

September 15, 1995

Mr. Robert E. Link, Vice President  
Nuclear Power Department  
Wisconsin Electric Power Company  
231 West Michigan Street, Room P379  
Milwaukee, WI 53201

SUBJECT: DIRECTORS' DECISION ON THE APPLICABILITY OF 10 CFR 72.48

Dear Mr. Link:

In response to your request, I am forwarding a January 31, 1995, decision by the Director of the Office of Nuclear Material Safety and Safeguards that Section 72.48 is applicable to the general license as defined in 10 CFR Part 72, Subpart K, of the Commission's regulations. The Director's Decision is published in Volume 41 of the Nuclear Regulatory Commission Issuances on page 62. The full reference for it is: Entergy Operations, Inc. (Arkansas Nuclear One), DD-95-3, 41 NRC 62 (1995). This was published in the Federal Register on Friday, February 10, 1995 (60 FR 8097).

I trust that this information is responsive to your concerns. If you need further information, please call Richard Laufer of my staff at 301-415-1373.

Sincerely,

original signed by

Gail H. Marcus, Director  
Project Directorate III-3  
Division of Reactor Projects III/IV  
Office of Nuclear Reactor Regulation

Docket Nos. 50-266  
and 50-301

Enclosure: As stated

cc: See next page

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

September 15, 1995

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Nuclear Power Department  
Wisconsin Electric Power Company  
231 West Michigan Street, Room P379  
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I trust that this information is responsive to your concerns. If you need further information, please call Richard Laufer of my staff at 301-415-1373.

Sincerely,

A handwritten signature in cursive script that reads "Gail H. Marcus".

Gail H. Marcus, Director  
Project Directorate III-3  
Division of Reactor Projects III/IV  
Office of Nuclear Reactor Regulation

Docket Nos. 50-266  
and 50-301

Enclosure: As stated

cc: See next page

Mr. Robert E. Link, Vice President  
Wisconsin Electric Power Company

Point Beach Nuclear Plant  
Unit Nos. 1 and 2

cc:

Ernest L. Blake, Jr.  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, DC 20037

Mr. Gregory J. Maxfield, Manager  
Point Beach Nuclear Plant  
Wisconsin Electric Power Company  
6610 Nuclear Road  
Two Rivers, Wisconsin 54241

Town Chairman  
Town of Two Creeks  
Route 3  
Two Rivers, Wisconsin 54241

Chairman  
Public Service Commission  
of Wisconsin  
Hills Farms State Office Building  
Madison, Wisconsin 53702

Regional Administrator  
U.S. NRC, Region III  
801 Warrenville Road  
Lisle, Illinois 60532-4531

Resident Inspector's Office  
U.S. Nuclear Regulatory Commission  
6612 Nuclear Road  
Two Rivers, Wisconsin 54241

Ms. Sarah Jenkins  
Electric Division  
Public Service Commission of Wisconsin  
P.O. Box 7854  
Madison, Wisconsin 53707-7854

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket Nos. 50-313  
50-368  
72-1007

ENERGY OPERATIONS, INC.  
(Arkansas Nuclear One)

SIERRA NUCLEAR CORPORATION

January 31, 1995

The Director of the Office of Nuclear Material Safety and Safeguards grants in part and denies in part a petition submitted pursuant to 10 C.F.R. § 2.206 by Mr. Dennis Dums, on behalf of the Wisconsin Citizen's Utility Board (Petitioner), requesting action with regard to Arkansas Nuclear One (ANO) operated by Entergy Operations, Inc. (Entergy or the Licensee).

Petitioner requested that the Chairman exercise his authority to: (1) determine the applicability of 10 C.F.R. § 72.48 to 10 C.F.R. Subparts K and L; (2) determine whether Entergy is in violation of any NRC regulations regarding use of section 72.48 to make modifications to the VSC-24 cask for use at ANO; (3) order ANO to cease using section 72.48 until NRC determines whether or not it is applicable; (4) order Sierra Nuclear Corporation to cease construction of VSC-24 casks for use at ANO that are being constructed based on ANO's section 72.48 evaluation.

With regard to the Petitioner's request for NRC to (1) determine the applicability of section 72.48 to 10 C.F.R. Subparts K and L, and (2) determine whether Entergy is in violation of any NRC regulations regarding use of section 72.48, the Director grants the petition in part and determines that section 72.48 is applicable to the general license found in 10 C.F.R. Part 72, Subpart K, of the Commission's regulations and that ANO can make use of this authority as

a Subpart K licensee in accordance with the terms and limitations of section 72.48.

With regard to the Petitioner's request for NRC to (3) order ANO to cease using section 72.48 until NRC determines whether or not it is applicable and (4) order Sierra Nuclear Corporation to cease construction of VSC-24 casks for use at ANO, the Director finds, in accordance with the foregoing determination, that ANO can make use of section 72.48, and accordingly denies those portions of the petition.

## DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

### INTRODUCTION

By petition dated July 5, 1994 (petition), Dennis Dums, on behalf of the Wisconsin Citizen's Utility Board (Petitioner), filed a request pursuant to 10 C.F.R. § 2.206 that the U.S. Nuclear Regulatory Commission (NRC): (1) determine the applicability of 10 C.F.R. § 72.48 to 10 C.F.R. Part 72, Subparts K and L; (2) determine whether Entergy Operations, Inc. (Entergy), is in violation of any NRC regulations regarding use of section 72.48 to make modifications to the VSC-24 cask for use at Arkansas Nuclear One (ANO); (3) order ANO to cease using section 72.48 until NRC determines whether or not it is applicable; (4) order Sierra Nuclear Corporation (SNC) to cease construction of VSC-24 casks for use at ANO that are being constructed based on ANO's section 72.48 evaluation.

By letter to Mr. Dennis Dums, dated August 16, 1994, I acknowledged receipt of the petition. Notice of receipt was published in the *Federal Register* on August 24, 1994 (59 Fed. Reg. 43,594). For the reasons given below, I have now concluded that the Petitioner's request should be granted in part and denied in part.

### BACKGROUND

The Petitioner submitted its July 5, 1994 request to NRC in connection with an earlier letter to NRC dated June 2, 1994, from Entergy, an NRC licensee under 10 C.F.R. Part 50, which operates ANO Units 1 and 2 near Russellville, Arkansas. In its June 2 letter, Entergy had briefly described its plans for spent nuclear fuel storage at ANO, involving use of the VSC-24 dry cask, in accordance with the general license of 10 C.F.R. Part 72, Subpart K. Entergy had also stated in the June 2 letter that its use of the VSC-24 would involve minor changes to the cask design. According to Entergy's July 2 letter, the specific

changes involved lengthening the approximately 18-foot VSC-24 by about 11 inches in order to accommodate the slightly longer ANO Unit 2 fuel.

The June 2 letter went on to advise NRC of Entergy's conclusions that section 72.48 of the Commission's regulations applied to the changes Entergy proposed to make to the cask for use at ANO. It was this statement by Entergy regarding the applicability of section 72.48 that apparently prompted the petition that is the subject of this Decision.

Section 72.48 of the Commission's regulations covers "Changes, tests, and experiments" that may be made by the "holder of a license issued under this part" without prior Commission approval.<sup>1</sup> Specifically with regard to its determination to use section 72.48, Entergy's June 2 letter contended that the minor changes proposed for the VSC-24 cask were covered by a "plain reading" of the regulations. It argued that the general license issued under 10 C.F.R. Part 72 was a license "issued under this part," and that the minor changes to the VSC-24 by Entergy, as the license "holder," could therefore be made to address site-specific considerations "as determined necessary" by Entergy. It also contended that its approach was consistent with the regulatory background of the general license, particularly the Commission's objective to provide for "a regulatory framework allowing on-site spent fuel storage 'without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'" (55 Fed. Reg. 29,181)." Entergy Letter at 2.

It is the foregoing determination by Entergy with which the petition takes issue.

The petition asserts as bases for its requests that: Entergy is currently pursuing spent fuel storage at ANO through use of 10 C.F.R. Subparts K and L; ANO currently intends to utilize the VSC-24 constructed by vendor SNC under an SAR submitted in October 1991, and safety evaluation report (SER), issued by the NRC in April 1993; an NRC response, dated January 31, 1994, to an October 13, 1993 public request for information, stated that Subparts K and L of 10 C.F.R. Part 72 are silent on cask SAR and certificate changes after the final rule; an ANO request for a rule exemption to 10 C.F.R. § 72.234(c) was granted by the NRC to allow for the fabrication of four VSC-24 casks to the longer length prior to NRC approval of SNC's June 14, 1993 submittal of Revision 1 to the 1991 VSC-24 Cask SAR; a February 14, 1994 memorandum

<sup>1</sup> In particular, section 72.48(a)(1) provides in pertinent part as follows:

(a)(1) The holder of a license issued under this part may:

(i) Make changes in the ISFSI [i.e., independent spent fuel storage installation] . . . described in the Safety Analysis Report,

(iii) . . . without prior Commission approval, unless the proposed change . . . involves a change in the license conditions incorporated in the license, an unreviewed safety question, a significant increase in occupational exposure or a significant unreviewed environmental impact.

to NRC Assistant General Counsel Treby requested a legal interpretation of the applicability of section 72.48 to general licenses issued under 10 C.F.R. § 72.210; a May 19, 1994 meeting was held regarding SNC's revisions to the VSC-24 SAR and the applicability of section 72.48 to general license users, as well as a June 3, 1994 memorandum regarding this meeting which stated that "the licensee can make its own interpretation of the regulations"; and a letter, dated June 2, 1994, from Entergy to the NRC which stated that Entergy has directed SNC to fabricate all fourteen planned casks with the increased length and that Entergy plans to continue to conduct evaluations in accordance with section 72.48.

Entergy has not filed any comments with the NRC following publication of the petition.

## DISCUSSION

As the discussion that follows will set forth in detail, we have determined that ANO, as a general licensee under 10 C.F.R. § 72.210, can make use of section 72.48. This determination is based first on the words of section 72.48 itself which are fully consistent with use of the authority in that section by a general licensee. Second, the determination is based on regulatory policy considerations. These include the extensive NRC safety review at the time of cask approval, the limited nature of the subsequent changes permitted under section 72.48, and the fact that NRC regulations in other contexts over many years have permitted utilities such as ANO to make similar types of changes to nuclear facilities that involve safety issues previously reviewed by NRC.

This approach is well suited to the Part 72 general license framework, especially given the congressional purpose underlying the Nuclear Waste Policy Act of 1982 that directed the NRC to establish a licensing framework for spent fuel storage technologies that can be approved by the Commission for use at reactor sites "without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission" (55 Fed. Reg. 29,181). Because section 72.48 permits certain changes by a licensee *without* Commission approval, making it available to general licensees will further this congressional purpose.

### A. The Language of Section 72.48

An analysis of the pertinent NRC regulations regarding use of section 72.48 by a general licensee shows that ANO's use of that authority is covered by the regulations. The relevant regulations and our analysis of them are given below.

Section 72.48(a)(1) provides as follows:

(a)(1) The holder of a license issued under this part may:  
(i) Make changes in the ISFSI . . . described in the Safety Analysis Report.

(iii) . . . without prior Commission approval, unless the proposed change, test or experiment involves a change in the license conditions incorporated in the license, an unreviewed safety question, a significant increase in occupational exposure or a significant unreviewed environmental impact. [Emphasis added.]

Further section 72.210 provides as follows:

*A general license is hereby issued for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors under Part 50 of this chapter. [Emphasis added.]*

In order to determine whether section 72.48 can be interpreted to cover the general license in section 72.210, the first question is whether the general licensee is "the holder of a license issued under this part," as required for the application of section 72.48. We think the language of section 72.210 answers this question. The phrase "[a] general license is hereby issued," leaves no doubt the general license is "a license issued under this part." Because a general licensee is "the holder of a license issued under this part," section 72.48(a)(1) therefore applies.

The second question, in order to determine if section 72.48 can be interpreted to apply to a general license, is whether changes to a certified cask by a general licensee can appropriately be termed "changes in the ISFSI . . . described in the Safety Analysis Report," as required for the application of section 72.48. We think the language of section 72.210 also resolves this issue. Specifically, the regulatory language of the general license authorizes "storage . . . in an independent spent fuel storage installation . . . in casks approved under the provisions of this part."<sup>2</sup> (Emphasis added.) The ISFSI under the general license incorporates the NRC-approved casks. Further the NRC's approved casks under the general license are ISFSI components described in a safety analysis report and, specifically, in the cask vendor safety analysis report (SAR).<sup>3</sup> Therefore, changes to an NRC-approved cask, used in an ISFSI, by the general licensee literally are "changes in the ISFSI . . . described in the Safety Analysis Report," and therefore are reasonably covered by the words of section 72.48(a)(1).<sup>4</sup>

<sup>2</sup> See 10 C.F.R. § 72.212(a)(2) ("This general license is limited to storage of spent fuel in casks approved under the provisions of this part.")

<sup>3</sup> See 10 C.F.R. § 72.230(a) ("A safety analysis report describing the proposed cask design and how the cask should be used to store spent fuel safely must be included with the application.")

<sup>4</sup> Commission policy already permits changes to a cask design approved by NRC in a site-specific licensing proceeding, this determination results in similar treatment for designs approved in rulemaking.

## B. Regulatory Policy Considerations

The foregoing analysis of the applicable regulations is fully supported by the policy underlying NRC's program for generic cask approvals. In particular, NRC generic approval of a cask certifies the cask for use under a range of environmental conditions sufficiently broad to encompass most sites within the United States, by using conservative requirements that make safety of an approved cask independent of the effects of site-specific phenomena. During the review of the SAR, NRC considers all credible accidents that could harm the cask. We analyze: drops, tipovers, lightning, floods, high and low temperatures, tornadoes, explosions, and other conditions. Using the safety analyses relied on by the NRC for the generic approval, a general licensee must thereafter establish that the cask is suitable for the environmental conditions of the licensee's site. However, use of the generically approved cask does not require additional NRC site-specific approvals, provided the conditions in the general license and the cask certificate are met.

The NRC's generic approval of a dry cask, without any site-specific approval, fulfills the express intent of the Congress. In the Nuclear Waste Policy Act of 1982, Congress directed the government (NRC and the Department of Energy) to establish a program allowing the NRC to approve spent fuel storage technologies "by rule . . . without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." 42 U.S.C. § 10198(a). If NRC were to require site-specific Commission approval of every change to an approved cask by a general licensee — even changes that did not involve any site-specific unreviewed environmental condition or safety issue — then its action could be viewed as seriously undermining the statutory policy supporting general cask approvals without, to the maximum extent practicable, requiring additional NRC site-specific approvals.

Section 72.48 is limited to changes that do not involve "a change in the license conditions incorporated in the license, an unreviewed safety question,<sup>5</sup> a significant increase in occupational exposure or a significant unreviewed environmental impact." If the proposed change involves a generic change to the certificate of compliance or any of the certificate's conditions, then an application must be filed with the Commission for approval for this generic change.

The general licensee must also satisfy other requirements under section 72.48. For example, section 72.48 requires that a licensee must permanently "maintain

<sup>5</sup> Under section 72.48(a)(2), a proposed change involves an unreviewed safety question:

(i) If the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the Safety Analysis Report (SAR) may be increased.

(ii) If a possibility for an accident or malfunction of a different type than any evaluated previously in the [SAR] may be created, or

(iii) If the margin of safety as defined in the basis for any technical specification is reduced.

records of changes in the ISFSI" which "include a written safety evaluation that provides the bases for the determination that the change . . . does not involve an unreviewed safety question." The NRC may examine these records during an inspection and take appropriate action if the changes made by the licensee do not comply with the regulations. Additionally, section 72.48 requires that the licensee must annually furnish the NRC a report containing a brief description of the changes.

The decision whether a proposed change involves an unreviewed safety question is made initially by the licensee but can be reviewed by the NRC. If the NRC disagrees with the licensee's decision, the agency may, upon review, take appropriate enforcement action. To facilitate review of a licensee's decision during subsequent inspections, the NRC promulgated the recordkeeping and reporting requirements described above, thus requiring the licensee to maintain records related to the licensee's decision under section 72.48.

There is a similar rule under 10 C.F.R. Part 50 for production and utilization facilities. Section 50.59 allows utilities to make changes to their power plants under circumstances comparable to those circumstances covered by section 72.48. In particular, section 50.59 specifically allows a reactor licensee to modify its facility without prior NRC approval unless the modification involves a change in the technical specifications incorporated in the facility license or involves an unreviewed safety question. The definition and criteria in section 50.59 for identifying whether a proposed change involves an unreviewed safety question are identical to those in section 72.48. If the proposed change does involve either an unreviewed safety question or a change in the technical specifications, then the licensee must apply for an amendment to its license. For decades the NRC has allowed its licensees in the first instance to review proposed changes in their facilities to determine whether changes in technical specifications are involved or unreviewed safety questions are presented. The NRC would not be sensibly allocating its limited resources if the agency itself were to expressly review and approve every single facility change, whether or not it raises an unreviewed safety question. Rather, NRC retains an oversight function for enforcement purposes, supported by requirements for licensees to retain and preserve all records of section 50.59 changes, just as they must retain all records of section 72.48 changes. *See Kelley v. Selin*, No. 93-3613, Slip op. at 11 (6th Cir., Jan. 11, 1995) ("NRC's historical method of regulation . . . has long allowed licensees to make initial determinations about changes to their facilities and has enabled the agency to retain its enforcement power. 10 C.F.R. § 50.59.")

Thus, for all of the foregoing reasons, we have determined that ANO, and any other general licensee under Subpart K, can make use of the authority in section 72.48 to make changes that comply with the requirements of that section. We accordingly have no basis and therefore are declining to take enforcement action

against ANO at this time. However, in our continuing regulatory oversight of ANO and other general licensees, we reserve the right to review any change made under section 72.48 and take appropriate followup action.

## CONCLUSION

Based on a review of the regulations and taking into account the relevant policy considerations, NRC Staff have determined that section 72.48 can be used by all Part 72 licensees. Therefore, the Petitioner's request to (1) determine the applicability of section 72.48 to Part 72, Subparts K and L; and (2) determine whether Entergy is in violation of any NRC regulations regarding use of section 72.48 has been granted. Further, in light of the foregoing determination that Entergy can make use of section 72.48, the Petitioner's request to (3) order ANO to cease using section 72.48 until NRC determines whether or not it is applicable, and (4) order Sierra Nuclear Corporation to cease construction of VSC-24 casks for use at ANO has therefore been denied.

FOR THE NUCLEAR  
REGULATORY COMMISSION

Robert M. Bernero, Director  
Office of Nuclear Material Safety  
and Safeguards

Dated at Rockville, Maryland,  
this 31st day of January 1995.