

June 25, 1998

SECY-98-148

FOR: The Commissioners

FROM: L. Joseph Callan /s/  
Executive Director for Operations

SUBJECT: RULEMAKING PLAN: 10 CFR PART 72 - CLARIFICATION AND  
ADDITION OF FLEXIBILITY

PURPOSE:

To inform the Commission that the Executive Director for Operations intends to implement the enclosed rulemaking plan to amend 10 CFR Part 72.

ISSUE:

Part 72 provides regulations for two types of license, general or specific, that may be used to store spent fuel. A general license is issued under 10 CFR 72.210 to persons authorized to possess or operate nuclear power reactors, under Part 50 of this chapter. A specific license is issued to a named person in an application filed pursuant to regulations in Part 72. Part 72 does not clearly specify which sections, other than Subpart K, apply to general licensees. Subpart L - "Approval of Spent Fuel Storage Casks" applies to certificate of compliance (CoC) applicants and holders.

The staff anticipates that the Nuclear Regulatory Commission (NRC) may receive several applications for specific licenses, for offsite independent spent fuel storage installations (ISFSIs), that will propose using storage casks previously approved (listed in 10 CFR 72.214) in Subpart K of Part 72. Under the current regulation, the adequacy of the design of these previously approved casks could be at issue (particularly during the hearing process) in each specific license application. This would result in the staff having to expend considerable resources in repeatedly re-examining and defending technical issues already resolved during the public rulemaking process.

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NOTE: TO BE MADE PUBLICLY  
AVAILABLE WHEN THE FINAL SRM  
IS MADE AVAILABLE

Following an initial request from, and issuance of an April 26, 1994 exemption to Sierra Nuclear, the staff has received multiple submittals to allow fabrication of storage casks prior to issuance of a Certificate of Compliance (CoC). During the current year for example, the staff has received five exemption requests, of which three have been granted. The staff's position is that construction of casks may begin before a CoC is issued, provided that construction is performed under an NRC-approved quality assurance (QA) program and that the applicant bears all risks associated with early construction..

#### DISCUSSION:

This rulemaking will clearly specify which sections apply to general licensees, specific licensees, or both general and specific licensees, and will allow general licensees to clearly determine which sections of Part 72 apply to their activities. This clarification will eliminate the uncertainty that now exists and it will reduce staff time in clarifying the requirements of Part 72 for applicants and licensees.

This rulemaking will specify the conditions under which a specific licensee may use a cask listed in 10 CFR 72.214 without necessitating staff review of the cask design nor consideration of cask design issues in a hearing. This additional flexibility will save the specific licensee considerable time and resources in that an approved cask can be used without additional NRC review.

This rulemaking will specify under what conditions early cask construction may take place and will clarify that the risk of building a non-approved cask falls on the applicant. Cask fabrication will be able to be started before its approval by NRC, provided it is constructed under an NRC-approved QA program and that the applicant bears the risks, mainly financial, associated with early construction. Allowing applicants to start construction of casks before a CoC is issued, at their own risk, eliminates the need to process exemption requests, which use staff resources. This rulemaking will reduce the need for exemption requests regarding cask fabrication.

#### COORDINATION:

The Office of the General Counsel has no legal objection to this rulemaking plan. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource impacts and has no objection. The Office of the Chief Information Officer has reviewed the rulemaking plan for information technology and information management implications and concurs in it. However, the plan suggests a reduction in burden for reporting requirements that must be submitted to the Office of Management and Budget for review no later than the date the proposed rule is forwarded to the Federal Register for publication.

RESOURCES:

Resources to complete and implement the rulemaking are included in the current budget.

RECOMMENDATION:

Note that it is my intention to approve the rulemaking plan within ten days from the date of this paper unless directed otherwise by the Commission.

L. Joseph Callan  
Executive Director  
for Operations

Attachment: Rulemaking Plan

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Note that it is my intention to approve the rulemaking plan within ten days from the date of this paper unless directed otherwise by the Commission.

L. Joseph Callan  
Executive Director  
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Attachment: Rulemaking Plan

RECORD NOTE: A draft copy of this rulemaking plan was sent to OIG for information on \_\_\_\_\_.

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# Rulemaking Plan

## 10 CFR Part 72

### Clarification and Addition of Flexibility

#### Regulatory Issues

The Commission's regulations at 10 CFR Part 72 were originally designed to provide specific licenses for the storage of spent nuclear fuel in independent spent fuel storage installations (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 by issuance of a certificate of compliance (CoC) (Subpart L) and for granting a general license to reactor licensees (Subpart K) to use Nuclear Regulatory Commission (NRC)- approved casks for storage of spent nuclear fuel (55 FR 29181; August 17, 1990). Although the Commission intended that the requirements imposed in Subpart K for general licensees be in addition to, rather than in lieu of, appropriate existing requirements, ambiguity exists as to which Part 72 requirements, other than those in Subpart K, are applicable to general licensees. This rulemaking is primarily for the purpose of resolving that ambiguity.

In addition, the NRC staff has identified two aspects of Part 72 where it would be desirable to afford additional flexibility to licensees:

- 1) The NRC staff anticipates that NRC may receive several applications for specific licenses for offsite ISFSIs that will propose using storage casks previously approved by NRC and listed in 10 CFR 72.214 in Subpart K of Part 72. Under the current regulation, the adequacy of the design of these previously approved casks could be at issue (particularly during the hearing process) in each specific license application. This would result in the NRC staff having to expend considerable resources in repeatedly re-examining and defending technical issues already resolved during the public rulemaking process. This rulemaking will enable a specific licensee to use a cask listed in 10 CFR 72.214 without necessitating an NRC staff review of the cask design or consideration of cask design issues in a hearing.
- 2) Section 72.234(c), which is part of the 1990 amendments to Part 72, prohibits fabrication of a spent fuel cask before NRC's issuance of a CoC for the cask model. At the time this rule was proposed, a commenter suggested that a fabricator be allowed to take the risk of beginning fabrication before the receipt of the CoC. The Commission took the position that because the CoC provides the specific criteria for cask design and fabrication, "[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; 1990). Since 1990, the NRC staff has reviewed and approved several cask designs. These reviews and follow up requests for additional information have established the staff's expectation for how NRC's criteria for cask

design and fabrication should be met. In January 1997, the NRC staff issued NUREG-1536, "Standard Review Plan for Dry Cask Storage Systems," which informs CoC applicants of the staff's expectations in reviewing cask designs. In addition, two exemptions from 10 CFR 72.234(c) requirements have been requested and granted to allow applicants to begin fabrication before issuance of the CoC. Future CoC applications are expected to propose cask designs similar to those which have been approved. Given these developments, the NRC staff believes that if cask fabrication is performed under an NRC-approved QA program, the risk will be small that a cask will be fabricated to meet incorrect criteria and that CoC applicants should be allowed to take that risk if they so choose. This rulemaking will permit cask construction before the CoC is issued under specified conditions when the applicant is willing to take the risk involved.

## **Existing Regulatory Framework**

Currently Part 72 has requirements that apply to either a general license or specific license or both general and specific licenses.

Currently Part 72 does not allow the use of casks listed in 10 CFR 72.214 by specific licensee applicants without a full technical review of the cask design and an opportunity for a hearing on cask design issues by interested parties.

Currently 10 CFR 72.234(c) does not allow construction of a cask before issuance of a CoC.

## **How the Regulatory Problems Will be Addressed By Rulemaking**

Each section in Part 72 will be clearly identified as to whom it applies; general licensee, specific licensee, CoC holder, or a combination of licensees or CoC holders.

Regulations will be developed to allow the use of a cask listed in 10 CFR 72.214 by a specific licensee without the need for the NRC staff to provide a technical review of the cask design nor a need to permit cask design issues to be heard in any adjudication of the license because the design has previously been certified by the NRC in the rulemaking process.

Regulations will be developed to allow the construction of a cask before a final CoC is issued provided that construction is performed under an NRC-approved QA program and that the applicant bears all risks associated with early construction.

## **Rulemaking Options**

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

The benefit of the rulemaking is that it will clarify the Part 72 regulations as they apply to general licensees, thereby avoiding the need to resolve on a case-by-case basis questions that arise as to which Part 72 regulations, other than those in Subpart K, are applicable. This will reduce resources spent by licensees and the staff in making these

case-by-case determinations. The rulemaking will also reduce the burdens on licensees and the staff with respect to the review and adjudication of cask design issues where the cask design has already been reviewed and approved through rulemaking. The rulemaking will also provide increased flexibility to CoC applicants with respect to when a cask is fabricated and will reduce the need for the staff to consider requests for exemption from 10 CFR 72.234(c). The impact of this option consists primarily of the expenditure of NRC resources in conducting the 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 will be that the regulatory problems described above will not be addressed.

## **Preferred Option**

The recommended action is to adopt the first option because it will set forth a clear regulatory base for licensees, general and specific. This will be done by specifying clearly what requirements apply to each entity.

To allow specific licensees to use casks listed in 10 CFR 72.214 and simply reference the cask in a SAR, the NRC staff proposes that a new 10 CFR 72.24(r) be added to read as follows, "If the applicant intends to use a cask from the list of approved spent fuel storage casks in 10 CFR 72.214, the applicant may reference the applicable cask certificate of compliance without having to submit a separate safety analysis for the cask design. However, the applicant shall include as part of its Safety Analysis Report, an evaluation ensuring that all conditions set forth in the certificate of compliance will be met." Companion changes to other Part 72 regulations will need to be made to clearly identify what findings the NRC staff must make when an applicant uses a certified cask and when an applicant does not use a certified cask.

It is recommended that this rulemaking follow the standard two-step process of a proposed rule followed by a final rule.

## **Office of General Counsel Legal Analysis**

OGC does not foresee a basis for legal objection to the contemplated rulemaking. This rulemaking is primarily designed to enhance the clarity of Part 72 by explicitly identifying the regulations that apply to general licensees. The rulemaking also includes amendments which (1) will allow a specific license applicant desiring to use an NRC-certified cask to simply reference the CoC in its application rather than submit a safety analysis report for the cask, and (2) will allow an applicant for a CoC to begin fabrication of the cask at its own risk before receiving the CoC. It is reasonable for the Commission not to expend its own or a potential licensee's resources by requiring a redundant review, including possible adjudication, of a cask design which has already been thoroughly reviewed by the NRC staff and approved through the rulemaking process. It is also reasonable for the Commission to permit a CoC applicant to begin, at its own risk, fabrication of a cask before issuance of the CoC, given that cask fabrication will be performed under an NRC-approved QA program and given that the NRC staff

has published its “Standard Review Plan for Dry Cask Storage Systems,” which presents its expectations in the review of cask designs.

The proposed amendments do not involve provisions which would impose backfits as defined in 10 CFR 72.62 so a backfit analysis will not be required. An environmental assessment will not be needed for the clarifying changes because the categorical exclusion at 10 CFR 51.22(c)(2) applies but will be needed for the amendments providing increased flexibility to applicants for licenses and certificates. A regulatory analysis will be needed in conformance with NRC policy.

### **Backfit Analysis**

A backfit analysis is not required because this proposed amendment does not involve any provisions which would impose backfits as defined in 10 CFR 72.62.

### **Agreement State Implementation Issues**

This rule is classified as compatibility category “NRC” and addresses areas of exclusive NRC regulatory authority.

### **Major Rule**

This is not a major rule.

### **Supporting Documents Needed**

An Environmental Assessment, Regulatory Analysis, and an OMB clearance package will be prepared for this rulemaking.

### **Issuance by Executive Director for Operations or Commission**

NMSS recommends Commission issuance.

### **Resources Needed to Complete Rulemaking**

Resources to complete and implement the rulemaking are included in the FY 1998 budget.

- NMSS 1.5 FTE
- OGC 0.1 FTE
- Other 0.1 FTE
- No contractor support dollars are needed

Staff Level Working Group                      Concurring Official

NMSS G. Gundersen, Task Leader                      M. Knapp  
F. Young



## **Management Steering Group**

A steering group is not required for this rulemaking.

## **Public Participation**

Enhanced public participation is not needed in this simple rulemaking. This rulemaking plan will be placed on the rulemaking interactive website following EDO review and approval.

## **Schedule**

Proposed Rule to EDO.....9 months after approval of rulemaking plan.

The OMB clearance package will be submitted to OMB at the same time the proposed rule will be published in the Federal Register.

Final Rule to EDO.....6 months after public comment on proposed rule closes.

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