

August 25, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-174

TITLE: FINAL RULE: EXPAND APPLICABILITY OF 10 CFR PART 72 TO HOLDERS OF, AND APPLICANTS FOR, CERTIFICATES OF COMPLIANCE, AND THEIR CONTRACTORS AND SUBCONTRACTORS

The Commission (with Chairman Dicus and Commissioner McGaffigan approving, Commissioner Merrifield approving in part and disapproving in part, and Commissioner Diaz disapproving) has approved in part and disapproved in part the subject paper as noted in the Affirmation Session and recorded in the Affirmation Session Staff Requirements Memorandum (SRM) of August 25, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission, and the Affirmation Session SRM of August 25, 1999.

Annette Vietti-Cook
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-99-174

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
COMR. DICUS	X				X	8/6/99
COMR. DIAZ					X	8/4/99
COMR. McGAFFIGAN	X				X	8/9/99
COMR. MERRIFIELD	X				X	8/6/99

COMMENT RESOLUTION

The Commission (with Chairman Dicus and Commissioners McGaffigan and Merrifield approving) has voted to approve the publication and implementation of the final revisions to 10 CFR Part 72 which serve to clarify the regulatory requirements imposed on holders of, or applicants for, a certificate of compliance under this Part. The Commission (with Commissioners Diaz and Merrifield disapproving) has not approved the extension of NRC requirements under Part 72, Subpart G, to contractors and subcontractors. Commissioner Diaz disapproved this rule because he believes licensees are responsible for assuring that their contractors and subcontractors are implementing adequate quality assurance programs and that the NRC should not extend its regulatory reach into new areas beyond matters of adequate protection without a compelling safety benefit that justifies the costs to all. Commissioner Merrifield disapproved of the extension of regulatory requirements to contractors and subcontractors of certificate holders and licensees for reasons similar to those articulated by Commissioner Diaz. However, Commissioner Merrifield approved of those changes related to certificate of

compliance holders since he believes those changes represent clarifications to existing requirements and not an extension into new areas. Subsequently, the Commission approved portions of the final rule as noted in the Affirmation Session SRM issued on August 25, 1999.

Commissioner Comments on SECY-99-174

Chairman Dicus

I approve the issuance and publication of the final 10 CFR Part 72 rule and Federal Register notice of final rulemaking in the Federal Register, subject to the attached changes proposed by staff. I also approve the revised NRC Enforcement Policy. I continue to concur with staff that the extension of the requirements of 10 CFR Part 72 to holders of, and applicants for, certificates of compliance, and their contractors and subcontractors would make clear the Commission's intention that the standards in this area are enforceable requirements. Although I recognize that these changes are a deviation from the way in which we have regulated in the past, they are necessary to address performance problems that have occurred in the relatively young spent fuel storage industry.

I believe it is critically important for the NRC to take these additional enforcement measures at this time, in view of past fabrication problems coupled with the expected significant increase in the demand for spent fuel storage casks as more nuclear power plants reach their spent fuel pool capacity. Current DOE projections indicate that there will be a significant loss of full core reserves over the next ten years. Given the spent fuel storage industry's limited capacity to fabricate spent fuel storage casks, it is imperative that a regulatory framework containing adequate enforcement provisions be in place that will help minimize the number of delays caused by fabrication problems similar to those experienced in the past.

Although a comprehensive Quality Assurance program may not be needed in all cases, the attached revisions help to clarify to what extent contractors and subcontracts must implement a Quality Assurance program. I commend the staff on its efforts in completing this final rule.

Commissioner Diaz

I disapprove publication of the final rule in its present form. As I have stated previously, NRC licensees manage their plants. For the issue at hand, accordingly, I believe that licensees are responsible for assuring that their contractors and subcontractors are implementing adequate quality assurance programs. As I have also stated previously, NRC should not extend its regulatory reach into new areas beyond matters of adequate protection without a compelling safety benefit that justifies the costs to all. Applying these principles, I do not find a demonstration of a substantial safety benefit in expanding the applicability of 10 CFR Part 72, nor do I find adequate consideration of costs.

A licensee has direct relationships with its vendors under which it has controls and tools to assure compliance with 10 CFR Part 72. Imposition of this proposed final rule could dilute the licensees' accountability and the NRC's strong focus on the licensee's responsibilities.

The NRC already has effective tools at its disposal to assure compliance with quality assurance requirements. In addition to the NRC's existing control of cask certification and licensees' acceptance and use of casks, the staff can address noncompliance with quality assurance requirements through orders to licensees, and notices of nonconformance, confirmatory action letters and demands for information to certificate holders and their contractors and subcontractors. For situations involving deliberate misconduct or substantial safety hazards, certificate holders and their contractors and subcontractors are already subject to 10 CFR 72.12, "Deliberate Misconduct," and 10 CFR Part 21, "Reporting of Defects and Noncompliance." Moreover, to the extent that the rule would largely turn into regulatory requirements those quality assurance requirements that certificate holders or licensees already impose, it is difficult to discern the safety benefit to be achieved.

I am also concerned about the potential costs to the NRC, certificate holders, and their contractors and subcontractors. The rule is, in spirit, a backfit. Although the applicable backfit provision (72.62) does not apply to certificate holders or their contractors or subcontractors, the rule would treat these entities more like licensees without the protection of a backfit provision. For contractors and subcontractors of certificate holders, there may be additional quality assurance requirements, and needs for additional management and legal review of contractual obligations or notices of violation relating to new regulatory requirements. These burdens would be imposed on small businesses, including some mom-and-pop size facilities that supply materials, equipment or services to certificate holders. Thus, the rule could increase the costs and decrease the availability of materials, equipment or services with no commensurate increase in safety.

For these reasons, I believe that current wording in 10 CFR 72.148, "Procurement document control," is adequate. It is noteworthy that other quality assurance regulations (e.g., 10 CFR Part 50, Appendix B, 10 CFR Part 71) require licensees and certificate holders to assure the quality of the materials, equipment, or services provided by contractors or subcontractors while still affording flexibility. If we approve this rule, it would be difficult to prevent proliferation of requirements similar to those proposed in this rule into other areas.

Should further experience in this area lead the staff to identify problems that amply demonstrate a need for new requirements, it can return to the Commission and recommend appropriate action.

Commissioner McGaffigan

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.

Commissioner Merrifield

I approve in part and disapprove in part issuance of the final rule, the revised NRC Enforcement Policy and the associated Federal Register Notices presented in SECY 99-174 as discussed below:

I approve the proposed revisions to 10 CFR Part 72 which serve to clarify the regulatory requirements imposed on holders of, or applicants for, a certificate of compliance under this Part. The proposed revisions to Part 72 and related changes to the NRC's Enforcement Policy will improve the NRC's regulatory framework, consistent with strategies in the Nuclear Materials Safety strategic arena, by providing a clear articulation of the responsibilities of certificate of compliance holders and applicants and by providing a more measured tool (issuance of Notices of Violation) to enforce compliance than has been possible under the current framework. I find the staff's arguments supporting the efficacy of using Notices of Violation, as opposed to Notices of Nonconformance or Orders, to be persuasive with regard to certificate holders and applicants. The staff is to be commended for its efforts in this regard.

However, I disapprove the staff's recommendation to extend NRC's regulatory requirements under Part 72, Subpart G, to contractors and subcontractors. Such an extension for cask manufacturing and design would be inconsistent with the way in which we regulate quality assurance in other arenas including reactor parts and equipment. Yet, I can see no logical distinction that would justify treating the two situations differently. In both instances there is a potential that deficiencies in the quality assurance program could lead to safety related problems. However, NRC's longstanding regulatory approach has been to make it clear that licensees are responsible for ensuring that the parts and equipment are safe. We do not take the extra step of extending our enforcement arm to reach contractors and subcontractors of reactor parts and equipment in a way contemplated under this rulemaking. I do not believe we have a sufficient basis to take the step of changing this long-standing policy as it relates to contractors and subcontractors of casks.

In contrast, certificate holders are similarly situated to licensees in that they also have primary responsibility under our existing regulations for ensuring the components they design and manufacture meet applicable safety standards (modifications to Subpart G under this rulemaking will make this point clearer with respect to certificate holders). Thus, it makes sense to extend our enforcement reach over them.

I also agree with Commissioner Diaz that it is difficult to discern the safety benefit to be achieved by this rulemaking, as it applies to contractors and subcontractors. The NRC already has effective tools at its disposal to assure compliance with quality assurance requirements. Indeed, we will rely on these tools for most other quality assurance matters. Further, holding contractors and subcontractors responsible as contemplated by this rulemaking could dilute the message that our regulations will otherwise make clear -- that licensees and certificate holders are ultimately responsible for assuring quality. Consequently, if the new policy were implemented, licensees and certificate holders may not be as vigilant about identifying problems as we would expect them to be. To me, it would be better to continue our present policy of clearly conveying to licensees and certificate holders that they ultimately will be held responsible, and that we expect more vigilance on their part to identify problems. For these reasons I believe the NRC's enforcement policy, modified as it relates to certificate holders, will provide the tools necessary to enforce our quality assurance requirements.

Therefore, before issuing the final rule, the staff should revise the proposed final rule language and supporting discussion in the Federal Register Notice to delete the proposed changes which reference contractors and subcontractors. Note that any references to contractors and subcontractors in the existing regulations need not be changed (e.g., in existing section 72.148).

Again, the staff is to be commended for its efforts to improve the regulatory framework in this very important and dynamic arena.