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# RULEMAKING ISSUE

(NEGATIVE CONSENT)

March 9, 1998

SECY-98-044

FOR: The Commissioners

FROM: L. Joseph Callan  
Executive Director for Operations

SUBJECT: MODIFIED RULEMAKING PLAN: "CERTIFICATION RENEWAL AND AMENDMENT PROCESS," 10 CFR PART 76

PURPOSE:

To inform the Commission that the staff believes the current rulemaking to modify the certification amendment process for gaseous diffusion plants should be canceled. In its place, the staff would like to develop a more comprehensive rulemaking to change both the certificate renewal and certificate amendment processes.

CATEGORY:

This paper covers a policy question requiring Commission consideration.

BACKGROUND:

In the Staff Requirements Memorandum issued October 9, 1997, in response to SECY-97-195, the Commission did not object to the staff's plan to develop a proposed rule to revise 10 CFR Part 76. During Office review and concurrence on the final draft of the proposed rule, NMSS and OGC reconsidered the approach. Currently, the staff and OGC believe that this rulemaking should be canceled and a more comprehensive revision to Part 76 should be pursued. Accordingly, a Modified Rulemaking Plan is attached.

CONTACT: John Telford, NMSS/IMNS  
(301) 415-6229

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

The primary purpose of the previous rulemaking was to establish, in Part 76, a process for issuance of immediately effective amendments. Although the certificate holder has requested amendments to its certificates during the past year, no request was for an immediately effective amendment. However, because of the time required to process a certificate amendment under the existing Part 76 provisions, the staff has exercised enforcement discretion in a few limited cases. When this rulemaking was initiated, the staff envisioned that it would be followed by a second, more comprehensive revision to Part 76 to address other needs. Because of the other high priority needs for amending Part 76, described below, the most efficient use of our rulemaking resources would be to pursue one consolidated rulemaking. Thus, in collaboration with the OGC, we have reconsidered the piecemeal approach, and now recommend a single rulemaking.

The more comprehensive single rulemaking would accomplish goals not addressed in the current rulemaking. It would modify the process for certificate renewals, and establish a new process for certificate amendments comparable to the process currently used to amend a fuel cycle license. First, under the modified certificate renewal process, publication of notice of receipt of a certificate renewal application would be discretionary. Second, under the new certificate amendment process the distinction between significant and not-significant amendments would be eliminated, and handling of the amendment decision at a delegated staff level (SES), rather than only by the Office Director, would be allowed. Also, provisions would be included for a first level of appeal from the staff's initial decision on an amendment to the Office Director. In addition, the Office Director's decision would be appealable to the Commission. As a result, the Commission would no longer be the first level of review of certification amendment decisions. Further, publishing a notice for a certificate amendment in the Federal Register would be discretionary. The term "Director's Decision" would also be removed in order to support delegation of authority for routine certificate amendment decisions to the Branch Chief level. Until this rulemaking is completed, the staff would use Notice of Enforcement Discretion to address time sensitive issues. The staff in SECY-95-214 informed the Commission that the staff intended to exercise enforcement discretion at the gaseous diffusion plants in a manner similar to that used for reactor licensees. The staff is developing a Commission paper to modify section VII.C of the Enforcement Policy to include gaseous diffusion plants.

In order to expedite this work, the staff is providing a Modified Rulemaking Plan that covers only the four sections of the previous plan that have changed. All other changes described in the previous plan will be retained.

#### COORDINATION:

The Office of the General Counsel has no legal objection to the Modified Rulemaking Plan. The Office of the Chief Financial Officer has reviewed this commission paper for resource implications and has no objections. The Office of the Chief Information Officer concurs that there will be no information technology impacts.

RESOURCES:

Resources to complete this rulemaking are included in the current budget. No additional resources are required to implement this rule.

RECOMMENDATION:

I intend to proceed with the implementation of the attached Modified Rulemaking Plan within 10 days from the date of this paper.

  
L. Joseph Callan  
Executive Director  
for Operations

Attachment:  
Modified Rulemaking Plan

SECY NOTE: In the absence of instructions to the contrary, SECY will notify the staff on Tuesday, March 24, 1998 that the Commission, by negative consent, assents to the action proposed in this paper.

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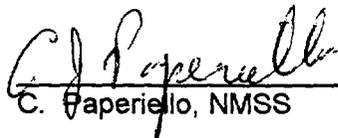
MODIFIED RULEMAKING PLAN

"CERTIFICATION RENEWAL AND AMENDMENT PROCESS"  
10 CFR PART 76

Lead Office: Office of Nuclear Material Safety and Safeguards

Staff Contact: John Telford, NMSS/IMNS

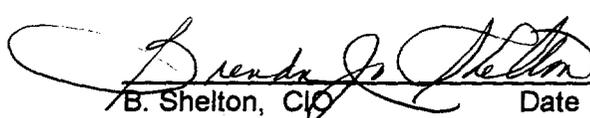
Concurrences:

 2/27/98  
C. Paperiello, NMSS Date

By Phone 2-25-98  
S. Treby, OGC Date

By Phone 2-26-98  
J. Lieberman, OE Date

By Phone 2-26-98  
J. Funches, CFO Date

 2/23/98  
B. Shelton, CIO Date

Approval:

 3-3-98  
L. Joseph Callan Date

# Modified Rulemaking Plan

## 10 CFR Part 76

### “Certification Renewal and Amendment Processes”

#### Regulatory Issue

In 1994, 10 CFR Part 76, “Certification of Gaseous Diffusion Plants” was codified to provide the regulatory process by which the NRC would assume regulatory authority for the operation of the Portsmouth and Paducah Gaseous Diffusion Plants (GDPs). These plants had operated safely for many years under the authority of the Department of Energy. The initial certificates of compliance authorizing continuing operation of the GDPs under NRC regulatory oversight was issued on November 26, 1996, and the GDPs came under NRC authority on March 3, 1997. When 10 CFR Part 76 was initially promulgated, the certification process was to be repeated annually. This recertification period has recently been extended, by Congressional action and implementing rulemaking, to as long as 5 years. In implementing the certificate renewal process described in § 76.37 and the certificate amendment process described in § 76.45, the NMSS staff has identified several deficiencies that should be corrected.

#### Existing Regulatory Framework

Currently, § 76.37 requires that the NMSS Office Director (the Director) publish in the Federal Register a notice of the filing of an application for renewal. This regulatory procedure may not be an efficient use of agency resources if the application contains no new risk significant issues. Also, it does not allow the Director to use his or her discretion in deciding whether the application for renewal contains enough risk significant or other important issues to warrant publication in the Federal Register.

Section § 76.45 does not currently provide for immediately effective certificate amendments. After the NMSS staff completes its review, the actual certificate amendment cannot be issued until after the public has had an opportunity to petition the Commission for review of the recommended amendment. The earliest the staff can issue the certificate amendment is 15 days after the recommendation for approval of the amendment is published in the Federal Register. For significant certificate amendments (as established in § 76.45), there is an additional 30-day comment period when the request for an amendment is first received and published. The Part 76 Certificate Amendment process should allow that a certificate amendment be effective when issued, similar to the amendment process for other facilities over which the Commission exercises regulatory authority, for example 10 CFR Parts 30, 40, and 70 facilities.

Also for certificate amendment applications, § 76.45 requires that the Director make a

finding of compliance or acceptability for the proposed activities. This regulatory procedure may not be an efficient use of agency resources, particularly if the amendment application involves only routine or inconsequential issues. Accordingly, if the staff is delegated the authority to issue certificate amendments, it would be logical and more efficient for the Director to be the first level of appeal and the Commission to be the second level of appeal.

Thus, the regulations in 10 CFR Part 76 should be revised to address these regulatory issues.

### **How the Regulatory Problem Will be Addressed by Rulemaking**

In § 76.37, replacing "shall" with "may, at his or her discretion," allows the Director to determine if a Federal Register notice is warranted for an application for renewal, on a case by case basis. There are two reasons for taking this action. First, if the application does not address any new safety issues or there have not been any major changes to the facility or its operating procedures that would substantially increase the risk associated with the facility, then the Director may decide that a Federal Register notice is not necessary. This flexibility would allow the agency to focus its regulatory oversight on safety issues that have significant potential risk. Secondly, there is no requirement in the Atomic Energy Act to notice an application for renewal and similar actions for Parts 30, 40, and 70 facilities are not noticed.

A modification to paragraph 76.45(a) would remove the responsibility for making the initial decision on an amendment application from the Director. This change allows the decision to accept or deny a certificate amendment application to be delegated to the branch chief level. This would be logical, contribute to a more efficient use of agency resources, and be comparable to the process currently used to amend a fuel cycle license.

A new paragraph, 76.45(c), would provide that a certificate amendment would become effective when issued. This allows the staff to handle issues that need to be addressed quickly either to avoid an unnecessary operational upset of a large gaseous diffusion plant or to ensure adequate protection of public health and safety from radiological hazards and/or provide for the common defense and security. The paragraph would also provide that the staff may, at its discretion, publish notice of its decision on an amendment application in the Federal Register. The staff would take this action, on a case-by-case basis, whenever warranted. For example, if the application does not address any new safety issues or there have not been any major changes to the facility or its operating procedures that would substantially increase the risk associated with the facility, then the staff may decide that a Federal Register notice is not necessary. In addition, this would eliminate the distinction between significant and not significant amendments. This flexibility would allow the agency to devote its resources to safety

issues that have significant potential risk.

Currently, a decision on a certificate amendment application can be appealed by filing a request for the Commission's review. A new paragraph 76.45(d), concerning the staff's decision on an amendment application, would establish procedures for the United States Enrichment Corporation, or any person whose interests may be affected, to file a petition for the Director's review. Given that the initial decision on the amendment application can be delegated to the branch chief, it is logical for the Director to be the first level of review.

Also, concerning the Director's decision (regarding the first appeal), a new paragraph 76.45(e) would establish procedures for either the Corporation, or any person whose interests may be affected, to file a petition for the Commission's review. Given that the initial **review** of a decision on a certificate amendment application is rendered by the Director, it is logical for the Commission to be the final level of review. This process would contribute to a more efficient use of agency resources because if an appeal issue can be resolved by the Director, it should not need to involve the Commission.

In §§ 76.62 & 76.64 the time periods associated with filing petitions for review and responses to petitions would be extended to better accommodate the process for public participation.

## **Schedule**

|                                  |   |
|----------------------------------|---|
| Proposed Rule Package to the EDO | 3.5 months after approval of modified plan  |
| Final Rule Package to the EDO    | 8.5 months after EDO approves proposed rule |