

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 71

[Docket No. PRM-71-12]

International Energy Consultants, Inc.; Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking filed by the International Energy Consultants, Inc. The petition has been docketed by the Commission and has been assigned Docket No. PRM-71-12. The petitioner requests that the NRC amend its regulations that govern packaging and transportation of radioactive material. The petitioner believes that special requirements for plutonium shipments should be eliminated.

DATES: Submit comments by May 5, 1998. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Rulemakings and Adjudications Staff.

Deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

For a copy of the petition, write: David L. Meyer, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

You may also provide comments via the NRC's interactive rulemaking website through the NRC home page (<http://www.nrc.gov>). This site provides the availability to upload comments as

files (any format), if your web browser supports that function. For information about the interactive rulemaking website, contact Carol Gallagher, 301-415-5905 (e-mail: CAG@nrc.gov).

FOR FURTHER INFORMATION CONTACT:

David L. Meyer, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Telephone: 301-415-7162 or Toll Free: 800-368-5642 or e-mail: DLM1@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Regulatory Commission received a petition for rulemaking submitted by Frank P. Falci on behalf of the International Energy Consultants, Inc. in the form of a letter addressed to the Secretary of the Commission, dated September 25, 1997. The petitioner believes that 10 CFR 71.63(b) should be eliminated. As an option, the petitioner believes that 10 CFR 71.63(a) should also be eliminated. This option would totally eliminate 10 CFR 71.63. The petitioner made the same recommendation in a letter dated July 22, 1997, which he provided as a comment in the Commission's proposed rulemaking amending 10 CFR 71.63(b) to remove canisters containing vitrified high-level waste from the packaging requirement for double containment.

The petition was docketed as PRM-71-12 on October 22, 1997. The NRC is soliciting public comment on the petition. Public comment is requested on both the petition to eliminate 10 CFR 71.63(b), as well as the option to eliminate 10 CFR 71.63 totally, as discussed below.

Discussion of the Petition

NRC's regulations in 10 CFR Part 71, entitled "Packaging and Transportation of Radioactive Material," include, in § 71.63, special requirements for plutonium shipments: § 71.63 Special requirements for plutonium shipments.

(a) Plutonium in excess of 20 Ci (0.74 TBq) per package must be shipped as a solid.

(b) Plutonium in excess of 20 Ci (0.74 TBq) per package must be packaged in a separate inner container placed within outer packaging that meets the requirements of subparts E and F of this part for packaging of material in normal form. If the entire package is subjected to the tests specified in § 71.71

("Normal conditions of transport"), the separate inner container must not release plutonium as demonstrated to a sensitivity of 10^{-6} A₂/h. If the entire package is subjected to the tests specified in § 71.73 ("Hypothetical accident conditions"), the separate inner container must restrict the loss of plutonium to not more than A₂ in 1 week. Solid plutonium in the following forms is exempt from the requirements of this paragraph:

- (1) Reactor fuel elements;
- (2) Metal or metal alloy; and
- (3) Other plutonium bearing solids

that the Commission determines should be exempt from the requirements of this section.

The petitioner requests that § 71.63(b) be deleted. The petitioner believes that provisions stated in this regulation cannot be supported technically or logically. The petitioner states that based on the "Q-System for the Calculation of A₁ and A₂ Values," an A₂ quantity of any radionuclide has the same potential for damaging the environment and the human species as an A₂ quantity of any other radionuclide. The petitioner further states that the requirement that a Type B package must be used whenever package content exceeds an A₂ quantity should be applied consistently for any radionuclide. The petitioner believes that if a Type B package is sufficient for a quantity of a radionuclide X which exceeds A₂, then a Type B package should be sufficient for a quantity of radionuclide Y which exceeds A₂, and this should be similarly so for every other radionuclide.

The petitioner states that while, for the most part, the regulations embrace this simple logical congruence, the congruence fails under § 71.63(b) because packages containing plutonium must include a separate inner container for quantities of plutonium having an activity exceeding 20 curies (0.74 TBq). The petitioner believes that if the NRC allows this failure of congruence to persist, the regulations will be vulnerable to the following challenges:

- (1) The logical foundation of the adequacy of A₂ values as a proper measure of the potential for damaging the environment and the human species, as set forth under the Q-System, is compromised;
- (2) The absence of a radioactivity limit for every radionuclide which, if

exceeded, would require a separate inner container, is an inherently inconsistent safety practice; and

(3) The performance requirements for Type B packages as called for by 10 CFR Part 71 establish containment conditions under different levels of package trauma. The satisfaction of these requirements should be a matter of proper design work by the package designer and proper evaluation of the design through regulatory review. The imposition of any specific package design feature such as that contained in 10 CFR 71.63(b) is gratuitous. The regulations are not formulated as package design specifications, nor should they be.

The petitioner believes that the continuing presence of § 71.63(b) engenders excessively high costs in the transport of some radioactive materials without a clearly measurable net safety benefit. The petitioner states that this is so in part because the ultimate release limits allowed under Part 71 package performance requirements are identical with or without a "separate inner container," and because the presence of a "separate inner container" promotes additional exposures to radiation through the additional handling required for the "separate inner container." The petitioner further states that " * * * excessively high costs occur in some transport campaigns," and that one example " * * * of damage to our national budget is in the transport of transuranic wastes." Because large numbers of transuranic waste drums must be shipped in packages that have a "separate inner container" to comply with the existing rule, the petitioner believes that large savings would accrue without this rule. Therefore, the petitioner believes that elimination of § 71.63(b) would resolve these regulatory "defects."

As a corollary to the primary petition, the petitioner believes that an option to eliminate § 71.63(a) as well as § 71.63(b) should also be considered. This option would have the effect of totally eliminating § 71.63. The petitioner believes that the arguments propounded to support the elimination § 71.63(b) also support the elimination of § 71.63(a).

The Petitioner's Conclusions

The petitioner has concluded that NRC regulations in 10 CFR Part 71 which govern packaging and transportation of radioactive material must be amended to delete the provision regarding special requirements for plutonium shipments. The petitioner believes that a Type B package should be sufficient for a

quantity of radionuclide Y which exceeds the A₂ limit if such a package is sufficient for a quantity of radionuclide X which exceeds the A₂ limit. It is the petitioner's view that this should be true for every other radionuclide including plutonium.

Dated at Rockville, Maryland, this 11th day of February 1998.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

[FR Doc. 98-4146 Filed 2-18-98; 8:45 am]

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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 1998-6]

Definition of "Express Advocacy"

AGENCY: Federal Election Commission.

ACTION: Notice of disposition of petition for rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking filed on October 20, 1997 by James Bopp, Jr., on behalf of the James Madison Center for Free Speech. The petition urged the Commission to revise its definition of "express advocacy" to reflect a recent U.S. Circuit Court of Appeals Decision. The Commission has decided not to initiate a rulemaking in response to this Petition.

DATES: February 12, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On October 20, 1997, the Commission received a Petition for Rulemaking from James Bopp, Jr., on behalf of the James Madison Center for Free Speech. The Petition urged the Commission to revise the definition of "express advocacy" set forth at 11 CFR 100.22 to reflect the decision in *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8 (D.Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997). Specifically, the Petition urges repeal of 11 CFR 100.22(b), which was held invalid in that case. The challenged paragraph defines "express advocacy" to include communications in which the electoral portion is "unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to

whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

The Fourth Circuit reached a similar conclusion in *FEC v. Christian Action Network ("CAN")*, 92 F.3d 1178 (4th Cir. 1997). However, the Ninth Circuit earlier reached a contrary result in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), the decision on which 11 CFR 100.22(b) is largely based. Thus there is a conflict among the circuits on this issue.

The Commission published a Notice of Availability on the Petition on November 6, 1997, 62 FR 60047. In response, the Commission received comments from American Target Advertising, Inc.; the Brennan Center for Justice; Common Cause; Alan Dye, of Webster, Chamberlain & Bean; the Attorney General for the State of Hawaii; the Attorney General for the State of Iowa; the Attorney General for the Commonwealth of Kentucky; U.S. Senator Carl Levin; the National Voting Rights Institute; the Attorney General for the State of New Mexico; the Attorney General for the State of Oklahoma; the Republican National Committee; and the State of Vermont. After reviewing these comments and other information, the Commission has decided not to open a rulemaking in response to this Petition.

First, the Supreme Court has repeatedly admonished "that denial of a petition for certiorari imports nothing as to the merits of a lower court decision." *Griffin v. United States*, 336 U.S. 704, 716 (1949), *reh. denied*, 337 U.S. 921. This is especially true where, as here, the Court has declined to review decisions from different circuits that reach different results on the same question.

Consistent with this reasoning, while Supreme Court decisions are binding nationwide, the rule of *stare decisis* requires only that a decision by a circuit court of appeals be followed within the circuit in which it is issued. Since government agencies typically operate nationwide, it is not unusual for an agency to find that different courts have interpreted its statutes or rules in different ways.

The Supreme Court has recognized that, when confronted with this situation, an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation. It is collaterally estopped only from raising the same claim against the same party in any location, or from continuing to pursue the issue against any party in a circuit that has already rejected the agency's interpretation.