

covered by the words of section 72.48(a)(1).<sup>4</sup>

### 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, lighting, 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.

10 CFR 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>

<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.

<sup>5</sup> Under 10 CFR 72.48, a proposed change involves an unreviewed safety question if:

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, 10 CFR 72.48 requires that a licensee must permanently "maintain 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, 10 CFR 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 record keeping and reporting requirements described above, thus requiring the licensee to maintain records related to the licensee's decision under 10 CFR 72.48.

There is a similar rule under 10 CFR Part 50 for production and utilization facilities. 10 CFR 50.59 allows utilities to make changes to their power plants under circumstances comparable to those circumstances covered by 72.48. In particular, 10 CFR 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 10 CFR 50.59 for identifying whether a proposed change involves an unreviewed safety question are identical to those in 10 CFR 72.48. If the

(i) 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) the possibility for an accident or malfunction of a different type than any evaluated previously in the SAR may be created; or

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

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 50.59 changes, just as they must retain all records of 72.48 changes. See *Kelley v. Selin*, No. 93-3613, Slip opinion 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 CFR 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 10 CFR 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 10 CFR 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 has determined that 10 CFR 72.48 can be used by all Part 72 licensees. Therefore, the Petitioner's request to (1) determine the applicability of 10 CFR 72.48 to 10 CFR Part 72, Subparts K and L; and (2) determine whether Entergy is in violation of any NRC regulations regarding use of 10 CFR 72.48 has been granted. Further, in light of the foregoing determination that Entergy can make use of 10 CFR 72.48, the Petitioner's request to (3) order ANO to cease using 10 CFR 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.