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RULEMAKING ISSUE

(NEGATIVE CONSENT)

September 11, 1996

SECY-96-197

FOR: The Commissioners
FROM: James M. Taylor, Executive Director for Operations
SUBJECT: RULEMAKING PLAN: USEC PRIVATIZATION ACT - CONFORMING CHANGES

PURPOSE:

To inform the Commission that the EDO intends to approve the attached Rulemaking Plan to amend 10 CFR Parts 40, 70, and 76, to bring these regulations into conformance with the new statutory requirements of the "USEC Privatization Act."

ISSUE:

Public Law 104-134, by amending the Atomic Energy Act of 1954, changes the way uranium enrichment facilities are licensed and adds different procedural requirements. The Commission's regulations must conform to these changes. A direct final rule providing the necessary amendments to the Commission's regulations should be published for public information and codified through the rulemaking process.

BACKGROUND:

On April 26, 1996, President Clinton signed into law H.R. 3019 (Public Law No. 104-134), legislation which provides FY 1996 appropriations to a number of Federal agencies. Included within the Act is a subchapter entitled the "USEC Privatization Act," which among other things, directs the Board of Directors of the United States Enrichment Corporation (USEC) to sell the assets of the USEC to a private sector entity. The private sector corporation that

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NOTE: TO BE MADE PUBLICLY AVAILABLE
WHEN THE FINAL SRM IS MADE
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L-4-1 Proposed Rule
XL-4-1 PT40 Source Material License
XL-4-1 PT70
XL-4-1 PT76
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purchases the assets of the Corporation will be responsible for the operation of the two gaseous diffusion plants and the development of the atomic vapor laser isotope separation technology (AVLIS). In addition, this legislation amended the Atomic Energy Act (the Act) with respect to the licensing of AVLIS and certification of Part 76 gaseous diffusion plants.

DISCUSSION:

The attached rulemaking plan would amend 10 CFR Parts 40, 70, and 76 as required to implement Section 3116 of Public Law 104-134. To conform with the changes to the Act by Public Law 104-134, these amendments contain several new and/or revised licensing/certification requirements specific to the Corporation and its successor's operation of gaseous diffusion plants. Section 3116 of Public Law 104-134 amended the Act as follows:

- An amendment to Section 11v. of the Act provides that AVLIS may be licensed using the one-step licensing process set forth in Section 193 of the Act (the same provision that Louisiana Energy Services' application is being processed under). Under the prior law, the traditional two-step licensing process of Part 50 would have been required for AVLIS.
- An amendment of Section 193 of the Act mandates that the Commission not issue a certification of compliance to the USEC or its successor private corporation if the Commission determines that (1) the Corporation is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government; (2) issuance would be inimical to the common defense or security of the United States; or (3) is inimical to the maintenance of a reliable and economical domestic source of enrichment services.
- Another amendment of Section 193 eliminates the requirement that the Commission certify that the Corporation is in compliance with NRC regulations each year. Instead, the Commission can determine how frequently the Corporation must submit a recertification application to the NRC, provided that the NRC recertify Corporation compliance with its regulations at least once every 5 years. It is the staff's intent that the initial certification will be for 2 years to permit most items of the compliance plan to be completed. Subsequent recertification will be based on a number of considerations, including implementation status of compliance plans and certification regulatory experience. It is anticipated that recertification may be for longer than 2 years. The exact term will be specified in the certificate. Congress, however, did not eliminate the requirement found in Section 1701 (a) of the Act that the NRC shall report at least annually to the Congress on the status of health, safety, and environmental conditions at the gaseous diffusion plants.
- Section 3116 also modifies Section 234a of the Act to provide the Commission with the authority to issue civil penalties to the Corporation for violation of the provisions of the Act, regulations, orders and terms of the certificate. The "General Statement of Policy

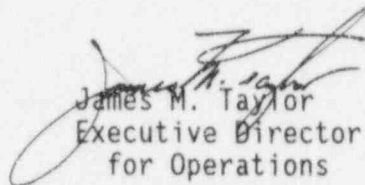
and Procedures for NRC Enforcement Action," NUREG-1600, will be supplemented to provide examples of violations in each of the four severity levels as guidance in determining the appropriate severity level for violations in the area of gaseous diffusion plant operations.

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.

COORDINATION:

The Office of the General Counsel has no legal objection to the actions proposed in the Rulemaking Plan. The Offices of Nuclear Materials Safety and Safeguards, and Enforcement have concurred in the Rulemaking Plan.


James M. Taylor
Executive Director
for Operations

Attachment:
Rulemaking Plan

SECY NOTE: In the absence of instructions to the contrary, SECY will notify the staff on Wednesday, September 25, 1996 that the Commission, by negative consent, assents to the action proposed in this paper.

DISTRIBUTION:

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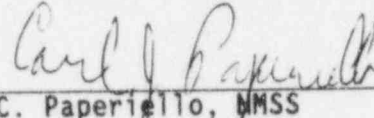
RULEMAKING PLAN
USEC PRIVATIZATION ACT

RULEMAKING PLAN FOR
USEC PRIVATIZATION ACT (PUBLIC LAW 104-134)

Lead Office: Office of Nuclear Regulatory Research
Staff Contact: C. W. Nilsen, RDB

Concurrences:

 8/16/96
D. Morrison, RES Date

 8/23/96
C. Paperiello, NMSS Date

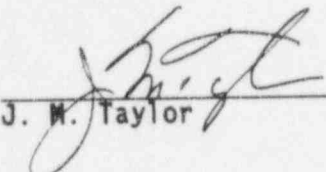
08/19/96 by e-mail

James Lieberman, OE Date

08/30/96 by e-mail

Karen D. Cyr, OGC Date

Approval:

 9/10/96
J. W. Taylor Date

RULEMAKING PLAN - USEC PRIVATIZATION ACT

Uranium Enrichment Regulation; Rulemaking-Conforming 10 CFR Parts 40, 70 and 76 to the Requirements of Public Law 104-134

Regulatory Issue (Codify Legislation)

On April 26, 1996, President Clinton signed into law H.R. 3019 (Public Law No. 104-134), legislation which provides FY 1996 appropriations to a number of Federal agencies. Included within this legislation is a subchapter entitled the "USEC Privatization Act," which among other things, directs the Board of Directors of the United States Enrichment Corporation (USEC) to sell the assets of the USEC to a private sector entity. The private sector corporation that purchases the assets of the Corporation will be responsible for the operation of the two gaseous diffusion plants and the development of the atomic vapor laser isotope separation technology (AVLIS). In addition, this legislation amended the Atomic Energy Act of 1954, as amended (the Act) with respect to the licensing of AVLIS and certification of 10 CFR Part 76 gaseous diffusion plants. To implement these amendments to the Act, several conforming changes to 10 CFR Parts 40, 70 and 76 are needed.

Current Rule Requirements

The NRC certification of the two USEC gaseous diffusion plants is regulated under 10 CFR Part 76 "Certification of Gaseous Diffusion Plants."

Before Public Law 104-134, the NRC licensing of an AVLIS facility would have followed the two step process of 10 CFR Part 50. As a result of this new legislation, the licensing of uranium enrichment facilities using AVLIS technology will now be licensed under 10 CFR Part 70, "Domestic Licensing of Special Nuclear Material."

NRC regulated uranium enrichment facilities are also required to have a license under 10 CFR Part 40 "Domestic Licensing of Source Material."

Regulatory Problem to be Resolved

Section 3116 of Public Law 104-134, by amending the Act, changes the way uranium enrichment facilities are regulated by the NRC and adds different procedural requirements for the certification of the gaseous diffusion plants and the licensing of AVLIS. The Commission's regulations must conform to these changes.

New provisions of Section 3116 of Public Law 104-134 amended the Act as follows:

- An amendment to Section 11v. of the Act provides that AVLIS may be licensed using the one-step licensing process set forth in Section 193 of the Act (the same provision that Louisiana Energy Services' application is being processed under). Under the prior law, the traditional two-step licensing process of 10 CFR Part 50 would have been required for AVLIS.
- An amendment of Section 193 of the Act mandates that the Commission not issue a certification of compliance to the USEC or its successor private corporation if the Commission determines that (1) the Corporation is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government; (2) issuance would be inimical to the common defense or security of the United States; or (3) is inimical to the maintenance of a reliable and economical domestic source of enrichment services.
- Another amendment of Section 193 eliminates the requirement that the Commission certify that the Corporation is in compliance with NRC regulations each year. Instead, the Commission can determine how frequently the Corporation must submit a recertification application to the NRC, provided that the NRC recertify Corporation compliance with its regulations at least once every 5 years. Congress, however, did not eliminate the requirement found in Section 1701(a) of the Act, that the NRC shall report at least annually to the Congress on the status of health, safety, and environmental conditions at the gaseous diffusion plants.
- Section 3116 also modifies Section 234a of the Act to provide the Commission with the authority to issue civil penalties to the Corporation for violation of the provisions of the Act, regulations, orders and terms of the certificate.

The principal effect of these legislative changes is that the referenced AVLIS uranium enrichment facilities will be licensed pursuant to the provisions of the Act pertaining to source material and special nuclear material rather than the provisions pertaining to a production facility. Under this legislation, licensing of AVLIS will be a single step licensing process with one license issued pursuant to 10 CFR Parts 40 and 70 rather than a two-part licensing process under 10 CFR Part 50. Under previous rulemaking Part 70 was revised pursuant to the "Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990" (Public Law 101-575) to include the licensing of uranium enrichment facilities. Conforming changes to 10 CFR Part 70 may be required to ensure that AVLIS is clearly included within the definition of "uranium enrichment facility." As a point of reference Part 70 is currently the basic regulation for licensing the Louisiana Enrichment Services (LES) uranium enrichment facility.

In addition, provision is made in the legislation to impose civil penalties on the USEC or its successor for failure to comply with regulatory requirements governing the safety of the operation of gaseous diffusion plants. The "General Statement of Policy and Procedures for NRC Enforcement Action," NUREG-1600, will be supplemented to provide examples of violations in each of the four severity levels as guidance in determining the appropriate severity level for violations in the area of gaseous diffusion plant operations. Also included is a requirement prohibiting issuance of a license/certificate as related to Corporation foreign ownership or domination. Amendments to 10 CFR Parts 40, 70 and 76 are dictated.

Part 76 also needs amending to eliminate the requirement that the Commission certify that the Corporation is in compliance with NRC regulations each year. Instead, the Commission can determine how frequently the Corporation must submit a recertification application to the NRC, provided that the NRC recertify Corporation compliance with its regulations at least once every 5 years. It is the staff's intent that the initial certification will be for 2 years to permit most items of the compliance plan to be completed. Subsequent recertification will be based on a number of considerations, including implementation status of compliance plans and certification regulatory experience. It is anticipated that recertification may be for longer than 2 years. The exact term will be specified in the certificate. Congress, however, did not eliminate the requirement found in Section 1701(a) of the Act, that the NRC shall report at least annually to the Congress on the status of health, safety, and environmental conditions at the gaseous diffusion facilities.

This rulemaking providing the necessary amendments to the Commission's regulations to codify "USEC Privatization Act" (Public Law No. 104-134) legislation will be issued as a direct final rule. It should be noted that if the NRC receives significant adverse public comments, during the first 30 days following publication of the direct final rule action, the full notice and comment rulemaking process will be completed based on the proposed rule and the schedule will be revised with the effective date to be determined by resolution of comments and final rulemaking action.

Preliminary Regulatory Analysis

Changes to 10 CFR Parts 40, 70 and 76, must be made to bring these regulations into conformance with the Act. Thus, the No Action option is not feasible for rulemaking and is not considered further.

The chief benefit to the public, industry, and NRC will be derived from the codification of the Commission's regulations to conform to the changes to the Act in accordance with Public Law 104-134. Codification will facilitate the process for review of any license application for an enrichment facility and provide the final regulatory base for health and safety review of the application.

The principal cost will be the expenditure of staff resources in codifying the requirements, which is estimated at 0.4 staff years. Codification of the

requirements should also result in a better understanding of the procedures and requirements for licensing and/or certification of enrichment facilities, and thereby reduce the litigation burden that might result from not having the provisions of the Act codified in regulation.

OGC Legal Analysis

The proposed rulemaking revisions are directly tied to the statutory directives of the USEC Privatization Act. Furthermore, the nature of the statutory provisions do not provide the NRC with much discretion over how these provisions should be implemented. Consequently, OGC believes that the use of a direct final rule is an appropriate mechanism for promulgating this rule. However, as a general proposition for any direct final rule, the NRC cannot choose to issue a final rule for those provisions of the direct final rulemaking package that do not receive critical comment, while using the proposed rule mechanism for those provisions that do. The rulemaking provisions must be treated as a unified and indivisible package for purposes of the direct final rule concept. In all other respects, OGC has not identified any potential legal complications or known bases for a legal objection to the rulemaking.

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 Problems

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

Supporting Documents

There are no supporting documents.

Resources Required

Resources to complete and implement the rulemaking are included in the FY 1997 budget.

Lead Office Staff and Staff From Supporting Offices

RES/DRA	C. W. Nilsen
NMSS	John Hickey
OE	Nader Mamish
OGC	Kathryn Winsberg

Steering Group/Working Group

Yes. All staff developed proposals will be formulated and integrated through the steering committee comprised of RES, NMSS, OE and OGC.

Public Participation

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

EDO or Commission Issuance

The rulemaking is considered to be a minor question of policy for Commission action.

Schedule

Direct Final Rulemaking Package for concurrence
Rulemaking Package to EDO

Late September, 1996
Mid October, 1996