

POLICY ISSUE NOTATION VOTE

November 30, 2012

SECY-12-0160

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED RULE: PETITION FOR RULEMAKING PROCESS (RIN 3150-AI30); EXPANDED AUTHORITY OF EXECUTIVE DIRECTOR FOR OPERATIONS TO DENY PETITIONS FOR RULEMAKING UNDER MANAGEMENT DIRECTIVE 6.3

PURPOSE:

To request Commission approval to publish a proposed rule in the *Federal Register* that would amend Part 2 to Title 10 of the *Code of Federal Regulations* (10 CFR) "Agency Rules of Practice and Procedure." The proposed rule would amend the U.S. Nuclear Regulatory Commission's (NRC) regulations to streamline its process for addressing a petition for rulemaking (PRM).

In addition to the proposed amendments to 10 CFR, the staff recommends Commission approval of changes to Management Directive (MD) 6.3, "The Rulemaking Process," to expand the authority of the Executive Director for Operations (EDO) to deny certain types of PRMs in order to make the PRM process more efficient and effective.

SUMMARY:

The proposed rule would: (1) clarify and codify the NRC's current policies and practices on the actions taken upon receipt of a PRM and at other stages of the PRM process; (2) clarify and improve the current policies and practices for evaluating PRMs, and communicating to the petitioner and the public information on the status of NRC PRMs and rulemaking activities

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addressing PRMs; and (3) establish an improved process for resolving PRMs, including an administrative process for closing the PRM docket to reflect agency action for the PRM. The proposed amendments are intended to enhance the consistency, timeliness, and transparency of the NRC's actions and to increase the efficient use of the NRC's resources in the PRM process.

BACKGROUND:

Guidance in subpart H, "Rulemaking," to 10 CFR Part 2, sets forth the NRC's requirements for rulemaking. In particular, 10 CFR 2.802, "Petition for rulemaking," and 10 CFR 2.803, "Determination of petition," establish the NRC's current framework for PRMs. The NRC's requirements for PRMs have remained substantially unchanged since their initial promulgation in 1979. The NRC's processes and procedures for dispositioning PRMs historically have been established by and implemented through internal NRC policies and practices. In recent years, the NRC has experienced a sharp increase in the number of PRMs submitted for consideration (see Figure 1), which has created resource challenges for the agency.

Figure 1. NRC Petitions for Rulemaking

Fiscal Year	PRMs Docketed by the NRC	PRMs Insufficient for Docketing	Total
2002	5	0	5
2003	3	0	3
2004	2	1	3
2005	7	0	7
2006	6	1	7
2007	19	4	23
2008	5	4	9
2009	2	2	4
2010	6	3	9
2011	25	3	28
2012	9	2	11

In a 2006 memorandum to the other Commissioners, Chairman Nils J. Diaz and Commissioner Edward McGaffigan, Jr., proposed ways to streamline the PRM process (COMNJD-06-0004/COMEXM-06-0006, "Streamlining the NRR Rulemaking Process," dated April 7, 2006, NRC's Agencywide Documents Access and Management System (ADAMS) Accession No. ML060970295). Because of the increase in general rulemaking activities, they suggested that the staff remove unnecessary constraints, while simultaneously enhancing transparency of and public participation in, the process. The memorandum also suggested that the staff identify additional mechanisms for "streamlining and increasing the transparency of the rulemaking process, thus allocating the appropriate level of resources for the most important rulemaking actions and ensuring that the staff's hands are not tied by perceived or real procedural prerequisites that are necessary for a given rulemaking."

In a staff requirements memorandum (SRM) dated May 31, 2006 (ADAMS Accession No. ML061510316), responding to COMNJD-06-0004/COMEXM-06-0006, the Commission directed the staff to undertake numerous measures to streamline the rulemaking process, which included direction to evaluate the interoffice Rulemaking Process Improvement Implementation Plan and “further seek to identify any other potential options that could streamline the rulemaking process.”

The staff formed a working group to respond to the Commission’s directives. The staff provided its commitments and recommendations to the Commission in SECY-07-0134, “Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan,” dated August 10, 2007 (ADAMS Accession No. ML071780644). A recommendation to review the NRC’s PRM process with the objective to reduce the time needed to complete an action was included in SECY-07-0134. In SRM-SECY-07-0134 dated October 25, 2007 (ADAMS Accession No. ML072980427), the Commission indicated support for the working group’s recommendation to review the PRM process: “The PRM process needs some increased attention and improvement. The staff’s overall effort to improve the PRM process should focus on provisions that would make the NRC’s process more efficient while improving the process’ transparency and consistency.”

Concurrently, in SRM COMGBJ-07-0002, “Closing Out Task Re: Rulemaking on [10 CFR Part 51] Tables S3 and S4,” dated August 6, 2007 (ADAMS Accession No. ML072180094), the Commission approved closing a specific PRM that it described as “decades-old.” In so doing, the Commission again directed the staff to “consider developing a process for dispositioning a petition in a more effective and efficient manner so that existing petitions deemed old can be closed out in a more timely manner and prevent future petitions from remaining open for periods longer than necessary.”

To implement the Commission’s direction, the Rulemaking Coordinating Committee¹ (RCC) formed a working group to examine the regulations, policies, procedures, and practices that govern the NRC’s PRM process, as well as the practices and processes other Federal agencies use to resolve PRMs. The goal is to make the NRC’s PRM process more efficient and effective, while enhancing transparency and maintaining the opportunity for public participation. This proposed rule would amend the NRC’s rules of practice on PRMs to achieve this goal.

DISCUSSION:

To improve the PRM process, the staff reviewed both internal policies and procedures and the external regulatory framework associated with the PRM process. The PRM process historically has been dictated by internal policy, and the proposed amendments are intended to enhance the consistency, timeliness, and transparency of the NRC’s actions, and also to use the NRC’s resources more efficiently.

¹ The Rulemaking Coordinating Committee (RCC) is a standing interoffice group with representatives from the lead rulemaking offices: Office of Federal and State Materials and Environmental Management Programs (FSME), Office of New Reactors (NRO), Office of Nuclear Reactor Regulation (NRR), Office of the General Counsel (OGC), and Office of Administration (ADM) (Chair). The RCC’s focus is to ensure consistency in methods used to develop and promulgate rules and to initiate and implement improvements to the rulemaking process.

Reorganization of §§ 2.802 and 2.803 Provisions

The current provisions in §§ 2.802 and 2.803 would be reorganized by separating pre-submission provisions regarding petitioner action from provisions regarding NRC action. Requirements applicable to petitioners would remain in § 2.802. Requirements governing the NRC's actions on submitted petitions would be moved to § 2.803.

Information Inclusion Requirements and Acceptance Review

The information required to be included in a PRM and the NRC's acceptance criteria would be clarified and expanded to reduce the potential for delay associated with the NRC having to request additional information to clarify or support insufficient PRMs. This change would promote more efficient use of NRC resources.

To increase transparency of the process, the proposed rule would codify the NRC's long-standing practice of notifying the petitioner upon receipt of the PRM, even before it is reviewed for sufficiency.

- The acceptance criteria and acceptance review process currently described in § 2.802(e) would be amended to state in a clear manner that the NRC will not accept a PRM for review if it does not include the information required under § 2.802(c).
- The criterion in § 2.803(b) governing the NRC's acceptance would be supplemented with two additional criteria. Before accepting a petition for docketing, the NRC would perform a review of the petition to ensure that: (1) the changes requested in the petition are within the legal authority of the NRC; and (2) the PRM raises a potentially valid issue that warrants further consideration by the NRC.

No Requirement for Public Comment

The proposed rule would clearly state that the NRC is not required to solicit public comment on petitions for rulemaking, but may do so at its discretion.

Limited Post-Submission Consultation Assistance

Currently, the staff may provide limited consultation assistance to a potential petitioner before a PRM is filed. However, petitioners occasionally have requested that the NRC withdraw or amend their submitted PRM. Responding to such a request would be easier if the NRC expanded its offering of limited consultation assistance to be available after a PRM has been filed. Thus, the proposed rule would provide the following limited consultation assistance both before and after a petitioner files a PRM:

- The proposed amendments would permit limited consultation with the petitioner after a PRM is submitted.
- The NRC's consultation assistance would be limited to describing the process for filing, accepting, closing, tracking, amending, withdrawing, and resolving a PRM; clarifying

existing NRC regulations and the basis for those regulations; and assisting the petitioner to clarify a PRM so that the NRC can understand the issue or concern.

- Additionally, the proposed rule would note that the NRC will not draft or develop text for the PRM or advise the petitioner on whether a PRM should be filed, amended, or withdrawn.
- The proposed rule would expand the current codified text to provide information about submitting a request to amend or withdraw a PRM.

Determination by the NRC of the PRM

The proposed rule would enumerate some of the considerations that the NRC uses when evaluating PRMs. Currently, a multi-office working group reviews each PRM that is accepted for review and evaluates whether the information in the PRM warrants additional agency consideration through the rulemaking process, as well as any comments the public has submitted (as applicable). The working group develops a recommendation for NRC action on the PRM and presents its recommendation to the Petition Review Board (PRB). The PRB resolves the petition by determining whether the petition has merit such that it be placed into the rulemaking process or rulemaking commenced on the matter raised by the PRM, or be denied. The proposed rule would rename this process as the determination of the petition. The resolution of the petition would be the final agency action. This process is discussed in more detail below in the section entitled, “Resolution of Petitions for Rulemaking.”

The proposed considerations are based on the 30 years of NRC experience in processing PRMs, insights from the NRC’s initiative to streamline the agency’s PRM process, and information from the NRC’s review of other agencies’ PRM regulations and practices. By codifying criteria commonly used by petition working groups and PRBs to evaluate PRMs, the proposed rule would provide more transparency of the NRC’s process to petitioners and the public, while also promoting consistency for NRC review of PRMs.

The addition of specific, nonexclusive criteria for the NRC’s full review of a PRM would establish some of the considerations that the NRC may take into account when determining a course of action in response to a PRM. The proposed rule would allow the NRC to examine the merits of the PRM, the immediacy of the concern, the availability of NRC resources, the relative priority of the issue raised in the PRM, whether the NRC is already considering the issues raised in the PRM, any public comments (if comments are requested), and the NRC’s past decisions and current policy on the issues raised in the PRM.

Resolution of Petitions for Rulemaking

The proposed rule would codify a definition for the term “resolution” that differs from the NRC offices’ current definition. Currently, internal policy defines “resolution” as the decision made by the PRB in the responsible office on how to proceed on a PRM. However, from a legal standpoint, the terms “resolve” and “resolution” are inherently connected and frequently used by Federal courts and other adjudicatory bodies with the legal issue of “final agency action.” In light of this, the staff recommends that the term, “resolution” be redefined with respect to PRMs

such that resolution signifies that the NRC has completed final agency action on a specific issue or set of issues raised by a PRM (e.g., issuing a final rule).

Office rulemaking procedures in FSME, NRO, and NRR would have to be updated to reflect the renaming of some of these steps, such as the new definition of resolution. The proposed rule would codify this definition, explaining to the public the various ways that the NRC may resolve a PRM.

Administrative Closure of Petitions for Rulemaking

Under the NRC staff's current process, the NRC may "administratively close" the PRM docket after notifying the public of the PRB's determination to consider the matters raised in the PRM as part of the agency's rulemaking process. This consideration may occur in three ways: (i) initiating a new rulemaking; (ii) placing the PRM issues for consideration in an existing rulemaking effort; or (iii) monitoring existing NRC activities that may result in rulemaking (i.e., ongoing generic safety issues), which would serve as an appropriate initiative for addressing the PRM issues. In the current process, a PRM is considered closed when a *Federal Register* notice (FRN) has been published informing the public of the PRB's determination for agency action. As applicable, the public would be informed of opportunities to participate in rulemaking activities related to the final resolution of a PRM.

The proposed rule would codify the NRC's current internal process for administratively closing a PRM docket. Codifying this process in the proposed rule would result in greater transparency and an improved level of communication with the petitioner and the public about the NRC's consideration of a PRM.

Additionally, the proposed rule would clearly state that, upon review, the NRC may determine to combine some or all of the issues in a PRM with an ongoing or planned rulemaking activity, which would constitute administrative closure on the combined parts of the PRM.

Rulemaking and PRM Status Updates

To promote more efficient use of NRC resources and greater transparency, the proposed rule would advise petitioners and the public of various online resources where they may view the status of an NRC rulemaking (including an action arising from a PRM), as well as any PRM that has not been administratively closed. The proposed amendments refer to the online resources for a petitioner to view the disposition status of their PRM, which would enhance the availability of information and transparency of the PRM process, including:

- The Federal rulemaking Web site (www.regulations.gov), where the public may view the status of currently active rulemakings and PRMs. Use of this Federal rulemaking Web site would meet a requirement of the e-Government Act of 2002 that agencies use a single, Governmentwide resource for rulemaking activities to enhance transparency to the public.
- The *Unified Agenda of Federal Regulatory and Deregulatory Actions* (Unified Agenda), constituting a Federal Government-wide summary of planned and ongoing rulemakings which the NRC updates on a semiannual basis.

In addition, to support the overall changes in the PRM disposition process and to promote transparency, the proposed rule would indicate that if the NRC closes a PRM by entering the rule into the rulemaking process, but subsequently decides not to carry out the planned rulemaking, then the NRC would notify the petitioner in writing and publish an FRN notifying the public of the NRC's decision.

Existing Guidance

The staff recommends the withdrawal of Regulatory Guide (RG) 10.12, "Preparation of Petitions for Rulemaking Under 10 CFR 2.802 and Preparation and Submission of Proposals for Regulatory Guidance Documents." Regulatory Guide 10.12 provides guidance on the PRM content requirements for: (1) the expeditious handling of PRMs; and, (2) submitting proposals to change existing regulatory guidance documents such as RGs.

The proposed rule would clarify and expand PRM submittal requirements to reduce the potential for delay in NRC processing, thereby obviating the need for the portion of RG 10.12 with respect to PRMs. With respect to the guidance on how to submit changes to existing regulatory guidance documents, the staff will include this information in each future guidance document. This will obviate the need to retain the remaining portions of RG 10.12 with respect to guidance documents.

Delegation of Authority to the EDO to Deny Certain Additional Types of PRMs

Currently, MD 6.3 authorizes the EDO to approve or deny petitions and institute rulemakings which either: (1) involve a minor change in policy; (2) involve a minor new issue; or (3) involve a rule of a minor, corrective, or nonpolicy nature which does not substantially modify existing precedent (MD 6.3, (032) and Handbook, Part I (B)). The staff recommends expanding the EDO delegated authority to deny (in whole or part) a petition for rulemaking: (i) so long as the petition is neither controversial nor addresses significant policy issues; or (ii) raise concerns or issues that are already under consideration by the NRC in other non-rulemaking processes (e.g., a 10 CFR 2.206 petition and hearings under 10 CFR Part 2). Allowing the EDO to approve PRM denials meeting this criteria would reduce the time needed to close the petition and inform the petitioner of the resolution of the petition. Commission approval would still be sought for denial of potentially controversial petitions or petitions that address significant policy issues such as the petition submitted by Mr. Eric Epstein (PRM-54-5) that addressed emergency planning during the license renewal proceedings, the Earth Day Commitment petition (PRM-54-6), which requested that the NRC limit the time period in which a licensee may apply for license renewal to 10 years, and the petition known as the C-10 petition (PRM-72-6) that addressed dry cask storage requirements.

Expanding the EDO's authority to issue most PRM denials would not undercut the Commission's oversight and ultimate authority over NRC rulemaking. The proposed expansion of the EDO's PRM denial authority – which excludes PRMs which are controversial or address significant policy issues - is consistent with the current EDO authority under MD 6.3 to conduct rulemakings that involve minor policy issues or are of a corrective or nonpolicy nature not substantially modifying existing precedent. Denials of a PRM maintain the status quo by maintaining the current policy or regulations and do not result in further expenditure of resources. Moreover, consistent with current practice, the Commission would be informed by a

Daily Note that the EDO plans to issue a petition denial. If the Commission disagrees with the EDO's course of action, the Commission could direct the EDO to raise the issue to the Commission for consideration, or simply grant the PRM and place it into the appropriate rulemaking process (e.g., combine it with an existing rulemaking; initiate a new docketed rulemaking).

Expanding the EDO's authority to deny PRMs where the subject matter or issue raised by the PRM is already under consideration by the NRC in other non-rulemaking processes (e.g., a 10 CFR 2.206 petition and hearings under 10 CFR part 2) also does not undercut the Commission's oversight and ultimate authority. In many cases, the non-rulemaking NRC process that would be relied upon to support denial of a PRM will require the staff either to notify the Commission of the staff's intended action, or to seek Commission review and approval before final NRC action is taken. Thus, Commission oversight and authority over the ultimate NRC resolution of the issue coincidentally raised in the PRM is preserved. In those cases in which the NRC process does not require Commission review and approval, the Commission has already determined—as a generic matter for that activity—that Commission involvement in the decisionmaking for that activity is not necessary. Hence, transitioning from a PRM denial with Commission involvement to an NRC activity that the Commission already has determined does not require a Commission decision, would not appear to have any significant impact on the Commission's decisionmaking authority.

COMMITMENTS:

If a final rule is approved, the staff will:

- (1) Update Office procedures to reflect the rule changes;
- (2) Update MD 6.3 to reflect the additional delegation of authority to the EDO;
- (3) Publish a notice of withdrawal of RG 10.12 in the *Federal Register* following approval of the withdrawal from the Advisory Committee on Reactor Safeguards, and concurrent with the publication of the final rule; and
- (4) Make conforming changes to the NRC's internal and external Web site.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication, in the *Federal Register*, the proposed amendments to §§ 2.802, "Petition for rulemaking—requirements for filing," 2.803, "Petition for rulemaking—NRC action," and 2.811, "Filing of standard design certification application; required copies" (Enclosure 1).
2. Approve a general delegation of authority to the EDO to deny, in whole or in part, a PRM that is neither controversial nor addresses significant policy issues.

3. Approve a general delegation of authority to the EDO to deny, in whole or in part, a PRM raising concerns or issues that are already under consideration by the NRC in other NRC processes.
4. Note:
 - a. That the proposed amendments will be published in the *Federal Register*, allowing 75 days for public comment.
 - b. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).
 - c. That appropriate congressional committees will be informed of this action.
 - d. That a press release will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register.

RESOURCES:

The funding for this rulemaking is provided by the Corporate Support Services, Operating Reactors, and Rulemaking Support business lines. The withdrawal of RG 10.12 and revisions to the internal and external Web site will be funded under the Office of Administration's Corporate Support Services business line. No full-time equivalents (FTE) have been proposed in the NRC's Fiscal Year 2013 budget under consideration by Congress. The FTE required for this activity is as follows: FSME (0.1), NRR (0.1), NRO (0.1), ADM (0.3), OGC (0.2), and Office of Information Services (0.1).

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed rulemaking. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosure:
Federal Register notice

4. Note:

- a. That the proposed amendments will be published in the *Federal Register*, allowing 75 days for public comment.
- b. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).
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/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosure:

Federal Register notice

ADAMS Accession Number: **ML120440461**

**via e-mail*

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Office	DAS	D	DAS	DD	ADM	DD(A)	ADM/D		DEDCM	
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Date	11/30/2012									