

July 6, 1999

FOR: The Commissioners

FROM: William D. Travers /s/
Executive Director for Operations

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

PURPOSE:

To obtain Commission approval for publication of the final rule and for publication of a revision to the Nuclear Regulatory Commission (NRC) Enforcement Policy.

BACKGROUND:

NRC's regulations contained in 10 CFR Part 72 were established to provide specific licenses for the storage of spent nuclear fuel in an independent spent fuel storage installation (45 FR 74693; November 12, 1980). In 1990, the Commission added Subpart L to Part 72 to include a process for approving the design of spent fuel storage casks and issuance of a certificate of compliance (CoC); and to allow for the use of these approved cask designs for storage of spent nuclear fuel by granting general licenses to reactor licensees in Subpart K of Part 72 (55 FR 29181; July 18, 1990).

The NRC Enforcement Policy and implementing program have been established to support NRC's overall safety mission in protecting public health and safety and the environment. Consistent with this purpose, enforcement actions are used as a deterrent: (1) to emphasize the importance of compliance with requirements; and (2) to encourage prompt identification and comprehensive correction of the violations. Enforcement sanctions consist of Notices of Violation (NOVs), civil penalties, and orders of various types. In addition to the formal enforcement actions, NRC also uses related administrative actions such as Notices of Nonconformance (NONs), Confirmatory Action Letters (CALs), and Demands for Information (DFIs), to supplement NRC's enforcement program.

Over the past 2 years, staff has observed repeated problems with the performance of two certificate holders involving inadequate implementation of NRC-approved Quality Assurance (QA) programs. In one case, this performance compromised the integrity of the confinement boundary for a dry cask storage system, and cask fabrication activities were suspended for almost 2 years. Repeated fabrication errors by another certificate holder resulted in similar safety concerns being identified and also led to suspension of cask fabrication for a year. These two events effectively stopped all cask fabrication and brought dry fuel storage loading activities to a standstill. The staff issued NONs and ultimately, DFIs to these certificate holders; however, the use of Orders was not warranted. NONs and Orders are at extreme ends of the enforcement spectrum. Therefore, staff concluded that a provision to issue NOVs is a necessary tool to address the performance problems that have occurred in the spent fuel storage industry.

The Commission approved the proposed rule (SECY-98-113; May 26, 1998) in a Staff Requirements Memorandum (SRM) dated June 30, 1998 (Attachment 1). The proposed rule was subsequently published in the Federal Register (63 FR 39526; July 23, 1998). The comment period ended October 6, 1998.

DISCUSSION:

In promulgating Subpart L, the Commission intended that selected Part 72 provisions would apply to spent fuel storage cask certificate holders and applicants. For example, 72.234(b) requires that, as a condition for approval of a CoC, "[d]esign, fabrication, testing, and maintenance of spent fuel storage casks must be conducted under a quality assurance program that meets the requirements of subpart G of this part." However, the QA requirements in Subpart G refer only to licensees and applicants for licenses, and not to certificate holders. Further, some of the Subpart L regulations apply explicitly to "the applicant" (e.g., 72.232), or to "the cask vendor" (e.g., 72.234(d)(1)), or were written in the passive voice, so that it was not clear who was responsible for meeting the requirement (e.g., 72.236). Although CoCs are legally binding documents, certificate holders, applicants for a CoC, and their contractors and subcontractors have not clearly been brought within the scope of Part 72 requirements. Because the terms "certificate holder" and "applicant for a CoC" do not appear in the above-cited Part 72 regulations, NRC has not had a clear basis to cite these persons for violations of Part 72 requirements in the same way it treats licensees. Presently, when NRC has identified a failure to comply with Part 72 requirements by these persons, it has issued an administrative action in the form of a NON or a DFI rather than enforcement action in the form of a NOV.

Although it may appear that a NON and a NOV are similar, the staff believes that the issuance of a NOV is preferred because: (1) the issuance of a NOV effectively conveys to both the person violating the requirement and the public that a violation of a legally binding requirement has occurred; (2) the use of graduated severity levels associated with a NOV allows NRC to effectively convey to both the person violating the requirement, and the public, a clearer perspective on the safety and regulatory significance of the violation; and (3) violation of a regulation reflects the NRC's conclusion that potential risk to public health and safety could exist.

This final rule would explicitly make certificate holders and applicants for CoCs subject to Part 72 requirements and would allow the use of NOVs against these persons, rather than using administrative sanctions. In addition, a new 72.242 is added to Subpart L to identify recordkeeping and reporting requirements for certificate holders and applicants for a CoC. Although this rule will permit NRC to issue NOVs to certificate holders and applicants for a

CoC, the Office of Nuclear Material Safety and Safeguards (NMSS) will continue to focus attention on potential safety and risk-significant issues, as described in Enforcement Guidance Memorandum (EGM) 98-008. This final rule does not provide authority for issuing civil penalties to nonlicensees other than under the Deliberate Misconduct rule. Staff believes that these amendments will have the effect of telling persons designing and building spent fuel storage casks, as well as the public, that it is NRC's expectations that these persons are to understand and follow the Part 72 requirements placed on them.

NRC received four comment letters on the proposed rule, and they are discussed in the Federal Register notice ([Attachment 2](#)). Three of the comment letters favored the proposed rule and one was opposed. In addition, one commenter opposed to the proposed rule and one favoring the proposed rule were both concerned with the potential enforcement aspects of this rule. The concern focused on applying NOVs and civil penalties to contractors and subcontractors. Staff believes, for the reasons stated in the proposed rule, that certificate holders and their contractors and subcontractors should be subject to NOVs and orders, though without civil penalties. Staff believes that these changes are necessary to address performance issues in the cask fabrication industry. Staff also believes that these changes will provide NRC with greater enforcement flexibility toward these persons, thereby allowing the enforcement sanctions to be commensurate relative to the safety significance of the violation.

One commenter who supported the proposed rule also suggested that two clarifying changes be made to [72.140\(d\)](#) and [72.242\(d\)](#). Staff is recommending that these changes be adopted in the final rule. The first change suggested that [72.140\(d\)](#) allow applicants for a CoC to take credit for an existing NRC-approved QA program in lieu of submitting a new QA program with their application. The second change suggested that [72.242\(d\)](#) require certificate holders to report design and fabrication deficiencies, when the design or fabrication deficiency affects the ability of structures, systems, and components important to safety to perform their intended safety function.

As a result of the adoption of this final rule, NRC's Enforcement Policy will be amended. The revisions to the Enforcement Policy are described in the attached Federal Register notice ([Attachment 3](#)). This amendment would be effective concurrently with the amendments in this final rule.

The staff wishes to note to the Commission that this final rule is one of three interrelated rulemakings in various stages of development. The other rules are: (1) a final rule on "Changes, Tests, and Experiments," forwarded to the Commission via [SECY-99-130](#) on May 12, 1999, and approved for publication by the Commission in an SRM dated June 22, 1999; and (2) a proposed rule on "Clarifications and Addition of Flexibility to Part 72" which is being forwarded to the Commission in parallel with this final rule. The sequencing of these rules for publication is critical. The "Expand the Applicability of Part 72" and the "Changes, Tests, and Experiments" final rules should be published before the proposed rule, "Clarifications and Addition of Flexibility to Part 72." The "Expand the Applicability of Part 72" final rule and the "Changes, Tests, and Experiments" final rule serve as foundations for the "Clarifications and Addition of Flexibility to Part 72" proposed rule. The proposed rule would permit an applicant for a CoC to fabricate casks prior to issuance of the CoC, provided that fabrication is accomplished under an NRC-approved QA program.

RESOURCES:

Resources to complete and implement the rule are included in the current budget.

COORDINATION:

The Office of the General Counsel has no legal objection to the final rule. The Office of the Chief Financial Officer has reviewed the Commission paper for resource impacts and has no objections. The Office of the Chief Information Officer has reviewed the final rule for information technology and information implications and concurs in it.

RECOMMENDATIONS:

That the Commission:

1. Approve issuance and publication of the attached final rule and Federal Register notice of final rulemaking ([Attachment 2](#)).
2. Approve issuance and publication of the attached revision to the NRC Enforcement Policy and Federal Register notice of revision ([Attachment 3](#)).
3. Certify that the final rule does not have significant economic impact on a substantial number of small entities. This certification is included in the attached Federal Register notice.
4. NOTE:
 - a. The appropriate Congressional Committees will be informed of this action ([Attachment 4](#));
 - b. The staff has determined that this action is not a "major rule," as defined in the *Small Business Regulatory Enforcement Fairness Act of 1996* (5 U.S.C. 804(2)) and has confirmed this determination with the Office of Management and Budget. The appropriate Congressional and General Accounting Office contacts will be informed ([Attachment 5](#));
 - c. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register ([Attachment 6](#));

- d. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the reasons for it, as required by the *Regulatory Flexibility Act* (5 U.S.C. 605 (b)).
- e. The final rule contains new or amended information collection requirements subject to the *Paperwork Reduction Act of 1995* (44 U.S.C. 3501, *et seq.*). The increase in burden for information collections has been determined as insignificant by the Office of Management and Budget (OMB) and does not require further OMB review.

William D. Travers
Executive Director for Operations

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Attachments: 1. SRM dated June 30, 1998
2. Federal Register Notice on the final rule
3. Federal Register Notice on a change to the NRC Enforcement Policy
4. Congressional Letters
5. SBREFA Forms
6. Press Release

ATTACHMENT 4

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Power
Committee on Commerce
United States House of
Representatives
Washington, DC 20515

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.

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: Representative Ralph M. Hall

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:

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Sincerely,
Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

ATTACHMENT 6

NRC EXPANDS REGULATIONS FOR SPENT FUEL STORAGE CASK DESIGNERS

The Nuclear Regulatory Commission is expanding the scope of its regulations 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.

The revisions enhance the agency's ability to take enforcement action against these companies if they violate requirements in Part 72 of the Commission's regulations.

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.