

RULEMAKING ISSUE AFFIRMATION

June 23, 2000

SECY-00-0134

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: FINAL RULE: 10 CFR PART 72 — CLARIFICATION AND ADDITION
OF FLEXIBILITY

PURPOSE:

To request Commission approval for publication of the final rule.

BACKGROUND:

10 CFR Part 72 provides regulations for two types of licenses - general or specific - that may be used to store spent fuel. A general license is available to persons authorized to possess or operate nuclear power reactors under 10 CFR Part 50. A specific license is issued to a person upon receipt of an application filed pursuant to regulations in Part 72. Currently, 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 applicants and holders of Certificates of Compliance (CoCs). In addition, Part 72 does not clearly specify which sections, other than Subpart L, apply to certificate holders.

The staff anticipates that the Nuclear Regulatory Commission (NRC) may receive several applications for specific licenses for independent spent fuel storage installations (ISFSIs) that will incorporate by reference storage cask designs previously approved under Subpart L of Part 72 (i.e., cask designs listed in 10 CFR 72.214). Under the current regulation, the adequacy of the design of these previously approved storage casks could be subject to a repetitive review during the licensing proceeding for a Part 72 specific license application. This final rule will eliminate this repetitive review if an applicant references in its application either a previously approved storage cask design or a storage cask design currently under review for certification by rulemaking.

CONTACTS: Anthony DiPalo, NMSS/IMNS
(301) 415-6191

Philip Brochman, NMSS/SFPO
(301) 415-8592

Section 72.234(c) does not currently permit an applicant for a CoC to begin cask fabrication before the NRC issues the CoC. Over the last 4 years, the NRC has issued several exemptions from this regulation. The Commission granted these exemption requests based on the applicant's performance of the fabrication under an NRC-approved quality assurance (QA) program and under the premise that the applicant bears any risks associated with fabrication.

In an SRM dated September 1, 1999 (Attachment 1), the Commission approved the proposed rule (SECY-99-175, July 6, 1999). It was published in the Federal Register on November 3, 1999 (64 FR 59677). The comment period closed January 18, 2000, and eight comment letters were received. These comments are discussed in detail in the Federal Register notice (Attachment 2). The U.S. Department of Energy did not submit any comments on the proposed rule.

DISCUSSION:

This final rule implements several amendments:

First, it eliminates the regulatory uncertainty that previously existed in Part 72 and will clearly specify which sections apply to general licensees, specific licensees, and certificate holders. All the commenters favored this amendment, with minor changes. This clarification will reduce NRC staff burden spent in clarifying the requirements for applicants, licensees, certificate holders, and the public.

Second, it will eliminate the necessity for repetitious reviews of cask design issues in a potential licensing proceeding for those casks already approved, as well as those that are in the CoC review process. NRC staff anticipates that the Commission will receive several applications for specific licenses for ISFSIs that will propose using storage cask designs previously approved by the NRC. Applicants for specific licenses currently have the authority, under 10 CFR 72.18, to incorporate, by reference, information contained in previous applications, statements, or reports filed with the Commission into their applications, including information from the Safety Analysis Reports for cask designs previously approved by the NRC, under the provisions of Subpart L.

Based on an analysis of the public comments received, the staff agrees that not only should previously reviewed and approved cask designs be excluded from the scope of a licensing proceeding, but so should those cask designs currently under review for certification by rulemaking. The rationale is that 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 is no safety issue involved with eliminating repetitive cask reviews in the site-specific licensing proceeding. These safety issues can still be raised and will be resolved in the cask certification process (i.e., rulemaking). Therefore, those issues need not be repetitively reviewed and resolved in a parallel site-specific licensing proceeding. As several commenters pointed out, allowing these safety issues to be raised in both a site-specific licensing proceeding and a CoC rulemaking would create the possibilities of both inconsistent results and wasted resources for both the NRC and the applicant. Members of the public can still raise any questions regarding the cask design during the CoC certification process and the NRC will address these safety concerns in the course of the staff's review or in the rulemaking process that follows. In addition, the right of the public to petition the Commission under 10 CFR 2.206 or 2.802, to raise new safety issues on the adequacy of a previously approved cask design, will not be adversely impacted by this rulemaking.

Third, the final rule 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. However, the rule will indicate that the applicant assumes the risk that the NRC review may result in a change in the cask design. Currently, an applicant for a CoC is not permitted under 10 CFR 72.234(c) to begin cask fabrication until after the CoC is issued. Applicants for specific licenses, and their contractors, are currently allowed to begin fabrication of casks before the Commission issues their licenses. However, general licensees and their contractors (i.e., certificate holders) are not allowed to begin fabrication before the CoCs are issued. Consequently, this final rule will 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 staff anticipates that additional storage cask designs will be submitted to the NRC for approval, and the staff also expects that exemption requests to permit fabrication before issuance of the CoC will also be received. This rulemaking would eliminate the need for these exemption requests. No adverse comments were received on this portion of the rulemaking.

Additionally, this final rule will revise the QA regulations in Subpart G of Part 72 to require that an applicant for a CoC that voluntarily wishes to begin cask fabrication must do so under an NRC-approved QA program. Currently, applicants for CoCs are required by 10 CFR 72.234(b) to conduct design, fabrication, testing, and maintenance activities under a QA program that "meets the requirements of Subpart G." However, NRC prior approval of an applicant's QA program is not required by 10 CFR 72.234(b). Additionally, 10 CFR 72.234(c) precludes cask fabrication until after the CoC is issued. The staff believes this final rule is a conditional relaxation to permit fabrication before the CoC is issued. Currently, the staff approves an applicant's QA program as part of the issuance of the CoC. Therefore, approving an applicant's QA program before the CoC is issued is a question of timing, and is not imposing new requirements on the applicant. The staff expects that any financial or schedule risks associated with fabrication of casks before issuance of the CoC would be borne by the applicant. This rule will require that a cask for which fabrication was initiated before issuance of the CoC must conform to the issued CoC before it may be used. Furthermore, the final rule is not a backfit because 10 CFR 72.62 applies to licensees and does not apply to applicants, or to certificate holders.

RESOURCES:

Resources to complete and implement this final rule are included in the current budget.

RECOMMENDATIONS:

That the Commission:

1. Approve publication in the Federal Register of the attached notice of final rulemaking (Attachment 2).

2. To satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605 (b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the attached Federal Register notice.
3. NOTE:
 - a. The appropriate Congressional committees will be informed;
 - b. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register;
 - c. A table is attached to aid in specifying the sections in Part 72 that apply to general licensees, specific licensees, and certificate holders (Attachment 3). This table will be made available to the public on NRC's rulemaking website;
 - d. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the reasons for it, as required by the Regulatory Flexibility Act;
 - e. The final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) that must be submitted to the Office of Management and Budget (OMB) for its review and approval; and
 - f. The staff has determined that this action is not a "major rule," as defined in the Small Business Regulatory Enforcement Fairness Act of 1996 [5 U.S.C. 804(2)] and has confirmed this determination with the OMB. The appropriate Congressional and General Accounting Office contacts will be informed (Attachment 4).

COORDINATION:

The Office of the General Counsel has no legal objection to the final rule. The Office of the Chief Financial Officer has reviewed the final rule for resource implications and has no objection. The Office of the Chief Information Officer has reviewed the Commission paper for information technology and information management implications and concurs in it.

/RA/

William D. Travers
Executive Director
for Operations

- Attachments:
1. SRM dated 9/1/99
 2. Federal Register Notice
 3. Table of Applicability
 4. SBREFA forms

COORDINATION:

The Office of the General Counsel has no legal objection to the final rule. The Office of the Chief Financial Officer has reviewed the proposed rule for resource implications and has no objections. The Office of the Chief Information Officer has reviewed the Commission Paper for information technology and information management implications and concurs in it.

/RA/

William D. Travers
Executive Director
for Operations

- Attachments: 1. SRM dated 9/1/99
2. Federal Register Notice
3. Table of Applicability
4. SBREFA forms

DOCUMENT NAME: O:\DiPalo\comm.wpd

File Name (o:\dipalo\comm.wpd)

*See previous concurrence

OFFICE	RGB:IMNS	E	RGB:IMNS	E	TECH ED	N	D:SFPO	E	D:IMNS:NMSS	E
NAME:	AdiPalo		PKHolahan		Ekraus * via fax		EWBrach		DCool	
DATE:	5/8/00		/ /00		4/10/00		5/28/00		6/9/00	
OFFICE:	D:OE*		OGC*		RDB:ADM		OCIO		CFO	
NAME:	WBorchardt * via e-mail		JGray * via e-mail		DMeyer *		BJShelton *		JFunches* via e-mail	
DATE:	05/01/00		05/04/00		04/27/00		04/19/00		05/05/00	
OFFICE:	D:OSTP		D:NRR		D:NMSS		DEDMRS		EDO	
NAME:	PLohaus *		SCollins *		WKane		CPaperiello		WTravers	
DATE:	04/26/00		05/02/00		06/15/00		6/22/00		6/23/00	

OFFICIAL RECORD COPY