

IEMA

Illinois Emergency Management Agency
Division of Nuclear Safety

Rod R. Blagojevich, Governor
William C. Burke, Director

PR.20,30,31,32,33,35,50,61,62,72,110,170, and 171
(71FR42952)

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August 8, 2006

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Rulemaking and Adjudications Staff

Subject: RIN 3150-AH84 Proposed Rule: 10 CFR Parts 20, 30, 31, 32, 33, 35, 50, 61, 62, 72, 110, 150, 170, and 171 Requirements for Expanded Definition of Byproduct Material

Dear Madam Secretary:

The subject Proposed Rule is designed to implement certain provisions of the Energy Policy Act of 2005 (EPAct). The Illinois Emergency Management Agency (IEMA) has participated with other State representatives and the U.S. Nuclear Regulatory Commission (NRC) on the Naturally-Occurring & Accelerator-Produced Radioactive Material (NARM) Task Force and NARM Rulemaking Working Group (WG), as well as the joint Steering Committee overseeing both the NARM Task Force and NARM Rulemaking WG. This activity and its product--the subject Proposed Rule--are a part of the efforts to implement the Energy Policy Act of 2005 (EPAct). The IEMA has very serious concerns regarding the proposed H&S--adequacy--designation for the definition of "Byproduct Material" (and other definitions included in the subject proposed rule) and the implementation of the Compatibility B requirements for many of the sections of the proposed rule. Our concerns are with the NRC's implementation of the requirements more than the accuracy of the categorization for the H&S definitions and with the implementation of sections of the proposed rule with categorization as Compatibility B requirements. The EPAct indicated that the Commission was "to the maximum extent practicable (i) cooperate with States and (ii) use model State standards in existence on the date of enactment of this Act." This letter is provided to state the position of the IEMA on the subject proposed rule and provide justification for the position.

The IEMA has three primary concerns as follows:

- 1) The "Health and Safety (H&S) Adequacy designation requires the adoption of the "essential objectives" of a given program element. The NRC has proven unwilling to state in writing that the Agreement States already meet these criteria. Although the discussion in the first portion of the Federal Register Notice (FRN) indicates that the NRC used the language of the Conference of Radiation Control Program Directors, Inc.

(CRCPD) *Suggested State Regulations for the Control of Radiation (SSRs)*, which the vast majority of states have used as the basis for their regulations, there is no clear indication that Illinois and other Agreement States will not be in the position of the NRC essentially forcing the states to amend definitions in both their states' statutes and rules. In light of this concern, and the overwhelming support of the Agreement State Program Directors for a "D" Compatibility designation (33 of 34 Agreement States) for the H&S definitions, the IEMA believes that the "D" compatibility designation would not result in any requirement for substantive changes to State statutes or rules, since the IEMA and other Agreement States have been meeting the "essential objectives" of the new rules for the past 40 years or more.

- 2) For each of the sections with a Compatibility B category, it is not clear that the NRC accepts the language of the states that is essentially identical to the SSRs. IEMA carefully considered the definitions of the Compatibility categories provided in the FRN on page 42974.
- 3) In addition, the IEMA considered the express language of the Energy Policy Act of 2005 (EPAct) in making its evaluation of the potential impact of the proposed rule. The EPAct requires that:

"The Commission...to the maximum extent practicable--
(i) cooperate with States; and
(ii) use model State standards in existence on the date of enactment of this Act."

The IEMA took the plain language of the statute as a rather clear indication that the substantive burden would be upon the NRC to bring its regulations into conformance with the IEMA and other Agreement State regulations, since these regulations have, for 40 years or more, already provided for the safe control of the sources that will only now, after the enactment of the EPAct, come under the jurisdiction of the NRC. These IEMA and other Agreement State regulations are essentially the same as the model State regulations of the CRCPD found in the SSRs.

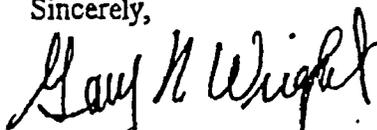
The Summary section of the FRN on page 42952 accurately states "In addition, this proposed rule was informed and guided by the CRCPD's applicable Suggested State Regulations for the Control of Radiation." Whether or not the NRC is making an effort that matches the EPAct language "to the maximum extent practicable," to cooperate with States or to use model State standards in existence on the date of enactment of this Act will depend on whether the NRC essentially forces the Agreement States to make minor word changes in the Agreement States' regulations to be just like the NRC's words or the NRC accepts that the Agreement States' regulations developed based on the SSRs have functioned quite well on a national basis for decades and most of them do not need to be changed to be exactly like the NRCs.

In summary, the IEMA thinks that the appropriate Compatibility/Adequacy designation at this time is a "D" for the definition of "Byproduct Material" and the other new definitions that arise from the EPAct (e.g., "Particle Accelerator" and "Discrete Source").

Enclosed please find a document detailing the justification for the IEMA position that the definition of "Byproduct Material" and other definitions arising from the EPAct should carry a "D" compatibility designation. Also, other comments are provided in the attachment.

Thank you for the opportunity to provide this input to the NRC on this proposed rule. Please contact Joe Klinger at 217-785-9930 or klinger@iema.state.il.us if you have any questions regarding this matter.

Sincerely,



Gary N. Wright, Assistant Director

cc: Janet Schlueter, Director, Office of State and Tribal Programs, NRC
Chair OAS Board (by email)
All Agreement States (by email)

Enclosures: Justification of IEMA Position
Additional Comments

Justification of IEMA Position

While working with the NRC to develop the proposed rule the IEMA and 33 of 34 Agreement State Programs recommend that the Compatibility/Adequacy designation for definitions arising from the Energy Policy Act of 2005, with respect to the regulation of Naturally-Occurring and Accelerator-Produced Radioactive Material (NARM) in existing Agreement States be a "D," i.e., not required for purposes of compatibility.

As stated in the fourth and fifth paragraph of I. Background section, Current Regulatory Structures for NARM, of the Federal Register Notice for the Proposed Rule:

"Agreement States have regulated NARM use for many decades in a fairly uniform and consistent manner. The Agreement States have accomplished this by using the same standards to regulate NARM as those used to regulate other byproduct, source, and special nuclear material under NRC authority. In many respects, regulations applicable to NARM adopted by the Agreement States are compatible with the NRC regulations for the current materials program, or parallel to the CRCPD's SSRs.

Although Agreement States do have some provisions specifically for NARM, in general, the regulatory structure used by Agreement States does not distinguish between NARM and other radioactive material. NARM users in Agreement States are expected to implement all aspects of standards for their radiation protection programs with respect to NARM, including those aspects relating to receipt, possession, use, storage, transfer, transportation, and disposal of NARM. This regulatory structure also subjects NARM users in the Agreement States to the same licensing, inspection, and enforcement policies as those using other byproduct, source, or special nuclear materials."

Simply stated, the IEMA and other existing Agreement States already have programs in place to regulate NARM, compatible with the programs implemented pursuant to their agreements with the NRC to regulate other byproduct, source and special nuclear material. As stated in the September 3, 1997 "Policy Statement on Adequacy and Compatibility of Agreement State Programs":

"An Agreement State radiation control program is compatible with the Commission's regulatory program when its program does not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis."

IEMA does not anticipate any "conflicts, duplication, [or] gaps," with respect to the regulation of NARM in the Agreement States, even with no changes to their definitions or to the sections of the Agreement States regulations that the NRC is changing its regulations to cover the same

radioactive materials. The IEMA and other Agreement States will simply continue to regulate these materials as they have for the past 40 years. A requirement to revise the definitions and regulations currently in use (which for the definitions in many cases are in both state statute and regulation) would create an enormous and unnecessary burden upon the IEMA and other Agreement States, potentially cause confusion for Agreement State licensees, and would not provide any measurable improvement to the system of regulation, since these NARM materials are already regulated under a system that, as stated above, is compatible with the programs implemented to regulate other byproduct, source and special nuclear material. If an Agreement State is currently compatible with respect to their regulation of other byproduct, source or special nuclear material, they will continue to be compatible with respect to the NRC's addition of NARM, since these sources are all regulated in the same manner. The only gap at issue should be the very sizable gap in the NRC regulations created by the former exclusion of NARM from the NRC jurisdiction, which the Agreement States have filled for many years. The NRC needs to work to fill that gap now that it has jurisdiction over these materials, and the Agreement States are willing and able to assist the NRC in this matter, but it is the NRC, in this case, that needs to move toward compatibility with the Agreement States on this issue and not vice versa.

The Energy Policy Act of 2005 includes the following language:

“The Commission shall, to the maximum extent practicable—

- (i) cooperate with States; and
- (ii) use model State standards in existence on the date of enactment of this Act.”

It is clear from this language that Congress did not intend that this new authority granted to the NRC would or should disrupt the existing State programs already regulating the use of NARM, but that the NRC would “to the maximum extent practicable,” conform its program to the State programs.

With respect to Compatibility, the appropriate designation for definitions arising from the Energy Policy Act of 2005 relating to the regulation of NARM, is “D,” except that the NRC should to the “maximum extent practicable” provide definitions in their own regulations that are consistent and compatible with the existing State regulations, though they needn't be “essentially identical,” since the NRC still does not have jurisdiction over the complete suite of radioactive materials and sources regulated by the States – i.e., the NRC should strive to meet the essential objectives of the existing State regulations. Also, with respect to the NRC proposed regulation sections designated Compatibility Category B, the Agreement States should not have to make minor wording changes to match the words used by the NRC in its efforts to regulate what the Agreement States and some other States have been regulating in a compatible manner for many decades.

With respect to the proposed “health and safety” designation, the Office of State and Tribal Programs, SA-200, “Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements,” states in footnote 5:

"If the essential objectives of the program element were not adopted, it could result directly...in an exposure to an individual in excess of the basic radiation protection standards."

It is inconceivable that the failure of the IEMA or other Agreement States to add or amend the definitions of "byproduct material," "particle accelerator," "discrete source," or other terms arising from the NARM provisions in the Energy Policy Act of 2005 could ever result in an "exposure to an individual in excess of the basic radiation protection standards," given that the Agreement States' regulation of NARM, and generic definition of "radioactive material" already extends far beyond the NRC's new jurisdiction with respect to these materials. Simply put, the Agreement States are already far more protective than the NRC in this regard, regulating non-discrete sources of NARM, and all machine-produced radiation, whether or not it is for the purpose of creating radioactive material for extraction. Based on the NRC's written procedures regarding the application of the H&S designation, it appears to be inappropriate to designate the new definitions as such.

In conclusion, the IEMA, other Agreement States and some States that are not Agreement States have long had programs to regulate NARM. These State programs are completely integrated into, compatible and consistent with the programs to regulate other byproduct, source, and special nuclear material. At this time, it is the NRC that needs to move to become compatible with the Agreement States with respect to the regulation of NARM; thus, the Agreement States do not need to make any changes with respect to the new definitions or other regulations that follow the model SSRs arising from the Energy Policy Act of 2005 relating to NARM regulation, for purposes of compatibility; these new definitions should therefore receive a compatibility designation of "D" as applicable to the States. In addition, these new definitions do not, in anyway, meet the express written intent of the H&S designation respecting adequacy, because the Agreement States' regulations and definitions are already far more comprehensive and protective than the NRC's, since the Agreement States have much broader authority to regulate in this area. The IEMA recommends that the definitions arising from the Energy Policy Act of 2005 NARM provisions receive a compatibility designation of "D," and that it be acknowledged, given the Agreement States broad jurisdiction over NARM and machine-produced radiation, that they are not required for the purposes of Health and Safety. The IEMA would like the acknowledgement in writing.

Additional Comments Based on Statements in the Federal Register Notice (FRN):

On page 42961 of the FRN in the section entitled "Self-luminous Products" the NRC provides a rationale for not including an exemption for previously acquired self-luminous articles containing less than 3.7 kBq (0.1 uCi) of radium-226 in its 10 CFR 30.19.

Comment: Although the exemption language would not need to be in the existing 10 CFR 30.19, which could cause the NRC some problem, the exemption language from the SSRs should be included by NRC for these low activity radium-226 sources rather than the NRC including these sources under a general license. There is no problem known to exist with these exempt sources so there is not sufficient reason for the NRC not to exempt them as the States have done for many decades. If the NRC is aware of some risk to public health and safety from these very low activity sources, then it should provide the information.

On page 42962 in the section entitled "New General License for Certain Items and Self-Luminous Products Containing Radium-226", Item 5 in the list of things included in the general license is "small radium sources containing no more than 37 kBq (1 uCi) of radium-226 as discrete survey instrument calibration sources, sources contained in radiation measuring instruments, sources used in educational demonstrations (such as cloud chambers, spinthariscopes, etc.), electron tubes, lightning rods, ionization sources, and static eliminators.

Comment: If these items contain 0.1 uCi or less of radium-226, they should be exempt. This can be accomplished by inserting the words "more than 0.1 uCi but" after the word "containing."

"The Commission specifically requests comments to provide information that may assist the NRC to more fully evaluate potential impact to public health and safety and the environment due to activities involving radium-226 sources. In particular, the Commission requests input on any quantitative or qualitative health and safety information regarding radium-226 sources that may be used to support a regulatory framework other than general licensing, such as an exemption. The Commission also requests comments regarding the specific constraints in the proposed exemption in 10 CFR 30.15(a)(1)(viii) and in its general license approach for certain items and self-luminous products containing radium-226 that were manufactured prior to the effective date of the rule, regarding under what circumstances an exemption is a more effective and viable approach, and request additional information for the technical basis supporting an exemption in lieu of a general license. In particular, the Commission would appreciate input on whether this general license approach, and its allowances and restrictions, is reasonable while the Commission evaluates the products; whether the general license should allow possession of radium-226 luminous items, such as individual watch hands, dials, gauge indicators and faces, which are not contained in an intact finished product regardless of number; whether commercial transfers should be restricted and require a specific license; or whether data are available to justify an exemption for certain types of radium-226 sources, now or in the future."

Comment: The IEMA believes that the NRC should accept the status of the sources, i.e., exempt or general license as of the date of enactment of the EPAct, unless there is documented evidence of failures of some particular source. A look into records by IEMA licensing staff indicated that

there were only a very few NARM sources that may have an active status—that is, may still be marketed. It seems to be an unwise use of resources to do anything other than accept the status quo for these sources that apparently have not been a public health and safety or worker safety or environmental risk for several decades.

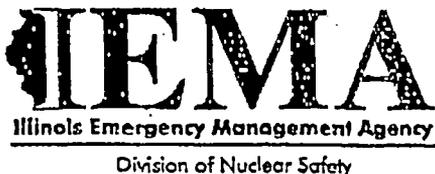
Comment: The IEMA has no comments regarding the proposed fee categories and amounts.

Comment: The IEMA agrees with the proposed effective date for the final rule and other implementation periods unless the NRC makes decisions that would require the Agreement States to amend their State statutes and regulations. If the NRC makes such adverse decision(s), then the effective date needs to be extended by five years in order for the IEMA and other Agreement States to attempt to convince their legislators that they all have to change State statutes because the NRC was unwilling to make the changes to prevent the adverse effect.

In the last paragraph of VII. Voluntary Consensus Standards, the NRC states, "To the maximum extent practicable, the NRC has incorporated the CRCPCD's SSRs into the proposed rule."

Comment: The IEMA does not agree with the NRC's statement. Although the NRC has come a long way toward meeting this criterion, it does not match the "maximum extent practicable" language. Details were provided in another part of the IEMA comments.

Comment: In the rule text for Section 30.71, Schedule B, the element and nuclide number do not have hyphens as appears elsewhere in the rule language, for example, "Cesium 129 (Cs 129)" should be "Cesium-129 (Cs-129)".



Rod R. Blagojevich, Governor
William C. Burke, Director

TO: Secretary - U.S. NRC

Telefax #: 301-415-1672

FROM: Joel Klinger

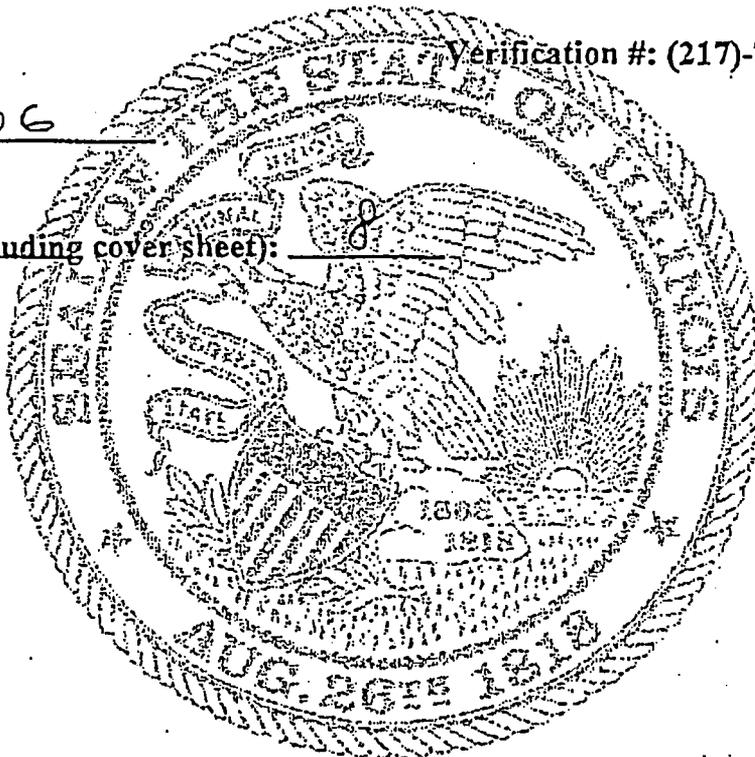
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Verification #: (217)-785-9947

DATE: 8-15-06

Number of pages (excluding cover sheet): 8

Remarks:



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