

NUCLEAR REGULATORY COMMISSION

2 CFR Chapter XX

5 CFR Chapter XLVIII

10 CFR Chapter I

[NRC-2011-0246]

Retrospective Analysis under Executive Order 13579

AGENCY: Nuclear Regulatory Commission.

ACTION: Final plan for retrospective analysis of existing rules.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is making available its final Plan for the retrospective analysis of its existing regulations. The final Plan describes the processes and activities that the NRC uses to determine whether any of its regulations should be modified, streamlined, expanded, or repealed. This action is part of the NRC's voluntary implementation of Executive Order (E.O.) 13579, "Regulation and Independent Regulatory Agencies," issued by the President on July 11, 2011.

DATES: The final Plan is effective **[INSERT DATE OF PUBLICATION]**.

ADDRESSES: Please refer to Docket ID NRC-2011-0246 when contacting the NRC about the availability of information for this final Plan. You may access information and comment

submittals related to this final Plan, which the NRC possesses and is publicly available, by any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2011-0246. Address questions about NRC dockets to Carol Gallagher; telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov. For technical questions, contact the individuals listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may access publicly available documents online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[ADAMS Public Documents](#)" and then select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- **NRC's Open Government Web Page:** Go to <http://www.nrc.gov/public-involve/open.html> under the tabs entitled "Selected NRC Information Resources" and "Rulemaking."

- **NRC's Plans, Budget, and Performance Web Page:** Go to <http://www.nrc.gov/about-nrc/plans-performance.html> and select "NRC's Plan for Retrospective Analysis of Existing Rules."

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC, 20555-0001; telephone: 301-492-3667 or e-mail: Cindy.Bladey@nrc.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Public Comments on the Draft Plan
- III. Process Improvements
 - A. Regulatory Flexibility Act Compliance
 - B. Small Business Regulatory Enforcement Fairness Act Compliance
- IV. Final Plan for Retrospective Analysis

I. Background

On January 18, 2011, President Obama issued E.O. 13563, “Improving Regulation and Regulatory Review.”¹ Executive Order 13563 directs Federal agencies to develop and submit a preliminary plan “under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” Executive Order 13563 did not, however, apply to independent regulatory agencies. Subsequently, on July 11, 2011, the President issued E.O. 13579,² which recommends that independent regulatory agencies also develop retrospective plans similar to those required of other agencies under E.O. 13563. In the spirit of cooperation, on November 16, 2011 (76 FR 70913), in response to E.O. 13579, the NRC made

¹ See <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

² See <http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf>.

available its initial Plan. A draft Plan was published on November 23, 2012 (77 FR 70123), for a 60-day public comment period that ended on February 6, 2013. After consideration of its processes and the public comments received, the NRC is now publishing its final Plan.

II. Public Comments on the Draft Plan

The NRC received 8 comment letters on the draft Plan. The commenters included State organizations, licensees, industry organizations, and individuals. The NRC staff determined that the comment letters covered six issues. The following paragraphs include a summary of the comments received under each issue and the NRC's responses to the comments.

Issue 1: Final Plan should include a section requiring review of existing non-power reactor (NPR) regulations

Comment: The University of Florida submitted a comment requesting that the NRC include a section in the final Plan that would require the review of existing requirements for NPRs. The University of Florida stated that the NPR community is overburdened by regulations that are marginal to safety and that the NPR community is ruled by NUREGs in a manner that exceeds the statutory constraints of Section 104(c) of the Atomic Energy Act of 1954, as amended (AEA).

Response: The NRC disagrees with the comment. While the NRC understands the NPR community's concern regarding compliance with Section 104(c) of the AEA, the NRC believes that the same principles of good regulation apply to NPR licensees and power reactor licensees alike. The NRC conducts extensive public outreach and a thorough legal review in order to ensure compliance with all sections of the AEA when issuing regulations or other regulatory actions involving NPRs. The NRC's regulations that apply to NPR licensees must

first meet the standard of providing reasonable assurance of protecting the public health and safety. If that standard can be met with regulations that impose a lesser burden on NPR licensees, stakeholders are encouraged to communicate their ideas to the NRC. In addition, the NRC issues guidance materials (Regulatory Guides, NUREGs, etc.) to communicate potential means by which licensees may comply with the regulations. Those guidance materials are not regulations, and licensees are permitted to administer their programs as they see fit, provided licensees can produce a sufficient basis illustrating how their program administration follows the NRC's regulations. The final Plan was not revised as a result of this comment.

Issue 2: Cumulative Effects of Regulation (CER)

Comment: The Nuclear Energy Institute (NEI) submitted a comment on the draft Plan that suggested “the intent of the retrospective analysis could be met through addressing the cumulative effects of NRC regulatory actions, rulemaking and other NRC regulatory processes resulting in greater benefit in safety and resource management.” The NEI also asserted that broadening the scope of applicable processes beyond rulemaking to other actions such as orders, generic guidance, and information requests would result in more meaningful improvements.

Response: The NRC agrees that the effort to address CER does contribute, in concert with the other NRC initiatives described in the draft Plan, to the intent of the retrospective analysis. The NRC also notes that SECY-12-0137, “Implementation of the Cumulative Effects of Regulation Process Changes,” dated October 5, 2012 (ADAMS Accession No. ML12223A162), provided the Commission with an update on the status of implementing CER and feedback obtained during a May 2012 public meeting. In response, the Commission

issued the staff requirements memorandum (SRM) to SECY-12-0137 (ADAMS Accession No. ML13071A635). Among other items, the SRM directed:

Any expansion of the consideration of the CER should be considered in the broader context of actions directed from COMGEA-12-0001/COMWDM-12-0002, "Proposed Initiative to Improve Nuclear Safety and Regulatory Efficiency."

The staff should continue to develop and implement outreach tools that will allow the NRC to consider more completely the overall impacts of multiple rules, orders, generic communications, advisories, and other regulatory actions on licensees and their ability to focus effectively on items of greatest safety import.

To inform its decision-making in addressing this directive, the NRC staff will obtain public feedback through public meetings. The NRC encourages continued public interaction on the subject of CER. The SRM also directed:

The staff should engage industry to seek volunteer facilities to perform "case studies" to review the accuracy of cost and schedule estimates used in NRC's regulatory analysis (such as the 10 CFR [*Code of Federal Regulations*] Part 73 security upgrades required after the attacks of September 11, 2011 and 10 CFR 50.84c, NFPA 805 program).

The NRC will use the aforementioned public meetings as tools to engage the industry on this initiative and believes that such case studies will result in meaningful insights to inform decisions for improving future regulatory analyses. The final Plan was not revised as a result of this comment.

Issue 3: General Support for the Draft Plan

Three commenters provided general support for the draft Plan. However, some commenters supported the draft Plan and offered comments on areas that could be clarified or improved.

Comment 1: The NEI supported the draft Plan. NEI stated that it understood the NRC's apparent rationale behind committing limited resources to this effort and agreed that there may not be benefit from a wholesale retrospective analysis.

Comment 2: GE Hitachi Nuclear Energy supported "the NRC approach that provides ongoing assessments of regulatory burdens in various NRC actions involving regulations..." However, GE Hitachi Nuclear Energy recommended that the NRC, when periodically revising the final Plan, describe specific review actions and results that have occurred since the last revision of the final Plan.

Response to Comments 1 and 2: The NRC appreciates the support for the draft Plan. When the NRC periodically revises the final Plan, it will consider including review actions and results that have occurred since the last revision of the final Plan. The final Plan was not revised as a result of Comments 1 and 2.

Issue 4: Openness and Transparency

Comment: The Citizens Oversight stated that while the draft Plan included a section called "Opportunities for Public Participation," the draft Plan did not propose any new opportunities for public participation. The commenter complimented the NRC on its January 31, 2013, Commission public meeting on regulatory decision-making. However, the commenter stated that the NRC limits oversight by the public by adopting overly restrictive definitions of standing, providing overly short periods for comments/petitions, making hearings the exception rather than the rule, making the adjudicatory process too formal, and conducting closed Commission meetings. Also, the commenter noted that the NRC had not responded to public comments and questions submitted after a public meeting in Dana Point, California.

Response: The Citizens Oversight comments are beyond the scope of E.O.s 13579 and 13563, and the NRC's draft Plan. Specifically, the Citizens Oversight comments on public

participation relate to such participation in NRC adjudicatory or licensee-specific licensing actions (e.g., standing, petitions for invention, etc.), and not the NRC's regulatory process for regulations. Executive Order 13579 is directed towards the manner in which Independent Regulatory Agencies issue or revise its regulations. To that end, E.O. 13579, recommends that, to the extent permitted by law, Independent Regulatory Agencies abide by a set of general requirements set forth in E.O. 13563, including those associated with public participation. As the Citizens Oversight notes in its comments, the principles of public participation that E.O. 13563 endorses concerns the ability of the public to participate in an agency's adoption of a regulation through the regulatory process. Executive Order 13563 provides that, each agency, to the extent feasible and permitted by law, shall "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." Executive Order 13563 further provides that each agency, to the extent feasible and permitted by law, shall also "provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov..." As stated in Section G of the NRC's final Plan, the NRC already complies with these principles in its regulatory process for the development or modification of regulations.

If the Citizens Oversight seeks to modify the NRC's regulations governing its adjudications, then it should avail itself of the opportunities for public participation that the NRC identifies in its final Plan, such as 1) participation in rulemaking activities related to the NRC's adjudicatory procedures in 10 CFR Part 2; or 2) use of the petition for rulemaking process in 10 CFR 2.802 to request specific revision to those procedures. On May 3, 2013 ([78 FR 25886](#)), the NRC published a proposed rule to streamline and clarify its process for addressing petitions for rulemaking. Proposed changes to that process aim to improve transparency and make the process more efficient and effective. The final Plan was not revised as a result of this comment

from the Citizens Oversight; however, the NRC did update Section III of the final Plan to include a description of the aforementioned proposed rule.

Issue 5: Suggestions for Technical Improvements

Comment: The Citizens Oversight suggested several technical improvements, including the following: 1) the NRC should provide direct links to relevant documents, rather than just including an ADAMS accession number; 2) the NRC should include Really Simple Syndication (RSS) feeds on all of its Web pages; and 3) the NRC should remove quotes in URLs. The commenter also noted that links within ADAMS documents do not always work.

Response: The NRC considers this comment out-of-scope with regard to the draft Plan. However, the Office of Information Services is reviewing this comment and may contact the commenter regarding these issues. The NRC would note that the recently developed Documents for Comment page (<http://www.nrc.gov/public-involve/doc-comment.html>) provides links to dockets on www.regulations.gov containing documents with an open comment period. Individuals can subscribe to page updates through GovDelivery³ in order to keep informed of NRC documents that have been published in the *Federal Register* for comment. The final Plan was not revised as a result of this comment.

Issue 6: Thorium is Incorrectly Classified under the 1954 Atomic Energy Act

Two commenters stated that thorium is incorrectly classified under the 1954 AEA and should be placed in a less restrictive category of isotopes of elements.

³ The Federal rulemaking Web site allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: 1) Navigate to the docket folder (NRC-2011-0246); 2) click the "Email Alert" link; and 3) enter your e-mail address and select how frequently you would like to receive e-mails (daily, weekly, or monthly).

Comment 1: Dr. Alexander Cannara stated that classifications of various radioactive elements that were initiated by the old Atomic Energy Commission are too broad and interfere with various environmental and industrial realities (specifically the rare earth industry).

Comment 2: Stephen Boyd seemed to infer that the NRC should review and presumably revise its regulations to better support the use of thorium reactors. In particular, the commenter suggested allowing public and private efforts to join in the research occurring elsewhere in the world.

Response to Comment 1: Comment 1 from Dr. Cannara is beyond the scope of the NRC's draft Plan. Thorium is already classified differently (as source material) than the other elements that it is compared to (which are categorized as byproduct material). Over the past decade, the staff has acknowledged some concerns about the fact that thorium and uranium are present ubiquitously in nature (unlike byproduct material) and their current classification as source material may result in the regulation of activities not necessarily considered by Congress in enacting the AEA. The final Plan was not revised as a result of Comment 1.

Response to Comment 2: Comment 2 from Stephen Boyd is beyond the scope of the NRC's draft Plan. Thorium is already classified differently (as source material) than the fissile Uranium-235 (which is classified as special nuclear material), with the latter element having much more restrictive limits on possession and use. Although the NRC does periodically review its regulations to identify areas where new technologies may require changes to the regulations, such significant regulatory changes are usually only undertaken when there is reasonable certainty that such technologies will be implemented because the process of significantly revising the regulations may be resource intensive. The NRC will also undertake such revisions at the direction of Congress, usually after appropriate funding is provided. In recent years, some bills have been brought before Congress specifically related to Mr. Boyd's concerns, but

to date, Congress has not passed those bills. The NRC is not aware of any prohibitions against private efforts being involved in foreign research on the subject, although any U.S. Government involvement would likely be through the U.S. Department of Energy. The final Plan was not revised as a result of Comment 2.

III. Process Improvements

While developing this final Plan, the NRC identified changes to improve the clarity and transparency of its processes for compliance with Section 610 of the Regulatory Flexibility Act (RFA) and Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The changes are described in the following sections.

A. Regulatory Flexibility Act Compliance

Section 610 of the RFA was enacted in 1980 and requires agencies to review those regulations that have or will have a *significant* economic impact on a *substantial* number of small entities every 10 years after publication of such rules as final rules. The purpose of the periodic review is to determine whether the rules should be unchanged, amended, or rescinded.

The NRC published its plan for Section 610 reviews in 1981. The NRC provided a status on its compliance with RFA to the Small Business Administration (SBA) in 1992 and 2002. In addition, the NRC provided a status on its compliance to Congress in 2005.

The NRC has one recurring rule that has a significant economic impact on a substantial number of small entities, its annual fee rule. This rule amends the licensing, inspection, and annual fees charged to its applicants and licensees. Given that a final fee rule is published each year, the NRC has determined that it does not require a Section 610 periodic review.

The NRC will update its internal procedures to clarify the NRC staff's responsibilities with regards to the Section 610 periodic reviews and to include a process for submitting Unified Agenda entries for those rulemakings that require a Section 610 periodic review. Entries will be added to the "Pre-rule" section of the Unified Agenda when a periodic review is started and will solicit public comment. The NRC will publish the results of its periodic reviews in the "Completed Actions" section of the Unified Agenda, including whether the rule will be unchanged, revised, or rescinded.

To further improve transparency, the NRC will update public Web site⁴ for RFA procedures to include a list of all final NRC rules that impact small entities and whether they must undergo a periodic review required by Section 610 of the RFA. This Web site will also include a link to the periodic review initiation and completion entries in the Unified Agenda for each rulemaking that must undergo a Section 610 periodic review.

Section 610 of the RFA allows agencies to update their plan at any time by giving notice in the *Federal Register*. The information on the public Web site for RFA procedures informs the public of which rules must undergo a periodic review and when and provides a link to the results of the periodic review as published in the Unified Agenda; supersedes the NRC's 1981 plan.

B. Small Business Regulatory Enforcement Fairness Act Compliance

Section 212 of the SBREFA was enacted in 1996 and requires that for each rulemaking that requires a Regulatory Flexibility Analysis under 5 U.S.C. 605(b), the agency must publish a "small entity compliance guide." The SBREFA was amended by the Fair Minimum Wage Act of 2007, which requires agencies to—1) publish, distribute, and post on their public Web sites compliance guides on the same date of publication of the final rule; and 2) submit an annual

⁴ See <http://www.nrc.gov/about-nrc/regulatory/rulemaking/flexibility-act.html>.

report (signed by the head of the agency) to the appropriate Congressional Committees describing the status of the agency's compliance with the Act.

The NRC will update internal procedures to clarify the NRC staff's responsibilities with regards to Section 212 of the SBREFA.

The NRC has issued small entity compliance guides and published them either in the *Federal Register* or in the appropriate document collection on the NRC's public Web site; however, the NRC has not published all of its compliance guides in one location. The public Web site for RFA procedures that lists all NRC rules that impact small entities will also include a listing of the NRC's small entity compliance guides and how they may be accessed.

The NRC has not submitted a status report to Congress regarding its compliance with SBREFA. However, the NRC staff is currently drafting the 2013 status report. A link to the status report will be included on the Web site for RFA procedures.

IV. Final Plan for Retrospective Analysis

The NRC's final Plan describes the NRC's processes and activities relating to retrospective analysis of existing regulations, including discussions of the: 1) efforts to incorporate risk assessments into regulatory decision-making; 2) efforts to address the

cumulative effects of regulation; 3) the NRC's methodology for prioritizing its rulemaking activities; 4) rulemaking initiatives arising out of the NRC's ongoing review of its regulations related to the recent events at the Fukushima Dai-ichi Nuclear Power Plant in Japan; and 5) the NRC's previous and ongoing efforts to update its regulations on a systematic, ongoing basis.

Dated at Rockville, Maryland, this _____ day of _____, 2013.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.