambiguity that now exists. This final rule also eliminates repetitious licensing proceeding reviews of cask design issues, that were under review, or previously reviewed and approved by the NRC, when the applicant for a specific license incorporates by reference information on a cask design that was previously approved, or under review, by the NRC. Finally, this final rule allows applicants for a CoC to begin

fabrication of a cask design before the NRC has issued a CoC. Applicants desiring to begin fabrication shall use an NRC-approval QA program. The requirement to obtain NRC approval of the applicant's QA program is not considered an additional burden. An applicant who has been issued a CoC, and is then considered a certificate holder, is currently required by § 72.140(c)(3) to obtain NRC approval of its QA program before fabrication or testing is commenced; consequently, no actual increase in burden occurs. Similarly, an applicant for a specific license is currently required by § 72.140(c)(2) to obtain NRC approval of its QA program before receipt of spent fuel or high-level waste; consequently, no actual increase in burden occurs. This final rule does not impose any additional obligations on entities that may fall within the definition of "small entities" as set forth in Section 601(6) of the Regulatory Flexibility Act; or within the definition of "small business" as found in Section 3 of the Small Business Act, 15 U.S.C. 632; or within the size standards adopted by the NRC on April 11, 1985 (60 FR 18344).

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not "a major" rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

Backfit Analysis

The NRC has determined that the backfit rule, § 72.62, does not apply to this final rule. Because these amendments do not involve any provisions that would impose backfits as defined in § 72.62(a), a backfit analysis is not required.

List of Subjects in 10 CFR Part 72

Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 72.

PART 72 - LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for Part 72 continues to read as follows:

AUTHORITY: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C.

5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102-486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); Secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. Section 72.13 is added to Subpart A to read as follows:

§ 72.13 Applicability.

(a) This section identifies those sections, under this part, that apply to the activities associated with a specific license, a general license, or a certificate of compliance.

(b) The following sections apply to activities associated with a specific license: §§ 72.1; 72.2(a) through (e); 72.3 through 72.13(b); 72.16 through 72.34; 72.40 through 72.62; 72.70 through 72.86; 72.90 through 72.108; 72.120 through 72.130; 72.140 through 72.176; 72.180 through 72.186; 72.190 through 72.194; and 72.200 through 72.206.

(c) The following sections apply to activities associated with a general license: §§ 72.1; 72.2(a)(1), (b), (c), and (e); 72.3 through 72.6(c)(1); 72.7 through 72.13(a) and (c); 72.30(c) and (d); 72.32(c) and (d); 72.44(b) and (f); 72.48; 72.50(a); 72.52(a), (b), (d), and (e); 72.60; 72.62; 72.72 through 72.80(f); 72.82 through 72.86; 72.104; 72.106; 72.122; 72.124; 72.126; 72.140 through 72.176; 72.190; 72.194; 72.210 through 72.220, and 72.240(a).

(d) The following sections apply to activities associated with a certificate of compliance: §§ 72.1; 72.2(e) and (f); 72.3; 72.4; 72.5; 72.7; 72.9 through 72.13(a) and (d); 72.48; 72.84(a); 72.86; 72.124; 72.140 through 72.176; 72.214; and 72.230 through 72.248.

3. In § 72.46, paragraph (e) is added to read as follows:

§ 72.46 Public hearings.

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(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.

4. In § 72.86, paragraph (b) is revised to read as follows:

§ 72.86 Criminal penalties.

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(b) The regulations in Part 72 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§ 72.1, 72.2, 72.3, 72.4, 72.5, 72.7, 72.8, 72.9,

72.13, 72.16, 72.18, 72.20, 72.22, 72.24, 72.26, 72.28, 72.32, 72.34, 72.40, 72.46, 72.56, 72.58, 72.60, 72.62, 72.84, 72.86, 72.90, 72.96, 72.108, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.182, 72.194, 72.200, 72.202, 72.204, 72.206, 72.210, 72.214, 72.220, 72.230, 72.238, and 72.240.

5. In § 72.140, paragraphs (c) and (d) are revised to read as follows:

§ 72.140 Quality assurance requirements.

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(c) *Approval of program:*

(1) Each licensee, applicant for a license, certificate holder, or applicant for a CoC shall file a description of its quality assurance program, including a discussion of which requirements of this subpart are applicable and how they will be satisfied, in accordance with § 72.4.

(2) Each licensee shall obtain Commission approval of its quality assurance program prior to receipt of spent fuel at the ISFSI or spent fuel and high-level radioactive waste at the MRS. Each licensee or applicant for a specific license shall obtain Commission approval of its quality assurance program before commencing fabrication or testing of a spent fuel storage cask.

(3) Each certificate holder or applicant for a CoC shall obtain Commission approval of its quality assurance program before commencing fabrication or testing of a spent fuel storage cask.

(d) *Previously-approved programs.* A quality assurance program previously approved by the Commission as satisfying the requirements of Appendix B to part 50 of this chapter, subpart H to part 71 of this chapter, or subpart G to this part will be accepted as satisfying the

requirements of paragraph (b) of this section, except that a licensee, applicant for a license, certificate holder, and applicant for a CoC who is using an Appendix B or subpart H quality assurance program shall also meet the recordkeeping requirements of § 72.174. In filing the description of the quality assurance program required by paragraph (c) of this section, each licensee, applicant for a license, certificate holder, and applicant for a CoC shall notify the NRC, in accordance with § 72.4, of its intent to apply its previously-approved quality assurance program to ISFSI activities or spent fuel storage cask activities. The notification shall identify the previously-approved quality assurance program by date of submittal to the Commission, docket number, and date of Commission approval.

6. In § 72.234, paragraph (c) is revised to read as follows:

§ 72.234 Conditions of approval.

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(c) An applicant for a CoC may begin fabrication of spent fuel storage casks before the Commission issues a CoC for the cask; however, applicants who begin fabrication of casks without a CoC do so at their own risk. A cask fabricated before the CoC is issued shall be made to conform to the issued CoC before being placed in service or before spent fuel is loaded.

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7. Section 72.236 is amended by revising the introductory text to read as follows:

§ 72.236 Specific requirements for spent fuel storage cask approval.

The certificate holder and applicant for a CoC shall ensure that the requirements of this section are met.

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Dated at Rockville, Maryland, this _____ day of _____, 2000.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.