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PROPOSED RULE **PR 71**  
(65 FR 44360)

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## WESTERN STATES LEGAL FOUNDATION

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October 20, 2000

Ms. Annette Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington D.C. 20555-0001

SUBJECT: Major Revision to 10 CFR Part 71  
Packaging and Transport of Radioactive Material  
Comments to Issue Paper  
(65 FR 44360 - July 17, 2000)

Dear Ms. Vietti-Cook:

Thank you for the opportunity to comment on the Issues Paper prepared by NRC staff in conjunction with proposed rule-making to revise 10 CFR Part 71 to incorporate portions of the IAEA's ST-1 transportation standards. The Western States Legal Foundation (WSLF) is a nonprofit environmental and disarmament foundation which since 1982 has been active in educational, research, administrative proceedings, litigation and rulemaking to address the end of the arms race, cleanup of facilities engaged in nuclear weapons production, and transportation and storage of nuclear materials. WSLF has participated in administrative forums involving prior rule-making by the NRC such as BRC, the NRC's decommissioning rule, and more recent proceedings involving a proposed recycling rule.

WSLF joins with the request made by the Union of Concerned Scientists and other environmental organizations to extend the comment period on the NRC issues paper for at least 30 days from September 30, 2000. As noted by other commenting organizations, the foundational materials promulgated by IAEA which underlie the proposed rulemaking were not readily available as part of the notice and comment process.

GENERAL COMMENTS

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The NRC must involve interested members of the public, state and local governments, and Tribes in a much broader framework in conjunction with the circulation of any draft Rule. Based on our attendance at the Oakland, California meeting and review of the Rockville transcript, public participation on this important proposal has to date been inadequate and not representative. The NRC should reaffirm its prior commitment to enhanced public participation in rule-making as it proceeds to issue a staff draft and/or formal draft rule.

The meetings regarding the issue paper were scheduled too close to the close of the comment period announced in the federal register. For many individuals and entities, these meetings constitute the first substantial notice of the process and the issues implicated by the proposed NRC rule. Any meetings and hearings conducted in conjunction with a draft rule should be staged early in the comment process, which will afford a more dynamic and interactive process between affected interests and the NRC.

Public comment regarding the issues paper is hampered somewhat by the determination by NRC staff to merely "spot issues" in the paper regarding any proposed rule, rather than provide an indication as to the substantive positions on the issue historically taken by staff. This would have crystalized some of the comments to anticipate the likely response and comments which will inure to the draft rule. The identification of practical or policy drivers in the issues paper would be helpful in furthering the public's understanding why these proposed changes, and especially incorporation of ST-1, is desirable.

Addressing the proposal to incorporate portions of the IAEA's ST-1 transportation standards into 10 CFR Part 71, we are concerned that the promulgation of these standards did not involve significant public participation as recognized by NRC or DOT, or contemplated under the Administrative Procedure Act. The IAEA standards further were not established under any "cost-benefit" regulatory standard as presently Congressionally mandated. Consequently, NRC is required to address such standards (both technical and procedural) *de novo*, and cannot adopt new standards in a fast-track setting.

#### PRELIMINARY RESPONSE TO ISSUES

Addressing, within the above limitations, specific issues:

*Issue 2:* At the Oakland public meeting, the representative from DOT observed that his agency would not be reviewing or questioning the scientific conclusions of the IAEA in adopting the ST-1 exemption limits. We respectfully believe that this posture is inappropriate given the regulatory mandate of NRC as referenced above. Any rule-making which has as its objective the adoption of substantive standards regarding transportation, handling, cleanup and storage or nuclear material must be addressed in the first instance without any presumptions of validity. This is especially true as to NRC since the adoption of the exemption standards did not involve a

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cost-benefit review as mandated in current NRC regulations. Standards-setting within the IAEA has been historically biased toward facilitating European nuclear power and fuel interests, which, for example, has not fully taken into account official U.S. policy to discourage reprocessing. The affected U.S. community, agreement states, and environmental organizations have not had meaningful input into most IAEA forums.

We are presently not in the position to critique any given exemption level for nuclear isotopes. Many of the proposed ST-1 levels as appear to be less than the current 70 Bq/g, while others substantially exceed the standard. The issues paper provides little objective basis for making health-based decisions as to the values. These proposed standards must be scrutinized to determine whether they are justified as protective of human health and the environment, through a complete, *de novo* rulemaking process. This is particularly necessary since agreement states and other agencies may refer or rely upon such values in regulating non-transportation activities.

*Issue 6:* As with Issue 2, any changes to packaging requirements to conform with ST-1 must be subjected to *de novo* technical review and be independently justified as protective of safety.

*Issue 14:* We are concerned over the concept of wholesale adoption of industry trade guidelines affecting transportation of radioactive material unless these are subject to full review, and notice-and-comment procedures are sufficiently in place to ensure that changes to the ASME Code guidelines are sufficiently examined prior to adoption into existing regulation.

*Issue 15:* The promulgation of a rule permitting *de minimus* or experimental changes to casks without NRC approval raises thorny issues of drafting capable and complete guidelines as to those examples of acceptable changes falling within this category. NRC should necessary engage in the regulatory presumption that changes to cask design require approval, so that in the event of technical debate, the applicant should seek approval. The draft regulations should comprehensively detail classes of changes that are contemplated by staff as non-safety related and beneath review authority.

*Issue 17:* There is no health or social benefit associated with removing the present requirement of double containment of plutonium, which is related to both security and safety rationales. All of the existing safety studies and Congressional mandates involving plutonium shipments have been premised upon double-contained shipments. We submit that any regulatory effort to remove this requirement is probably pre-empted, but in any event, wholly unjustified either as a safety concern, or to save costs to private industry, since the latter is disassociated from federal plutonium activities.

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Please add this organization to all NRC lists pertaining to this matter.

Very truly yours,

WESTERN STATES LEGAL  
FOUNDATION

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Foundation Counsel

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