

AFFIRMATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MCGAFFIGAN

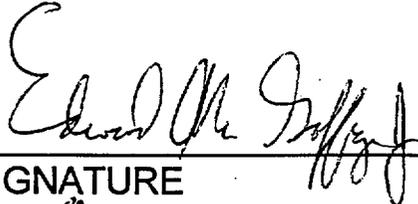
SUBJECT: **SECY-99-174 - FINAL RULE: EXPAND APPLICABILITY OF  
10 CFR PART 72 TO HOLDERS OF, AND APPLICANTS  
FOR, CERTIFICATES OF COMPLIANCE, AND THEIR  
CONTRACTORS AND SUBCONTRACTORS**

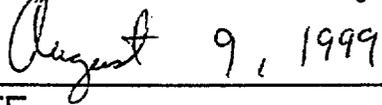
Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

See attached comments and edits.

  
\_\_\_\_\_  
SIGNATURE

  
\_\_\_\_\_  
DATE

Entered on "AS" Yes  No \_\_\_\_\_

### **Commissioner McGaffigan's Comments on SECY-99-174**

I approve publication of the final rule, "Expand Applicability of 10 CFR Part 72 to Holders of, and Applicants for, Certificates of Compliance, and their Contractors and Subcontractors" subject to the edits recently submitted by the staff to more clearly articulate the quality assurance requirements applicable to contractors and subcontractors. I also approve the revised Enforcement Policy. I join Chairman Dicus and Commissioner Merrifield in commending the staff for their efforts to improve the regulatory framework in this program area.

I firmly believe that NRC's regulatory program for the safe storage and transport of spent nuclear fuel (SNF) would be greatly enhanced by this rule since it allows NRC to establish a more direct and much needed regulatory relationship with contractors and subcontractors of certificate holders and licensees. The commercial nuclear power industry, the Department of Energy and the Navy depend on the availability of NRC-certified SNF casks that meet NRC-approved Quality Assurance (QA) requirements. The importance of high-quality casks to the national SNF management program should not be underestimated.

As the paper discusses, inadequate implementation of some NRC-approved QA programs in recent years resulted in significant safety issues that caused the suspension of SNF cask fabrication for two years in one case and brought dry fuel storage loading activities to a standstill in another case. The staff believes and I agree that the safety issues identified would likely have been identified and resolved more promptly and at a lower cost to both industry and the NRC had NRC promptly issued a Notice of Violation (NOV) as provided by this rule. One advantage of issuing an NOV rather than a Notice of Nonconformance (NON) is that an NOV **requires** a response whereas a NON simply requests a response. This is a subtle but important distinction that would allow NRC to establish a more direct regulatory relationship with those entities that implement an NRC-approved QA program for SNF casks on a daily basis. That is not to say that in promulgating this rule NRC would in any way dilute its expectation that licensees and certificate holders bear primary responsibility for assuring cask quality and compliance with applicable NRC requirements. The staff has indicated that this is NRC's position in the draft Federal Register notice when responding to a public comment.

I agree with Chairman Dicus that in light of the immaturity of the cask fabrication industry additional enforcement tools are necessary at this time. These tools will help NRC ensure a reliable and predictable supply of SNF casks for the future. I would also argue that a Commission decision to extend its authority to contractors and subcontractors in this industry should not necessarily be considered a precedent for other regulatory programs or industries. Rather, policy decisions of this nature should be determined on a case-by-case basis.

Suggested edits to the Federal Register notice, Congressional letters and press release are indicated on the attached pages.



**NUCLEAR REGULATORY COMMISSION**

**10 CFR Part 72**

**RIN: 3150-AF93**

**Expand Applicability of Part 72 to Holders of, and Applicants for, Certificates of Compliance and Their Contractors and Subcontractors**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending <sup>10 CFR Part 72</sup> ~~its regulations~~ to clarify the obligations of holders of, and applicants for, Certificates of Compliance (CoCs) and their contractors and subcontractors. These amendments will enhance the Commission's ability to take enforcement action against these persons when legally binding requirements are violated. This action will emphasize the safety and regulatory significance associated with violations of the regulations. In addition, a new section identifies recordkeeping and reporting requirements for certificate holders and applicants for a CoC. X

**EFFECTIVE DATE:** This final rule is effective on (60 days from the date of publication in the Federal Register).

resources to report deficiencies that do not affect the ability of the component to perform its intended safety function. The commenter suggested revising § 72.242(d) to read as follows: "...deficiency affects the ability of structures, systems, and components important to safety to perform their intended safety function," (emphasis original).

Response: The NRC agrees with the comment and the final rule has been revised to incorporate the comment.

9. Comment: One commenter, a cask fabricator, had two objections to the proposed rule. First, the commenter was opposed to the potential for issuance of NOVs and civil penalties against cask fabricators because they have no responsibilities or involvement in developing the design configurations for the various spent fuel packages. Second, the commenter indicated that the proposed changes to §72.146(a) and (b), "Design Control," were troublesome because, under the current procurement process for spent fuel packages, the commenter believes fabricators are intentionally precluded from the development of front end design and licensing activities. The fabricator currently bases manufacturing planning documentation upon the adequacy of a customer provided specification package. The commenter indicated that the fabricator may or may not utilize customer provided drawings for manufacture and that where the fabricator generates the drawings the designer and/or licensee might require their review and approval, but that there is no accepted industry practice on this matter.

Response: The NRC disagrees with the commenter. The NRC believes that while fabricators aren't involved in the design process, <sup>g</sup> all fabricators ~~typically do~~ <sup>g</sup> build the cask to the design ~~given to them~~ <sup>g</sup> by the certificate holder. However, in instances where the fabricator generates ~~provided~~ <sup>g</sup>

or a Demand for Information

taken administrative action  
by issuing

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within the scope of Part 72 requirements, and the NRC has not had a clear basis to cite these persons for violations of Part 72 requirements in the same way it treats licensees. When the NRC has identified a failure to comply with Part 72 requirements by these persons, it has issued a Notice of Nonconformance (NON) rather than an NOV. With these changes to Part 72, the Commission will be in a position to issue an NOV and Orders. A Notice of Violation (NOV) is a written notice that sets forth one or more violations of a legally binding requirement. The NOV effectively conveys to both the person violating the requirement and the public that a violation of a legally binding requirement has occurred and permits use of graduated severity levels to convey more clearly the safety significance of the violation. Therefore, in addition to the changes to Part 72, the Commission is amending Part X of the Enforcement Policy, Enforcement Action Against NonLicensees, to make clear that nonlicensees who are subject to specific regulatory requirements; e. g., Part 72, will be subject to enforcement action, including NOV and orders. The final Part 72 rule does not provide authority for issuing civil penalties to nonlicensees other than that provided under the Deliberate Misconduct Rule in section 72.12.

Paperwork Reduction Act

This policy statement does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150-0136. The approved information collection requirements contained in this policy statement appear in Section VII.C.



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

*Identical change is  
needed to the Rep. Barton  
letter.*

The Honorable James M. Inhofe, Chairman  
Subcommittee on Clean Air, Wetlands, Private  
Property and Nuclear Safety  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Enclosed for the information of the Subcommittee is a copy of a Federal Register notice concerning final amendments to 10 CFR Part 72, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste."

The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to expand the applicability of Part 72 to holders of certificates of compliance (i.e., a document issued by NRC that approves the design of spent fuel storage casks), applicants for the certificates, and their contractors and subcontractors. Although these persons are already subject to certain provisions of Part 72, they are not yet explicitly subject to other provisions intended to apply to them. As a result, NRC has refrained from issuing Notices of Violations (NOVs) in instances when these persons failed to comply with the regulations. Instead, NRC has issued an administrative action in the format of a Notice of Nonconformance which lacks the necessary enforcement sanctions to more effectively address performance problems that have occurred in the spent fuel storage industry. We are also adding to the NRC's Enforcement Policy, language that reflects these changes in the regulations.

*or Demand for Information*

These amendments will enhance the Commission's ability to take enforcement actions against certificate holders, applicants for certificates, and their contractors and subcontractors, in the form of NOVs, when these persons fail to comply with the regulations. This will allow NRC to more effectively and efficiently carry out its responsibilities to protect public health and safety and the environment.

The Commission is forwarding the final amendments to the Office of the Federal Register for publication.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

NRC EXPANDS REGULATIONS  
FOR SPENT FUEL STORAGE CASK DESIGNERS

CERTIFICATES

10 CFR Part 72

The Nuclear Regulatory Commission is <sup>amending</sup> ~~expanding the scope of its~~ regulations <sup>to clarify the obligations of</sup> ~~to make them more fully applicable to~~ holders of, and applicants for, NRC certificates of compliance for ~~the design of a~~ spent fuel storage cask, and to their contractors and subcontractors. These changes are necessary to more effectively address performance problems that have occurred in the spent fuel storage industry <sup>over the</sup> last two years.

The revisions enhance the agency's ability to take enforcement action against these companies <sup>when</sup> ~~if~~ they violate requirements in Part 72 of the Commission's regulations. <sup>legally binding</sup>

The changes also add recordkeeping and reporting requirements.

Further details of the changes are contained in a Federal Register notice to be published shortly. The revisions will be effective 60 days after publication of this notice. In addition, the NRC is publishing a revision to its ~~###~~ Enforcement Policy (NUREG-1600; Rev. 1) for public comment to clarify that enforcement action may be taken against nonlicensees for violations of 10 CFR Part 72.

This action will emphasize the safety and regulatory significance associated with violations of the regulations by allowing NRC to take enforcement action rather than administrative action when violations of NRC requirements have occurred.