

August 26, 1997

FOR: The Commissioners
 FROM: L. Joseph Callan /s/ Executive Director for Operations
 SUBJECT: RULEMAKING PLAN: 10 CFR PART 76, "CERTIFICATION AMENDMENT PROCESS"

PURPOSE:

To inform the Commission that the EDO intends to approve the attached Rulemaking Plan to amend 10 CFR Part 76 to correct the deficiencies and inconsistencies in the certificate amendment process through rulemaking.

ISSUE:

Since the initial certification of the Gaseous Diffusion Plants (GDPs), the operator of the GDPs, the United States Enrichment Corporation (USEC), has requested several amendments to those certificates. In implementing the certificate amendment process described in 76.45, the NMSS staff has identified several deficiencies that should be corrected.

BACKGROUND:

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) that 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 were issued on November 26, 1996, and became effective on March 3, 1997, at which time the GDPs came under NRC authority. When Part 76 was initially promulgated, the certification process was to be repeated annually. The recertification period has recently been extended, by Congressional action and implementing rulemaking, to allow for up to 5 years between recertifications.

DISCUSSION:

Although Part 76, presently, provides a process for amending the certificate, the process is not clearly defined and the need for numerous and timely amendments was not adequately anticipated. Only very limited amendments to the certificate were expected because of the requirement for complete recertification annually. (The GDP certificates have already been amended several times in the first several months of GDP operation under NRC regulatory authority and currently there are 17 amendment requests under NRC review or in preparation by the Corporation.) There are two principal deficiencies in the certificate amendment process:

While the process for both "significant" and "not significant"⁽¹⁾

amendments provides an opportunity for the public to petition the Commission for review of the Director's decision, only requests for "significant" amendments are published in the Federal Register, which provides an opportunity for public review and comment during NRC's review of the request. Amendments that are "not significant" are not noticed in advance for public comment. There is also an ambiguity in who may petition for Commission review. One interpretation of 76.62(c) is that only individuals who provided comments on the initial certificate application may petition for review;

76.62(c) does not explicitly address the certificate amendment process. Another possible interpretation is that only those who commented on a particular amendment can petition for review. This could be interpreted to mean the public has no petition rights for "not significant" amendments because there is no public comment period provided for in the regulations.

In addition, the existing regulatory framework of Part 76 does not provide for immediately effective amendment of a certificate for either "significant" or "not significant" activities. For "significant" amendments, there is an initial 30-day comment period when the application for amendment is received and published in the Federal Register. This initial 30-day notice is not required for "not significant" amendments. Amendments can be then be issued after the NMSS staff completes their review and the recommendation for approval of the amendment is published in the Federal Register giving the public an opportunity (15 days) to petition the Commission for review of the recommended amendment action. Therefore, the earliest the staff can issue an effective amendment is 45 days for a "significant" action and 15 days for a "not significant" action. Neither "significant" nor "not significant" amendments can be issued immediately. A change is proposed to add an "immediate effective amendment" process so that the existing regulatory process does not cause undue operational difficulty for the GDPs when certificate amendment action may be a preferred option to "enforcement discretion" or "commission order." Use of an "immediate effective amendment" process would mainly be focused on administrative types of amendments which are not safety related but, by continued plant operation, violation could be defined as willful. Although emergency amendments should not be needed routinely, the staff does need this flexibility to issue immediately effective amendments as the diffusion process does not lend itself to rapid partial or full shutdown. Under the proposed process for "immediate effective amendment" a petition for review may still be filed requesting the Commission set aside or modify an amendment action.

The regulations need to be corrected or clarified by revising Part 76.

In summary, it is expected that a proposed rulemaking revising the certificate amendment process will include prescriptive procedures specific for three different certificate amending processes.

A "not significant" amendment process action will be similar to the process for all types of amendments processed under 10 CFR 70.34 for fuel cycle facilities. The amendment application is received, reviewed, and the amendment is issued if found to be supported by the application. The difference is that under Part 76 the amendment action will also be published in the Federal Register and subject to a petition for review requesting the Commission to set aside or modify the amendment action. The current regulations in Part 76 contain provisions for publication of notice of an amendment action and for petition for review of the amendment action. A "significant" amendment processing action will begin with publication of the application for amendment in the Federal Register providing 30 days for public comment. This is similar to the initial notification process for public comment on amendments processed under 10 CFR 50.91 for nuclear power plants. In addition, a public meeting may also be scheduled on the amendment application if the Director, NMSS, determines that a meeting is in the public interest. The ensuing amendment processes are the same as for the "not significant" amendment process above (publication in the Federal Register and opportunity to petition for review).

A new "immediate effective amendment," process will also be added to process applications found to be "significant" or "not significant" but requiring immediate implementation. This process is again similar to the normal amendment process under 10 CFR 70.34 for fuel cycle facilities. The difference is that the amendment will be published for 30 days public comment after issuance and the amendment will be subject to a petition for review requesting the Commission to set aside or modify the amendment action. It is also similar to the process under 10 CFR 50.91(a)(6) for exigent circumstances.

COORDINATION:

The Office of the General Counsel has no legal objection to the actions proposed in the Rulemaking Plan. The Office of the Chief Financial Officer has no objection to the resources estimate contained in this paper. The Office of the Chief Information Officer has reviewed the rulemaking plan for information technology and information management implications and concurs in it.

RECOMMENDATION:

Unless the Commission directs otherwise, 10 days from the date of this paper, I will approve the Rulemaking Plan and direct the staff to begin development of a direct final rule.

L. Joseph Callan
Executive Director for Operations

Attachment: Rulemaking Plan

RULEMAKING PLAN

RESPONSE TO NMSS REQUEST FOR RULEMAKING 10 CFR PART 76 PART 76 CERTIFICATION AMENDMENT PROCESS

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) that 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 were issued on November 26, 1996, and became effective on March 3, 1997, at which time the GDPs came under NRC authority. When Part 76 was initially promulgated, the certification process was to be repeated annually. The recertification period has recently been extended, by Congressional action and implementing rulemaking, to allow for up to 5 years between recertifications. Since the initial certification of the GDPs, the operator of the GDPs, the United States Enrichment Corporation (USEC), has requested several amendments to those certificates. In implementing the certificate amendment process described in 76.45, the NMSS staff has identified several deficiencies that should be corrected.

Existing Regulatory Framework

Although Part 76 presently provides a process for amending the certificate, the process is not clearly defined and the need for numerous and timely amendments was not adequately anticipated. Only very limited amendments to the certificate were expected because of the requirement for complete recertification annually. There are two principal deficiencies in the certificate amendment process:

While the process for both "significant" and "not significant"⁽²⁾ amendments provides an opportunity for the public to petition the Commission for review of the Director's decision, only requests for "significant" amendments are published in the Federal Register, which provides an opportunity for public review and comment during NRC's review of the request. Amendments that are "not significant" are not noticed in advance for public comment. There is also an ambiguity in who may petition for Commission review. One interpretation of 76.62(c) is that only individuals who provided comments on the initial certificate application may petition for review; 76.62(c) does not explicitly address the certificate amendment process. Another possible interpretation is that only those who commented on a particular amendment can petition for review. This could be interpreted to mean the public has no petition rights for "not significant" amendments because there is no public comment period provided for in the regulations.

In addition, the existing regulatory framework of Part 76 does not provide for immediately effective amendment of a certificate for either "significant" or "not significant" activities. For "significant" amendments, there is an initial 30-day comment period when the application for amendment is received and

published in the Federal Register. This initial 30-day notice is not required for "not significant" amendments. Amendments can be then be issued after the NMSS staff completes their review and the recommendation for approval of the amendment is published in the Federal Register giving the public an opportunity (15 days) to petition the Commission for review of the recommended amendment action. Therefore, the earliest the staff can issue an effective amendment is 45 days for a "significant" action and 15 days for a "not significant" action. Neither "significant" nor "not significant" amendments can be issued immediately. A change is proposed to add an "immediate effective amendment" process so that the existing regulatory process does not cause undue operational difficulty for the GDPs when certificate amendment action may be a preferred option to "enforcement discretion" or "commission order." Use of an "immediate effective amendment" process would mainly be focused on administrative types of amendments which are not safety related but, by continued plant operation, violation could be defined as willful. Although emergency amendments should not be needed routinely, the staff does need this flexibility to issue immediately effective amendments as the diffusion process does not lend itself to rapid partial or full shutdown. Under the proposed process for "immediate effective amendment" a petition for review may still be filed requesting the Commission set aside or modify an amendment action.

The regulations need to be corrected or clarified by revising Part 76.

How the Regulatory Problem Will be Addressed by Rulemaking

Part 76 should be amended to correct the deficiencies and inconsistencies in the certificate amendment process through rulemaking.

Section 76.45 will be revised as a stand-alone certificate amendment process and will not refer to the process for initial certification.

The processes for "significant" and "not significant" amendment actions will be clarified by providing a prescriptive amendment process for each action.

A process for an immediately effective "significant" or "not significant" amendment of a certificate will be added to 76.45 to assure licensing action can be taken in a timely manner.

The criteria for persons who are eligible to file a petition for review of a certificate for amendment will be redefined to include any person whose interest may be affected.

The time periods associated with filing petitions for review will be extended to better accommodate the process for public participation.

Rulemaking Options

One option is to not change the process for amending certificates. Part 76 does contain a process for certificate amendment and the GDP certificates have been amended several times in the first 2 months of GDP operation under NRC regulatory authority. Currently there are 17 amendment requests under NRC review or in preparation by the Corporation. Although several amendments have been noticed, there have been no petitions for review or comments received from the public. In regard to the need for immediately effective amendments the terms and conditions of a certificate of compliance or approved compliance plan are subject to Commission modification by reason of orders issued in accordance with the Act (see 76.70).

The second option is to amend the certificate amendment process of 76.45 to correct deficiencies. Although many variations for amending a certificate could be developed, the one being considered parallels the current Part 76 process but removes the ambiguity. (See User Need Memorandum, C.J. Paperiello to D.L. Morrison, dated March 3, 1997, Attachment A, and a USEC transmittal of February 2, 1997, Attachment B, concerning rulemaking to revise the certificate amendment process.)

Impacts on the Corporation

A revised certificate amendment process that is prescriptive for both "significant" and "not significant" amendments and is nonambiguous will provide a more focused and publicly acceptable and open regulatory process.

On the other hand, clarification of who can petition the Commission to review an amendment and extension of the period for requesting review may result in more petitions being filed and, therefore, may require the Corporation to expend more resources in responding to petitions.

The no-change option would maintain existing deficiencies and ambiguities, thereby possibly delaying and limiting amendments requested by the Corporation.

Benefit

A revised process for certificate amendment that provides more focus with less ambiguity, should be a more efficient process. Clarification of who can petition the Commission to review an amendment action and extension of the time frame will provide greater opportunity for the public to participate in the amendment process.

The no-change option would save current rulemaking resources at the expense of potential savings on future amendment actions.

Preferred Options

The preferred option is to amend the regulations to 1) eliminate ambiguities, 2) better define the processes for "significant" and "not significant" amendments, 3) add a process for immediately effective amendments, and 4) improve the process for public participation. (Attachment B is an early draft of a proposed revision to 76.45.)

Office of General Counsel Legal Analysis

The proposed rulemaking plan would clarify the process for amendments to the certificates of compliance. This is a procedural rule which does not constitute a backfit under either 10 CFR 76.76 or 50.109, as appropriate, therefore no backfit analysis will be required. There is no requirement for an environmental assessment for this amendment to a procedural rule. There are no new information collection requirements which would require an analysis and submission of the information collection requirements to the Office of Management and Budget for approval in compliance with the Paperwork Reduction Act of 1980. OGC has not identified any basis for a legal objection to the rulemaking plan.

Backfit Analysis

The NRC has determined that the backfit rules for 10 CFR 50.109 and 76.76 do not apply to this rulemaking. Thus, a backfit analysis is not required for these amendments because they do not involve any provisions that would impose backfits as defined in 10 CFR 50.109(a)(1) and 76.76(a)(1).

Agreement State Implementation Issues

None. Agreement States do not review or inspect uranium enrichment facility programs as regulated by the Commission.

Major Rule

No

Supporting Documents Needed

There are no supporting documents.

Issuance by Executive Director for Operations or Commission

This Rulemaking is considered to be an action of a minor policy to be issued by the Executive Director of Operations.

Resources Needed to Complete Rulemaking

It is anticipated that 0.5 NRC FTE's will be needed to complete this action (0.3 RES, 0.1 NMSS and 0.1 all other). Resources to complete and implement the rulemaking are included in the FY 1998 budget.

Staff Level Working Group

C. W. Nilsen
M. L. Horn
K. L. Winsberg

Concurring Official

M. R. Knapp
C. J. Paperiello
S. A. Treby

Management Steering Group

None

Public Participation

This Rulemaking Plan will be placed on an electronic bulletin board following EDO approval and Commission review.

Schedule

Rulemaking Plan to the EDO	August 1997
Proposed Rulemaking Package to the EDO	September 1997
Final Rulemaking Package to the EDO	December 1997

ATTACHMENT C

76.45 Application for amendment of certificate.

(a) Contents of amendment application. In addition to the application for certification submitted pursuant to 76.31, the Corporation may at any time apply for amendment of the certificate to cover proposed new or modified activities. The amendment application should contain sufficient information for the Director to make findings of compliance or acceptability for the proposed activities as required for the original certificate.

(b) Oath or affirmation. An application for an amendment of the certificate must be executed in a signed original by the Corporation under oath or affirmation.

~~(b) Director's decision. Upon receipt of the Corporation's application for amendment of the certificate, the Director will determine whether the proposed activities are significant, and if so, follow the procedures specified in 76.37 and 76.39. If the Director determines that the activities are not significant, the Director will, after appropriate review, issue a decision pursuant to subpart C of this part.~~

(c) Notice for public comment. Upon receipt of the Corporation's application for amendment of the certificate, the Director will determine whether the proposed activities are significant. If the Director determines that the activities are not significant, the Director will, after appropriate review, issue a decision pursuant to subparagraph (d). If the Director determines that the activities are significant, the Director shall publish in the Federal Register a notice which contains:

(i) A notice of the filing of the amendment application (specifying that copies of the application, except for Restricted Data, Unclassified Controlled Nuclear Information, Classified National Security Information, Safeguards Information, Proprietary Data, or other withholdable information, will be made available for public inspection in the Commission's Public Document Room at 2120 L Street NW. (Lower Level), Washington, DC, and in the local public document room at or near the location of the plant);

(ii) A notice of a 30-day opportunity for written public comment on the amendment application; and

(iii) The date of any scheduled public meeting regarding the amendment application. A public meeting may be held on an amendment application if the Director, in his or her discretion, determines that a meeting is in the public interest with respect to a decision on the amendment application.

(iv) If the Corporation finds that an emergency situation exists and applies for an amendment that would need to be effective immediately, the Director may issue an immediately effective amendment to the certificate, involving proposed activities considered to be significant without prior notice and opportunity for public comment. In such a situation, the Director will publish a notice of issuance that provides a 30-day public comment period after issuance. The Corporation must explain why this emergency situation occurred and why it could not avoid this situation.

(d) Issuance of amendment to certificate. Upon a finding of compliance with the Commission's regulations for issuance of an amendment to a certificate, the Director shall issue a written decision explaining the granting of the amendment application. The Director may impose any appropriate terms and conditions. The Director shall publish notice of the decision in the Federal Register. Unless otherwise stated in the notice, the amendment and the Director's decision shall be final and effective upon issuance.

(e) Denial of amendment to certificate. The Director may deny an application for an amendment to the certificate upon a written finding that the amendment application is in noncompliance with one or more of the Commission's requirements for the plant, or that the requested amendment is inadequate to protect public health and safety or the common defense and security. The Director shall publish notice of the decision in the Federal Register.

(f) Petition for review. The Corporation, or any person whose interest may be affected, may file a petition, not to exceed 30 pages, requesting review of the Director's decision. This petition must be filed with the Commission not later than 30 days after publication of the Director's decision in the Federal Register. The Corporation, or any person whose interest may be affected, may file a response not to exceed 30 pages, to any petition for review within 15 days after the filing of the petition. If the Commission grants the petition for review or otherwise decides to act, it will issue a decision within 90 days after the publication of the amendment notice. The Commission may adopt, modify, or set aside the findings, conclusions, conditions, or terms in the Director's decision and will state the basis of its action in writing.

1. MEMO to Carl J. Paperiello from Elizabeth Q. Ten Eyck, dated January 29, 1997. Proposed activities shall be determined to be not significant if all the following conditions are met:

- I. There is no change in the types or significant increase in the amounts of any effluents that may be released offsite.
- II. There is no significant increase in individual or cumulative occupational radiation exposure.
- III. There is no significant construction impact.
- IV. There is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.
- V. The proposed changes do not result in the possibility of a new or different kind of accident.
- VI. There is no significant reduction in any margin of safety.
- VII. The proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs.

Any proposed activities not meeting all of the above criteria shall be deemed to be significant.

2. Memo to Carl J. Paperiello from Elizabeth Q. Ten Eyck, dated January 29, 1997. Proposed activities shall be determined to be not significant if all the following conditions are met:

- I. There is no change in the types or significant increase in the amounts of any effluents that may be released offsite.
- II. There is no significant increase in individual or cumulative occupational radiation exposure.
- III. There is no significant construction impact.

IV. There is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.

V. The proposed changes do not result in the possibility of a new or different kind of accident.

VI. There is no significant reduction in any margin of safety.

VII. The proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs.

Any proposed activities not meeting all of the above criteria shall be deemed to be significant.