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# RECORDS BEING RELEASED IN THEIR ENTIRETY

# POLICY ISSUE
## NOTATION VOTE

March 16, 2001 SECY-01-0044

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: STATUS OF STAFF EFFORTS REGARDING POSSIBLE EFFECTS OF NUCLEAR INDUSTRY CONSOLIDATION ON NRC OVERSIGHT

PURPOSE:

The purposes of this paper are to solicit the Commission's feedback on the staff's preliminary impact assessments and seek Commission approval on the timing and degree of external stakeholder participation in the current staff effort to identify and assess the potential impacts of nuclear industry consolidation on NRC's oversight responsibilities.

BACKGROUND:

Staff Requirements Memorandum (SRM) COMNJD-99-006, "The Effects of Industry Consolidation on NRC Oversight," dated February 20, 2000 (Attachment 1), asked the staff to assess and report to the Commission the policy implications of industry consolidation and the need to consider policy changes to NRC oversight of industry activities. The SRM also directed the staff to "be proactive and increase its interactions with stakeholders to identify emerging policy issues related to the new trends in industry consolidation."

An NRC staff Working Group was formed of staff from the principal headquarters stakeholder offices and a regional manager to carry out the effort. In a memorandum to the Commission dated December 21, 2000 (ML003776405), the staff identified about two dozen areas of regulatory oversight that could be affected by industry consolidation (and economic deregulation). This memorandum also reported the status of the task and the staff's plan and schedule for completing the task in accordance with the SRM. The staff's plan was to complete its preliminary impact assessment of each identified regulatory oversight area by the end of

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January 2001. After internal stakeholder concurrence, the preliminary assessments were to be given to the Commission for information before publication in the *Federal Register* to seek comments from external stakeholders, including the public. This was to be followed by a public meeting with interested external stakeholders in early May to discuss the impact assessments and the disposition of comments received. Finally, in late June, the staff planned to provide the Commission a paper with the staff's final assessments of the impacts and regulatory implications of industry consolidation. As requested in the SRM, this paper was to be coordinated time-wise with the separate staff assessment of the new Reactor Oversight Process.

Responding to the staff's December 21 status report, the Commission indicated its interest in changing the next Commission correspondence from an information paper to a notation vote paper in order to reconsider the timing and degree of external stakeholder involvement in this effort after reviewing the staff's preliminary assessments and recommendations.

DISCUSSION:

The staff has completed its preliminary impact assessments in accordance with the original plan. These preliminary assessments identify and discuss the potential impacts. The staff has not developed recommendations regarding these possible impacts. The recommendations in this paper address only what should be given further consideration to determine whether changes are needed, what the changes are, and when they might need to be implemented. The preliminary assessments are provided in Attachment 2.

The December 21 status report was made public on February 1, 2001, after consultation with the Commission. The only staff interaction to date with external stakeholders was a Working Group public meeting with Exelon Generation Company on February 8, 2001. The purpose of that meeting was to get a licensee's perspective on how consolidation may impact NRC oversight and staff-industry interactions. There was no discussion of the staff's ongoing effort or its preliminary assessments. The Working Group had not planned any interaction with external stakeholders at this stage of the effort. However, Exelon was scheduled to be at NRC headquarters for other meetings with the staff and the Working Group took advantage of this opportunity. Feedback from this meeting is included as Attachment 3 and generally coincides with the staff's preliminary assessments.

To complete the task directed by COMNJD-99-006, the staff intends to continue the effort in accordance with its plan as outlined in its December 21, 2000, memorandum to the Commission.

This plan would involve the publication of the preliminary impact assessments in the *Federal Register* for stakeholder and public comment, followed by a public meeting with stakeholders. The proposed *Federal Register* notice is included as Attachment 4. The staff's final assessments and recommendations would appropriately reflect stakeholder and public comments from these interactions.

The principal benefit of this approach is that the resulting staff product would be complete and well-balanced, and would reflect the concerns, interests, and impact projections of the staff, the industry, and other interested stakeholders. This plan would also likely improve public confidence. When seeking stakeholder input in the early stages of this plan, the staff would make clear that its assessments are preliminary.

If the Commission approves this plan, the staff will follow the process proposed in the December 21, 2000, memorandum to complete the effort as directed in the SRM.

SCHEDULE IMPACT:

The completion of this effort by June 23, 2001, as specified in COMNJD-99-006, assumed the staff would keep to the schedule of the December 21, 2000, memorandum. The Commission's review of the staff's preliminary impact assessments and issuance of further guidance on stakeholder interactions may impact the June 23 completion date.

RESOURCES:

This approach will not require significant additional staff resources beyond those needed to respond to the original SRM.

COORDINATION:

This paper and the attached preliminary impact assessments have been coordinated and concurred in by the principal internal stakeholder offices and the regions. Representatives of these offices participated in generating the preliminary impact assessments and recommendations. The Office of the General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

RECOMMENDATION:

The staff recommends that the Commission approve continuation and completion of this staff effort in accordance with the approach outlined in this paper.

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William D. Travers
Executive Director
for Operations

Attachments:
1. Staff Requirements - COMNJD-99-006, "The Effects of Industry Consolidation on NRC Oversight"
2. Industry Consolidation Preliminary Impact Assessments
3. Feedback from Working Group Meeting With Exelon
4. Proposed Federal Register Notice - Request for Comments on Preliminary Impact Assessments

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February 10, 2000

MEMORANDUM TO: William D. Travers
Executive Director for Operations

Jesse L. Funches
Chief Financial Officer

Karen D. Cyr
General Counsel

FROM: Annette L. Vietti-Cook, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - COMNJD-99-006 - THE EFFECTS OF INDUSTRY CONSOLIDATION ON NRC OVERSIGHT

The Commission has agreed that the staff should be proactive and increase its interactions with stakeholders to identify emerging policy issues related to the new trends in industry consolidation. The staff should report to the Commission on the policy implications of industry restructuring and on the need to consider policy changes to the NRC oversight of industry activities, including specifically financial issues, licensing issues, operational safety issues as well as NRC's fee structure issues. In addition, implications of industry consolidation on other licensed activities, such as fuel fabrication, transportation, and spent fuel storage should be included in the staff's assessment.

(~~EDO~~/CFO/OGC) (SECY Suspense: ~~6/30/2001~~)
NRR/NMSS 6/23/01

The staff should also maintain awareness of pertinent non-NRC regulatory issues. The staff should provide recommendations on the regulatory implications of restructuring concurrent with its assessment of the new oversight process that is due to the Commission in June 2001.

(~~EDO~~/OGC) (SECY Suspense: ~~6/30/2001~~)
NRR 6/23/01

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
CIO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR
DCS

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# INDUSTRY CONSOLIDATION

# PRELIMINARY IMPACT ASSESSMENTS

**ATTACHMENT 2**

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Preliminary Impact Assessments of Industry Consolidation

The objective of this effort is to perform a preliminary assessment of the potential impact of the consolidation of the nuclear power industry on the NRC. Specifically, the assessment seeks to identify industry consolidation issues that may warrant changes to the NRC's regulations, policies, processes, guidance, and organizational structure. The term *consolidation* herein includes mergers; purchases; the formation of holding companies, operating companies, and alliances; and other forms of industry restructuring.

Economic deregulation of the electricity market has been going on for the past few years and has been a strong incentive, although probably not the only reason, for industry consolidation. Deregulation has potential impacts on NRC oversight. Most of the impacts are related to the competition that results from deregulation, but some are synergetic with consolidation. The principal focus of this effort is industry consolidation. In a few instances, the impacts of consolidation and deregulation are interrelated, and in these instances the effects were considered independently of the causes. Grid and offsite power reliability impacts were considered even though they are tied almost entirely to industry deregulation.

An NRC staff-level Working Group was formed to carry out this effort. The Working Group includes staff from the principal internal NRC stakeholder offices. The Working Group has identified the regulatory issues that could be impacted by industry consolidation, and has grouped the issues into the following categories.

Category 1 Plant Operational Safety

This category includes regulatory oversight issues related to plant operations that could be impacted by industry consolidation, by economic deregulation, or (in a few cases), by both.

Category 2 Licensing

This category includes licensing process areas that could be impacted by industry consolidation. For the most part, these are areas for which NRC headquarters has lead responsibility.

Category 3 Inspection, Enforcement, and Assessment

This category encompasses regulatory processes for which the regions have lead implementation responsibility.

Category 4 Decommissioning

This category covers the impacts of industry consolidation on decommissioning planning, funding, and scheduling.

Category 5 External Regulatory Interfaces

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These issues involve the potential impacts of industry consolidation and economic deregulation on the NRC's interfaces with States and other Federal agencies with respect to the license transfer process and operational safety issues.

Category 6 Fuel Cycle Facilities

Most of the potential impacts discussed in the other categories apply equally to power reactors and fuel cycle facilities. This category covers the potential effects of industry consolidation that are unique to fuel cycle facilities.

Category 7 Financial

This category includes a broad range of financial issues that could be impacted by industry consolidation and/or economic deregulation.

Category 8 Non-NRC Regulatory Considerations

This category addresses two areas of concern to the NRC where other agencies have regulatory jurisdiction.

A number of general considerations apply to several issue assessments, but are not repeated in each of those individual assessments. For example, several assessments identify potential resource impacts, but there is insufficient information or experience to quantify the impacts.

Where continued monitoring of an issue is recommended, as experience with consolidation is gained, the staff will use the Planning, Budgeting, and Performance Management (PBPM) process to address the identified resource needs. Where there is also a potential for hearings in licensing actions, the associated needed resources will be considered. When self-assessments and lessons learned are needed for improving the efficiency and effectiveness of staff regulatory processes, it is understood that such followup efforts will be conducted in the normal course of business. Finally, wherever appropriate, the staff will develop communication plans, in accordance with agency policy.

## Categorization of Industry Consolidation Issues

| | |
|---|---|
| **Category 1** | **Plant Operational Safety** |
| **Issue 1.a** | **Possible Cost-cutting Initiatives** |
| **Issue 1.b** | **Technology-related Issues** |
| **Issue 1.c** | **Spent Fuel Storage and Transportation** |
| **Issue 1.d** | **Waste Management** |
| **Issue 1.e** | **Emergency Preparedness** |
| **Issue 1.f** | **Reliable Off-site Power** |
| **Category 2** | **Licensing** |
| **Issue 2.a** | **License Transfer Process** |
| **Issue 2.b** | **New License Applications, Site Approvals, and Reactivations of Deferred Plants** |
| **Issue 2.c** | **License Renewal** |
| **Issue 2.d** | **NRC Organizational Structure** |
| **Category 3** | **Inspection, Enforcement, and Assessment** |
| **Issue 3.a** | **NRC Reactor Oversight Process** |
| **Issue 3.b** | **Other NRC Inspection Programs** |
| **Issue 3.c** | **NRC Enforcement Program** |
| **Issue 3.d** | **NRC Allegation Program** |
| **Category 4** | **Decommissioning** |
| **Category 5** | **External Regulatory Interfaces** |
| **Category 6** | **Fuel Cycle Facilities** |
| **Category 7** | **Financial** |
| **Issue 7.a** | **Foreign Ownership** |
| **Issue 7.b** | **License Fee Structure** |
| **Issue 7.c** | **Insurance** |
| **Issue 7.d** | **Joint and Several Liability** |
| **Issue 7.e** | **Bankruptcy Protection** |
| **Issue 7.f** | **Financial Qualifications** |
| **Category 8** | **Non-NRC Regulatory Considerations** |
| **Issue 8.a** | **Grid Stability/Reliability** |
| **Issue 8.b** | **Antitrust Considerations** |

**Issue:** 1.a Possible Cost-cutting Initiatives

**Discussion:**

In a more consolidated, economically deregulated market, the nuclear power industry will be faced with new pressures to operate more efficiently. Cost controls could result in shorter outages (and thus longer run times), increased use of on-line maintenance, power uprate amendments, increased use of risk-informed technology and decisions and other changes that would result in lower costs and increased productivity.

Consolidated licensees will also seek to achieve economies of scale, which is a major potential benefit of consolidation. This will likely be manifested in organizational changes, both at the plant and corporate levels, to combine duplicative functions, optimize staff size, standardize best practices, and centralize functions. Organizational and operational philosophies may also be influenced by the prerequisites of economic deregulation, which often require existing utilities to separate power generation from transmission and distribution functions. Consolidation and economic deregulation will likely result in increased efforts by licensees to seek reductions in unnecessary regulatory burden, including reductions in licensing fees.

**Preliminary Impact Assessment:**

Licensee efforts to operate more efficiently may result in net positive safety impacts. There is evidence, both domestic and foreign, to demonstrate that well run, efficiently operated plants are also the safest plants. Nevertheless, if carried to excess, cost-cutting measures to achieve short-term economic gains could result in longer-term adverse safety performance impacts.

Licensees are responsible to ensure that safety and regulatory compliance are not compromised by the industry goals to maximize operational efficiency and performance effectiveness. The NRC must stay focused on operational safety and have the capability to assess and react to industry activities in response to economic pressures that appear to have an adverse impact on safety. Augmented staff expertise in economic, finance, and organizational assessment beyond currently existing capabilities may be needed to effectively implement oversight responsibilities in the changing industry environment. The staff must assure that its safety assessment processes have adequate flexibility to detect and respond to adverse safety performance trends that result from competition-driven licensee actions. At the same time, the staff will have to remain sensitive to reducing unnecessary regulatory burden.

**Recommended Followup:**

Continued staff monitoring of experience and feedback from current oversight processes should provide early identification of issues related to economics-driven licensee actions that need to be addressed. This, in turn, will define any needed staff reaction. Additional expertise in economic, finance, and organizational assessment areas may be needed. No other special followup effort is recommended at this time.

**Issue Category:** 1. Plant Operational Safety

**Issue Title:** 1.b. Technology-Related Issues

**Discussion:**

While technology and process advances have continued to be developed and introduced to the design and operation of licensed nuclear facilities, industry consolidation and economic deregulation may provide additional incentives for such advances.

The NRC research-sponsored effort encompasses a variety of broad technological areas which may be involved in future developments related to industry consolidation and economic deregulation. The following are examples of such technological areas which the staff may have to deal with in the future.

1. Fuel integrity must be addressed in an integrated fashion considering longer operating cycles, ultra-high fuel burnups, new cladding materials, power uprates, and changes to operational conditions such as may result from load following. A stronger, consolidated industry may see advantages to moving to a simpler performance-based assessment rather than the present design-based method.

2. Human and organizational factors affected by industry consolidation and deregulation may need to be considered to address reduced staffing, modified maintenance strategies, and increased use of contractors.

3. Introduction of new technologies, such as advanced information technologies, evolution of digital instrumentation and control systems in existing facilities, and development of new reactor concepts may require new regulatory approaches. These types of issues are also pertinent to Issue 2.b.

The staff has on-going, or planned activities which will enable it to accommodate the technology-related issues arising from industry consolidation and deregulation. The following are examples of such activities:

1. Development of risk-based performance indicators (RBPIs) will provide an additional tool with which to assess plant safety performance on a plant-specific as well as industry-wide basis. The RBPIs provide broader coverage of risk than the current performance indicators and allow a more detailed assessment of the root causes of problems, whether or not they are related to consolidation or deregulation. Also, plant-specific thresholds based upon risk are being established.

2. Risk information is routinely used to assist in regulatory decisions regarding such issues as equipment and plant aging, fuel burnup and power uprates. The synergetic effects of such changes on the overall safety of operating plants may require re-evaluation of existing probabilistic risk assessments.

3. Advanced information technologies are likely to be employed in emergency preparedness programs (Issue 1.e). Areas of potential interest are possible consolidation-related impacts on the communications infrastructure and integrity of data used for making decisions during emergencies.

4. There is an increased focus on results-based regulatory decision-making. The staff has developed high-level guidelines for performance-based activities to facilitate implementation of such approaches while ensuring that adequate safety margins are maintained. Broader use of performance-based approaches may allow more direct observation of the effects of consolidation.

5. As discussed in Issue 1.c, independent spent fuel storage installations may become more prevalent as a result of industry consolidation. The NRC will need to focus on safety concerns arising from new technical challenges at such installations.

**Preliminary Impact Assessment:**

The technology-related aspects of many of the potential issues that may arise from industry consolidation and deregulation require that more experience and operational information be incorporated into the staff's evaluations. While the staff is alert to possible safety concerns, the expectation is that the changes will also bring about safety improvements. However, impact assessments are premature at this point. The work being conducted by the staff on issues relevant to industry consolidation and deregulation provides confidence that technical challenges can and will be met effectively.

The generic issues program has dealt with a number of issues where safety considerations similar to those occurring with industry consolidation were addressed. A process exists for new information from industry consolidation to be fed back into the program and potentially trigger a re-evaluation of specific issues, if appropriate. So far, resolved issues in this area have not had to be re-evaluated, suggesting that the safety assessments conducted previously remain valid.

**Recommended Followup:**

As experience with industry consolidation is limited at this time, the emphasis should be on monitoring operational information and being alert to indications of an unexpected nature. NRC should continue to monitor the changes occurring within the nuclear industry and take these changes into account when considering modifications to its research activities.

**Issue Category:** 1. Plant Operational Safety

**Issue:** 1.c Spent Fuel Storage and Transportation

**Discussion:**

Nuclear industry consolidation could increase the viability of consolidated spent fuel storage facilities, i.e., an independent spent fuel storage installation (ISFSI). To gain additional capacity, a consolidated licensee might choose to locate its spent fuel storage functions at a single ISFSI at one of its reactor sites as opposed to re-racking individual spent fuel pools or building ISFSIs at each site. Alternatively, a consolidated licensee or a consortium of licensees could apply for a license for an away-from-reactor ISFSI (e.g., an application by Private Fuel Storage, LLC. for an away-from-reactor ISFSI license is currently under NRC review). An away-from-reactor ISFSI permits storage of waste from several utilites at a single location. NRC is aware of a potential application for an away-from-reactor ISFSI (i.e., the Owl Creek site). In either the case of transfer of spent fuel between at-reactor ISFSIs or transfer to an away-from-reactor ISFSI, increased intra- and interstate transportation of spent fuel would be expected to occur.

Potential impacts from nuclear industry consolidation on ISFSI licensing actions (both new license applications and amendments to existing licenses) will vary depending on the amount of consolidation. Additionally, licensees desiring to complete dismantlement as part of the reactor decommissioning process must also transfer the spent fuel from the spent fuel pool (SFP) to either an on-site ISFSI or away-from-reactor ISFSI. Current regulations, policies, and procedures are sufficient to support license amendments to transfer spent fuel between ISFSIs. The spent fuel storage cask industry is continuing to develop new cask designs, as well as modification of existing designs, to permit storing a wider array of spent fuel types, thus providing increased flexibility to licensees. NRC evaluates applications for new ISFSI licenses and spent fuel storage cask designs, and applications amending existing licenses and cask Certificates of Compliance (CoCs) under 10 CFR Part 72 regulations.

While full core offload capability is not a requirement, most licensees maintain sufficient space available in their SFPs in case they need to completely defuel a reactor vessel to perform certain repair work. To maintain SFP capacity and operational flexibility, the licensee could transfer the spent fuel to an onsite ISFSI, an off-site ISFSI, another reactor facility's SFP, owned by the consolidated licensee, or re-rack the SFP. Transfer of spent fuel from one reactor SFP to another SFP or from one ISFSI to another ISFSI is permitted by the regulations; however, amendments to the applicable Part 72 or Part 50 license may be needed, on a case-by-case basis.

Packages (casks) used to transport spent fuel currently exist; however, many of these packages can handle only a limited number of spent fuel assemblies. Consequently, the industry has submitted, and is continuing to submit, new package designs for NRC review and approval. These new package designs permit the transportation of a larger number of spent fuel assemblies.

**Preliminary Impact Assessment:**

The NRC has been able to successfully address applications for new ISFSI licenses and new spent fuel storage cask designs, as well as applications to amend existing licenses and cask certifications. Impacts would principally occur in an increased number of amendments to existing ISFSI licenses (to transfer spent fuel), applications for away-from-reactor ISFSIs (for consolidated storage), applications to amend existing Part 71 and 72 quality assurance programs, and amendments to existing certified cask designs (to permit storage of additional types of spent fuel). The staff currently interfaces with the licensees and industry groups (e.g., NEI) on a periodic basis to determine future submittals and thus aid in assessing future resource needs.

Furthermore, because a Part 72 general license only authorizes the storage of spent fuel at an on-site ISFSI for the spent fuel authorized by the associated Part 50 license, transfer of spent fuel from one general license ISFSI to another general license ISFSI requires amendment of the associated Part 50 license for the receiving ISFSI. Such transfers would be a cross-cutting issue with Part 50 licensing impacts.

Existing Part 71 and 72 regulations, policies, and guidance are sufficient to support nuclear industry consolidation. Potential impacts may arise from the need for increased staff and contractor resources to process new ISFSI licenses, cask design CoCs, or applications to amend existing ISFSI licenses or cask CoCs.

No changes to Part 71 regulations are required to support transfer of the spent fuel as a result of nuclear industry consolidation.

**Recommended Followup:**

At this time, it appears that current ISFSI licensing and spent fuel storage cask certification regulations, policies, and procedures are sufficient to accommodate situations resulting from industry consolidation. Staff is working with industry to obtain advance notice of future applications and thus predict future casework levels. Furthermore, there may be some unique, unanticipated circumstances that require changes to spent fuel storage or transportation policies or regulations. For either of these situations, the staff will utilize the PBPM process to address resource impacts or significant policy matters and make appropriate recommendations to NRC management.

**Issue Category:** 1. Plant Operational Safety

**Issue:** 1.d Waste Management

**Discussion:**

Nuclear industry consolidation can affect how individual licensees address management of low-level wastes. Consolidation impacts related to storing spent fuel are discussed in the assessment of Issue 1.c. Since the U.S. Department of Energy would be the applicant under current law if a license application for a high-level waste repository were filed, no consolidation impacts are anticipated for the licensing of such a facility. Regulations applicable to waste management include operational radiation health and safety requirements applicable to all waste generator licensees and requirements for commercial facilities licensed to dispose of low-level radioactive wastes. The Low-Level Radioactive Waste Policy Amendments Act of 1985 provides a process for siting new low-level waste disposal facilities. Regulations are also in place for transportation of both low-level and high-level radioactive wastes. Policy guidance for implementing these regulations has been prepared and issued as standard format and content guides, standard review plans, and branch technical positions.

Nuclear industry consolidation has the potential to strengthen low-level waste management programs within licensee organizations by consolidating management of waste disposal activities. The Envirocare disposal facility in Utah currently negotiates disposal charges on a case-by-case basis. Therefore, consolidation may also reduce disposal costs through the negotiation of larger volume contracts. Additional cost savings could also be implemented through the potential use of licensees' own low-level waste volume reduction and processing systems that may become economical for a larger number of plants, rather than contracting for this service. The construction and use of new volume reduction and waste processing systems would generally be implemented through 10 CFR 50.59, without the need for a license amendment. Incineration, however, would require licensing pursuant to 10 CFR 20.2004. Due to the controversial nature of incineration issues, intervention on any such license amendment applications would be likely.

Most nuclear power plants have developed on-site storage facilities as a contingency in the event of short-term interruptions in disposal site availability, as has occurred in the past. Industry consolidation could allow more optimal use of these storage facilities. However, because nuclear power plants generally are not licensed to accept wastes from off-site, license amendments would be required to implement optimized storage programs among several nuclear power plant sites. There would also be a need for transportation of wastes from the point of generation to the centralized storage facility. Due to the controversial nature of waste management and transportation issues, intervention on any license amendment applications would be expected. Centralization of storage facilities could require that licensees increase tracking of the origin of the wastes to ensure that state and compact waste generator reporting requirements are met.

There do not appear to be consolidation efforts among the low-level waste disposal licensees at this time. Programs at low-level waste facilities are driven primarily by external impacts (e.g.,

decisions related to the closure of the Barnwell low-level waste site) rather than by consolidation. Currently, all low-level waste disposal site facilities are located in and licensed by Agreement States, and there are no new applications projected to be submitted to the NRC.

**Preliminary Impact Assessment:**

Regulations and policies addressing waste management and transportation are sufficiently flexible to address license amendments to consolidate on-site storage operations or to use advanced volume-reduction technology. Industry consolidation should have no impact on the availability of low-level waste disposal sites or programs for handling and processing mixed wastes. There does not appear to be a need to revisit the Low-Level Radioactive Waste Policy Amendments Act of 1985 based solely on industry consolidation impacts. DOE and state projections of low-level waste generation may be affected by nuclear power plant license renewals and shutdowns that occur from industry consolidation.

Because DOE is responsible for development of a high-level waste repository under current law, industry consolidation should have no impact on the licensing process for such a facility.

**Recommended Followup:**

At this time, it appears that current waste management regulations and policies are sufficiently flexible to accommodate situations resulting from industry consolidation. Therefore, industry consolidation appears to have no significant impact in the waste management area and no further effort is recommended. However, the NRC needs to consider the effects of license renewals and plant shutdowns when providing feedback on DOE and state projections of low-level waste generation.

**Issue Category:** 1. Plant Operational Safety

**Issue:** 1.e Emergency Preparedness

**Discussion:**

Emergency preparedness (EP) programs, both on-site and off-site, may be sensitive to the impacts of industry consolidation because of the dependence on relationships with local governments and facilities where the plants are located. Possible outcomes of industry consolidation include centralization of staffs, functions, and facilities remote from individual site locations and the standardization of licensee EP programs and procedures. These outcomes can have both positive and negative impacts. There are NRC staff resource implications and challenges to assure that regulations and policies continue to be satisfied and that the NRC's safety assessment processes provide sufficient focus on the emergency preparedness area.

The NRC must be alert to potential safety impacts of EP program changes resulting from consolidation. Industry consolidation may result in licensees wanting to share Emergency Operations Facilities (EOFs), with the corporate headquarters serving as the location for and source of personnel to staff the EOF. Shared Emergency News Centers are another potential result of consolidation, with licensee corporate personnel staffing the facility. Currently, the ROP inspection procedures do not address inspection of corporate emergency response facilities, corporate EP training programs, or EP performance indicators from a corporate standpoint.

**Preliminary Impact Assessment:**

Some concerns associated with centralized emergency preparedness facilities remote from the site area include the potential loss of expertise local to the facility and maintenance of local contacts with first responders. However, centralized, shared facilities and staffs can strengthen EP programs. The NRC must evaluate proposals for centralized EP staffs, programs and facilities and, indeed, has approved such proposals in the past.

Another area of potential impact is the incentive for increased use of standardized emergency response procedures across numerous reactor facilities. Standardized procedures have positive and negative aspects: they can result in a better procedure, but one which a licensee may be more reluctant to modify for needed changes, due to the number of facilities affected by procedure changes.

There currently is a practice of Commission-level involvement in EP changes where there is a reduction of effectiveness. If a larger number of EP program change requests are submitted, it might become necessary to revisit this level of review and approval. Similarly, if the number of exemption requests increases significantly, this might indicate the need to consider rule changes.

**Recommended Followup:**

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Given the ongoing industry consolidation, the potential exists that owners of multiple facilities will seek to consolidate EP program functions and organizations. This could affect the effectiveness of emergency response programs. The staff recommends that requests for EP program changes be assessed and trended to determine whether changes to regulations, policies, or guidance are needed.

**Issue Category:** 1. Plant Operational Safety

**Issue:** 1.f Reliable Off-Site Power

**Discussion:**

As described in Issue 8.a., the primary concerns that arise with respect to off-site power reliability are a result of economic deregulation rather than industry consolidation. Stability and reliability of off-site power is a significant safety consideration in the regulation of nuclear power plants. The primary reason is that off-site power is the preferred source of electrical supply to operate decay heat removal systems. Hence, although highly reliable on-site emergency diesel generators will be available to assure capability to safely shut down the plant and provide for transfer of decay heat to the ultimate heat sink temporarily, a reliable off-site power supply is important for long-term safety. The NRC has a significant interest in monitoring challenges to the operation and management of the electric power grid so that appropriate actions can be taken to address concerns regarding reliability of off-site power.

From the perspective of plant operational safety, the potential challenges to the reliability of off-site power affect the use of probabilistic risk analyses in safety related decision-making. Increasingly, both licensees and the NRC staff use PRAs for risk-informed decision-making. Regulatory Guide 1.174, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis", provides the guidance needed for making licensing decisions using risk insights that may derive from the impacts of changes due to economic deregulation. New information based on grid experience after economic deregulation may have to be considered in estimating the frequency of initiating events where off-site power plays a role. Most of the information needed is likely to be readily available from the grid operators. This information is likely to be a part of submittals made by licensees in support of licensing actions.

In recognition of the importance of assuring the stability and reliability of off-site power the industry, as well as the NRC, has implemented programs and other initiatives to address this challenge. The NRC issued Regulatory Issue Summary 2000-24 on the subject in December 2000. NEI and INPO are sponsoring a workshop on offsite power reliability in April 2001, in which NRC staff will participate. In 1999, INPO issued SOER 99-1, which provides guidelines for good practices in support of grid reliability and is currently conducting an audit of licensees to determine the degree of conformance to these good practices.

**Preliminary Impact Assessment:**

Reliability of off-site power lately has been receiving considerable attention. The external stakeholders include other government agencies with regulatory responsibilities. Communication channels have been established with various stakeholders and are improving as experience is gained. The Institute for Nuclear Power Operations has developed the Equipment Performance and Information Exchange (EPIX) system, which should enable information needed to update PRAs to be easier to obtain.

Relative to operational safety matters, the body of regulations currently in force provides for safe operation, shutdown, and decay heat removal from nuclear power plants. The established lines of communication with industry and other stakeholders, especially those concerned with economic deregulation, are expected to provide timely information if safety issues arise. In addition, the NRC has in place the needed infrastructure (such as a Memorandum of Understanding with the Electric Power Research Institute) to obtain and assess information, affecting off-site power reliability.

**Recommended Followup:**

The NRC should continue its ongoing efforts to monitor developments relative to grid operation. The monitoring should include keeping abreast of actions taken by other government agencies which may affect grid reliability, as well as nuclear power industry initiatives relative to assurance of grid reliability.

**Issue Category:** 2. Licensing

**Issue:** 2.a License Transfer Process

**Discussion:**

The NRC responsibilities for the transfer of a license are set forth in 10 CFR 50.80, "Transfer of Licenses." From 1998 through the present, the staff has received license transfer applications for about 80 nuclear power reactor units. Most of the reviews for these applications have been completed except for a few that were submitted recently. Applications for transfer of a license include information on the identity and technical and financial qualifications of the proposed transferee, as well as any additional information that the Commission requires, such as radioactive material safeguards protection, and certain information related to the purpose of the transfer and the nature of the transaction necessitating the transfer. The NRC must obtain, review, and assess all relevant organizational and financial information associated with each license transfer to determine whether the proposed transferee is qualified and the transfer is otherwise consistent with the law and NRC regulations. Transfer of the license is by issuance of an order and, where necessary, a conforming amendment.

A concern has been raised by some external stakeholders that once a licensee has decided to sell its nuclear plants that licensee may no longer have the incentive to invest in safety or maintenance improvements, or take necessary corrective action to address identified problems, pending transfer of responsibility and liability to the license transferee. The stakeholders' proposed resolution to this concern is that the NRC staff consider such indications in its license transfer reviews and make the correction of physical or performance problems a condition of transfer approval.

**Preliminary Impact Assessment:**

The staff believes that the current license transfer process is effective. It appears likely that license transfer applications will continue to be submitted, and completed transfers will continue to be reviewed for lessons learned to improve the effectiveness of the process.

The concern that a licensee planning to sell its plant might no longer place a high priority on safety initiatives is accommodated by current processes. The NRC closely monitors the transfer process to ensure that NRC regulations and license requirements are met regardless of any pending sale. Further, the new license holder has a strong incentive to assure that the plant will meet NRC requirements upon completion of the transfer.

**Recommended Followup:**

No special followup effort is recommended at this time.

**Issue Category:** 2. Licensing

**NOTE: SENSITIVE INFORMATION - LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE**

**Issue:** 2.b New License Applications, Site Approvals, and Reactivations of Deferred Plants

**Discussion:**

A consolidated nuclear power industry consisting of larger, financially strong nuclear operators is more likely to consider new plant applications, standard design applications, reactivation of deferred plants, and site approval applications. There already is industry consideration of new reactor design applications (such as the pebble-bed-type standard design) within the next few years.

With larger, more stable licensees, the costs associated with new nuclear power plant planning and construction can be more readily supported. These new units likely would serve as merchant power plants for the owner. New construction may also involve multiple corporations pooling their resources to build new facilities.

The NRC has been monitoring industry activities in this area. The Commission has stated in COMSECY-00-0026 (REVISED FY 2000-2005 STRATEGIC PLAN) that the staff has an important ongoing initiative to improve the regulatory infrastructure associated with new plant construction (10 CFR Part 52) and that improving this infrastructure should serve to improve the efficiency, effectiveness, predictability, and consistency of the combined license review process.

**Preliminary Impact Assessment:**

The staff will need to assure that the necessary staff resources, expertise, organizational infrastructure, review processes, and guidance are available to support future activities in this area. In addition, current regulations and processes may need to be reviewed. New guidance may be needed on the scope of the review, as well as for antitrust and foreign ownership issues. Additional resources may need to be reassigned to support future staff action in this area. The Commission has directed the staff in COMJSM-01-0003, "Staff Readiness for New Nuclear Plant Construction and the Pebble Bed Reactor," to assess existing capabilities and identify needed enhancements to process an early site permit application, a license application, and construction of a new nuclear power plant. It also directed the staff to assess and identify needed enhancements to the regulatory infrastructure supporting applicable regulations, with emphasis on identification of regulatory issues and potential process improvements. Staff review of the reactivation of a deferred plant would be similar to a new license application review.

**Recommended Followup:**

Renewed interest in new license applications is attributable, at least in part, to industry consolidation. The Commission and staff have had meetings with industry representatives who are formulating plans for possible license application submittals in the next few years. The staff already has initiatives underway to prepare for such submittals. These ongoing initiatives appear to be sufficient and should be responsive to industry developments and evolving plans. Estimates of resources needed to accomplish reviews of new license applications are included in the planning assumptions as part of the budget formulation process. No specific additional followup effort is recommended at this time.

**Issue Category:** 2. Licensing

**Issue:** 2.c License Renewal

**Discussion:**

The number of future license renewal applications is expected to increase as a result of consolidation. Some reactors that were not considered to be candidates for license renewal could be reevaluated as a result of consolidation. With larger, more financially stable nuclear power plant owners, increased competition in power generation, and because of cost benefits, there will be increased incentive to extend the licenses of currently operating nuclear power plants. License renewal is seen by licensees as a cost-effective means of adding capacity.

The license renewal process for power reactors relies on a review of the licensing basis and plant design, scoping, and screening of structures and components that need to be subjected to an aging management review and evaluation of time-limited aging analyses.

**Preliminary Impact Assessment:**

The staff recognizes the potential resource impacts of the receipt of an increased number of license renewal applications, some of which may not have been in the planning assumptions. The NRC has published Regulatory Issue Summary 2000-20, which encourages licensees to inform the staff as soon as possible of their plans for license renewal. The staff uses the PBPM process to budget for applications for which the staff has been notified of submittal dates and to respond to emergent work. However, license renewal is a voluntary initiative and the decision to renew an operating license is largely a business decision over which the NRC has no control. In addition, a greater number of renewal applications could result in already established submittal dates being changed as consolidated licensees re-evaluate and re-prioritize their license renewal plans.

**Recommended Followup:**

No special followup effort is recommended at this time. As consolidation progresses, the NRC should stay engaged with the industry as to changing license renewal plans and schedules and modify resource planning assumptions accordingly.

**Issue Category:** 2. Licensing

**Issue:** 2.d NRC Organizational Structure

**Discussion:**

Traditionally, licensees have operated within limited geographical service areas and have had to interface with just one regional office and one headquarters project directorate. As a result of consolidation, some licensees may have to interact with as many as four regional offices and headquarters project directorates. This is likely to introduce management challenges, both for the staff and the licensees, especially with respect to consistent, coordinated, and efficient regulatory oversight.

The Commission stated in COMSECY-00-0026 (REVISED FY 2000-2005 STRATEGIC PLAN) that the staff needs to assure that NRC stakeholders recognize the importance the Commission places on regional consistency and coordination. With deregulation proceeding in the electric industry and with continuing applications for license transfers, the NRC will see an increase in the number of cross-regional licensees. While consistency and coordination between and among headquarters and the regions have been high priorities for the NRC, the increase in cross-regional licensees represents a growing challenge in these areas warranting greater management oversight.

**Preliminary Impact Assessment:**

The industry is currently in a state of transition and significant consolidation is relatively recent. Thus, it is premature to identify potential challenges to the current NRC organization, or to consider alternative organizational structures.

With respect to the question of whether the existing regional boundaries and currently assigned licensee oversight responsibilities will facilitate effective regulation of those licensees that own and operate reactor facilities in multiple regions, the key is effective NRC management oversight to assure consistency in implementing its programs. Measures that have been developed to assure consistent application of oversight processes include various periodic meetings with regional and headquarters management to discuss program implementation issues, conducting annual self-assessments, development of metrics for inspection procedures, program office audits of regional inspection reports, and obtaining industry stakeholder feedback. Consistent application of the Significance Determination Process among regions will be particularly important. Increased communications, both formal and informal, among the respective regional staffs are necessary to share insights when programs and processes are transferred from one licensee to another. Increased communications and coordination among regional staffs may also result in a broader look at a particular performance issue.

**Recommended Followup:**

Within the next few years, the regional and headquarters staffs will gain significant experience in regulating and otherwise interacting with consolidated licensees. This experience should be monitored so that a meaningful assessment of the impacts of consolidation on the NRC organization can be made at the appropriate time.

The recommended followup effort is to establish a consistent, agency-wide process to monitor and document relevant staff experience and stakeholder feedback and to establish meaningful assessment criteria for evaluating this experience and feedback. Since there already are several cross-regional, consolidated licensees, this effort should be started in the near-term.

**Issue Category:** 3. Inspection, Enforcement, and Assessment

**Issue:** 3.a NRC Reactor Oversight Process

**Discussion:**

In evaluating the potential impact of industry consolidation on effective implementation of the reactor oversight process (ROP), a number of issues need to be considered. One of the principal considerations is whether the ROP will provide the NRC with assurance that licensees are maintaining public health and safety in a consolidated/deregulated environment. The ROP is performance-based, meaning the level of NRC engagement is a function of licensee performance. It is also structured to be "indicative" rather than "diagnostic", meaning the inspection and assessment processes within the ROP are designed to provide an indication of licensee problems, e.g., performance indicators (PIs) and associated thresholds, rather than to determine the specific root causes for issues of lesser significance. This raises the question of whether the ROP enables the NRC to address adverse performance trends that might result from consolidation-related cost-cutting initiatives, which could be driven by financial pressures, or non-conservative changes to corporate policies, programs, and procedures, before they evolve into significant safety issues.

Industry consolidation could result in staffing reductions as licensees seek to increase their efficiency of operations by eliminating redundant functions and standardizing "best practices". If the staffing reductions are substantive, not targeted appropriately, and/or not managed well, problem identification and resolution functions could be impacted as key staff leave the company. Licensee efforts to increase operational efficiency could also result in changes to corporate policies, programs, and procedures. If these changes are non-conservative, the effectiveness of problem identification and resolution activities could be adversely affected. For example, a licensee could adopt a corrective action program with higher thresholds for initiating a root cause evaluation. This could result in more significant problems developing, as the root causes for lower level issues are not addressed. It is important to note that, while these postulated scenarios may be possible, experience to date with consolidated licensees has demonstrated that the opposite is true. Changes associated with the integration of individual facilities into a consolidated entities have generally been well managed and produced positive performance results.

The situation that existed in California in early 2001, where the Southern California Edison and Pacific Gas and Electric companies faced substantial financial difficulties, generated a number of questions regarding the NRC's role in ensuring public health and safety. The NRC conducted focused inspections at these facilities in response to this situation. These inspections revealed that there was no adverse impact on safety as a result of the financial difficulties. Nevertheless, significant financial pressures on a licensee could result in decisions to reduce the workforce, revise the scope of and/or delay planned maintenance and modification activities, shorten or delay plant outages, terminate licensing classes or training initiatives, etc. While these decisions would likely result in performance problems, it is not clear how significant those problems would be and in what time frame they would emerge. Assuming that some licensee decisions would have short-term and substantive effects on performance

and given that the NRC focus is on safety performance, a critical question is whether the NRC's safety assessment processes are structured to ensure that the NRC will be made aware of these performance issues in sufficient time to engage the licensee with the appropriate focus. For those licensee decisions that provide short-term financial relief but have a longer-term impact on performance, the question is how significant the associated performance issues would be when they first surface.

Another issue warranting consideration is whether the existing regional boundaries and currently assigned licensee oversight responsibilities will facilitate effective regulation, within the context of the ROP, for those licensees that own and operate reactor facilities in multiple regions (see Issue 2.d). Licensees that cross regional boundaries may present management challenges for the NRC with respect to consistency, coordination, and efficiency of oversight.

**Preliminary Impact Assessment:**

There are two scenarios which need to be considered in evaluating what impact industry consolidation might have on the effectiveness of the ROP. The first scenario relates to longer-term manifestation of licensee performance problems stemming from consolidation-related activities, and the second scenario involves safety performance problems deriving from licensee actions in response to financial pressures.

Regarding the first scenario, one of the primary considerations is whether the ROP is conducive to identifying adverse performance trends that might result from consolidation-related activities such as cost-cutting initiatives and non-conservative changes to corporate policies, programs, and procedures. The NRC must be able to engage a licensee to ensure the underlying performance deficiencies are appropriately addressed before these deficiencies evolve into significant safety issues that challenge public health and safety. Licensee performance issues, particularly those relating to human performance and the corrective action program, should become evident at a lower level of significance. This affords the licensee the opportunity to correct the issues before more significant NRC action is necessary due to elevated safety performance problems. As noted earlier, by design, the ROP is "indicative" rather than "diagnostic", which means that as inspection findings and PIs become more safety significant, the ROP increases focus on why a particular performance problem has occurred. Thus, if a consolidation-related, cost-cutting initiative or non-conservative changes in corporate policies, programs, and procedures result in a performance issue, that issue would likely surface initially as a finding of lesser safety significance. The licensee should then determine the extent of the condition and implement appropriate corrective action. Assuming that consolidation-related activities continue to create performance problems because the licensee has not addressed the root causes for the issues of lesser significance, those problems should develop into more safety-significant issues. The NRC would then detect this adverse performance trend and engage appropriately. This is not to say that licensee performance problems could not initially be evident at a higher level of significance, but this should be the exception if the licensee is aggressively addressing its lower level issues.

The corporate structure, ownership, and location of a particular plant should not impact the effectiveness of the ROP. While industry consolidation may offer efficiencies for the licensee,

the assessment process under the ROP is based on performance results and not on how licensees gain efficiencies. Inspection activities under the baseline and supplemental inspection programs are sufficiently defined in terms of scope and objectives, that ownership or geographic location is not a factor in effective implementation of the inspection program. Similarly, the use of risk information to determine the safety significance of inspection findings by applying the Significance Determination Process (SDP) is independent of plant ownership or licensee size.

In assessing overall licensee performance, the ROP uses PI information in conjunction with the significance of inspection findings. The degree of regulatory engagement is dictated by the results of this assessment through the Agency Action Matrix. Each licensee is expected to submit quarterly PI information to the NRC for each plant owned by that licensee. If a licensee, for some reason, elects not to submit PI data for a specific plant, then the ROP has provisions for additional inspection activities to obtain the information captured by the PIs in order to fully assess licensee performance. As the ROP is further refined, each licensee will be expected to implement associated changes, e.g., revisions to the PI reporting criteria, at each of its facilities.

Regarding the second scenario, there is a concern among some stakeholders that a licensee, when faced with financial pressures, including potential bankruptcy, could make decisions that might have significant short- or long-term effects. With respect to substantial short-term effects, the question is whether the NRC's regulatory oversight framework, given its performance-based, indicative nature in contrast to a more diagnostic approach, could preclude the NRC from increasing the level of licensee oversight in a timely manner to assure that operational safety is being maintained. Rather than having a short-term impact, some licensee decisions to dramatically improve financial viability could generate performance issues that do not surface until several months after the decisions are implemented. These performance issues could be safety-significant, depending upon the activities affected by the financially-based decisions. While the NRC's limited experience with licensees facing financial pressures has not validated these concerns, it may be prudent for the NRC to adopt a preemptive approach by initiating a targeted inspection module to assess licensee response to financial pressures.

**Recommended Followup:**

The ROP is expected to be transparent to industry consolidation. However, the NRC currently has limited experience with the effects of industry consolidation on effective implementation of the ROP. With additional experience, changes that may be needed to the ROP should become evident. The annual self-assessment process built into the ROP should serve as a vehicle to evaluate any needed changes. The NRC staff should continue to monitor consolidation activities and use the ROP self-assessment process to periodically evaluate the effectiveness of the ROP in light of the changing industry environment.

Further study should be initiated by the NRC to determine if an inspection module or "contingency plan" (similar to the "strike contingency plans" generated by some of the regional offices) needs to be developed to facilitate NRC evaluation of a licensee facing financial difficulties. This will help ensure that an enhanced level of NRC oversight is provided, if

appropriate, in a timely manner to assure operational safety is being maintained, and that the longer-term performance impacts of licensee actions have been appropriately evaluated.

**Issue Category:** 3. Inspection, Enforcement, and Assessment

**Issue:** 3.b Other NRC Inspection Programs

**Discussion:**

The NRC is in the process of developing revisions to the fuel cycle facility oversight process, including inspection, performance assessment, and enforcement. This process affects ten fuel cycle facilities: two gaseous diffusion plants, two highly enriched uranium fuel fabrication facilities, five low-enriched uranium fuel fabrication facilities, and one uranium hexaflouride production facility (See Issue Category 6). These facilities possess large quantities of materials that are potentially hazardous (radioactive, toxic, and/or flammable) to the workers, public, and environment. Similar to the reactor oversight process (ROP), the overarching objective in revising the fuel cycle facility oversight process is to establish a process that is more risk-informed and performance-based to focus on the more significant risks at fuel cycle facilities. The intent is to provide an objective and reliable basis for determining if a fuel cycle facility is safe and secure and to provide early indications of declining safety and safeguards performance.

The staff has interacted with external stakeholders through several public meetings and exchanges of documents. A work plan for revision of the fuel cycle facility oversight process, which lists the priority, sequence, and schedules for completing the oversight program revisions has been issued for stakeholder comment.

The NRC is also in the process of risk-informing and performance-basing the inspection program for independent spent fuel storage installations (ISFSIs). This is being accomplished in a phased approach. The short-term phase involves risk prioritizing the existing inspection procedures using available risk/consequence information and an expert panel approach, and applying inspection resources commensurate with risk and the performance history of the licensee. The longer-term phase is conceptualized to more closely align with the risk-informed inspection approach of the ROP. This would involve completing a probabilistic risk assessment (PRA) for ISFSIs and then using the PRA results to develop an inspection program, which is based on performance indicators and a significance determination process, similar to the ROP.

**Preliminary Impact Assessment:**

Given that the fuel cycle facility oversight process is being revised using a framework similar to the ROP, it is reasonable to expect that the new oversight process will be able to accommodate potential impacts of consolidation (refer to Section 3.a. for a discussion of the impacts of industry consolidation on the ROP). In addition, the extensive outreach effort initiated by the NRC to exchange information and obtain stakeholder feedback provides an opportunity to discuss any expected impacts from the consolidation of fuel cycle facilities on the new oversight process. Similarly, since the ISFSI inspection program is being revised using a framework similar to the ROP, it is reasonable to expect that the new program will be able to accommodate potential impacts of consolidation.

**Recommended Followup:**

No additional staff action beyond that recommended under Issue 6 is recommended at this time.

**Issue Category:** 3. Inspection, Enforcement, and Assessment

**Issue:** 3.c NRC Enforcement Program

**Discussion:**

The NRC derives its enforcement authority from the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended. The NRC exercises its statutory authority to impose enforcement sanctions in accordance with its enforcement policy described in NUREG-1600, "General Statement of Policy and Procedures for NRC Enforcement Actions". Enforcement actions have been used as a deterrent to emphasize the importance of compliance with NRC requirements and to encourage prompt identification and prompt, comprehensive correction of violations of those requirements. Compliance with NRC requirements plays an important role in giving the NRC confidence that safety is being maintained. In the context of risk-informed regulation, compliance also plays an important role in ensuring that key assumptions used in underlying risk and engineering analyses remain valid.

With the development of the reactor oversight process (ROP), where the significance of individual non-compliance findings is evaluated using more objective criteria and the regulatory response to these findings is more predictable, the enforcement program was revised to better integrate with the ROP. This revision to the enforcement program consisted of categorizing violations into two groups. The first group consists of those violations that can be evaluated under the Significance Determination Process (SDP), with appropriate NRC action determined by the Agency Action Matrix. Issue 3.a. discusses the potential impacts of industry consolidation on the ROP. The second group includes violations related to willfulness, including discrimination; violations involving actual safety consequences, such as an overexposure to the public or plant personnel or a substantial release of radioactive materials; and violations that may impact the NRC's ability to oversee licensed activities. This issue discussion focuses on the impact of industry consolidation on the enforcement program as it pertains to violations in the second group.

As noted in other issue discussions, licensee efforts to increase efficiency of operations could result in changes to corporate policies, programs, and procedures. Since consolidation results in more reactor facilities under a single licensee's control, corporate-wide changes affect more reactor facilities and more employees. Depending upon how a licensee manages these changes, there could be an increased number of allegations relating to technical issues. Similarly, efforts to increase operational efficiency or actions in response to financial pressures could result in staffing reductions which could lead to more discrimination complaints. Increased numbers of allegations would translate to an increased enforcement workload, assuming that the NRC substantiates some percentage of these allegations, in whole or in part, based on the results of its investigations.

On the other hand, it is equally likely that consolidation may result in a reduced volume of enforcement actions because of stronger licensees and better managed regulatory programs.

Staff experience to date with consolidated licensees has not shown any increases or decreases in discrimination complaints or other allegations or in related enforcement actions.

While measures and processes have been established to assure consistent application of the enforcement program among the regions, e.g., audits, enforcement panels, counterparts meetings, etc., those inconsistencies in implementing the enforcement program that may exist will be more apparent to cross-regional licensees. These inconsistencies may involve different thresholds for issuing non-cited violations, distinguishing between minor and Severity Level IV violations, and reaching conclusions on alleged discrimination. This may necessitate more oversight from the Office of Enforcement to ensure similar issues are treated consistently among the regions.

Another area potentially impacted by consolidation relates to the possible employment by a licensee of an individual who was terminated at one facility, based on poor performance or wrongdoing (whether or not the individual had been issued an NRC order prohibiting his involvement in licensed activities), at another facility if the second employer is unaware of the performance or wrongdoing problem at the first facility. This would be less likely to occur in a consolidated industry with fewer licensees.

**Preliminary Impact Assessment:**

The impact of industry consolidation on the NRC's enforcement program relates to implementation issues vice policy issues. It appears that the NRC can address these implementation issues within the context of the existing enforcement program framework/infrastructure. The Office of Enforcement may decide to increase its audit activities in an effort to minimize inconsistencies among the regions in implementing the enforcement program. More coordination and communication between the regions and program office can help assure that the same thresholds are applied for determining if discrimination violations occurred, as well as distinguishing between cited and non-cited violations and between minor and Severity Level IV violations. Regarding the potential increase in enforcement workload stemming from a greater number of technical allegations and discrimination complaints, this situation will need to be monitored to determine if additional resources are warranted.

**Recommended Followup:**

Experience with the effects of industry consolidation on effective implementation of the enforcement program is limited. The NRC should continue to monitor the enforcement workload associated with discrimination complaints and technical-related allegations to determine if industry consolidation activities are influencing this workload and make resource decisions based on the monitoring results. The Office of Enforcement should maintain its oversight activities of regional enforcement program implementation to minimize inconsistencies.

**Issue Category:** 3. Inspection, Enforcement, and Assessment

**Issue:** 3.d NRC Allegation Program

**Discussion:**

The allegation program was established to provide a mechanism for individuals to identify safety and regulatory issues directly to the NRC. An allegation is defined as a "declaration, statement, or assertion of impropriety or inadequacy associated with NRC-regulated activities, the validity of which has not been established." The allegation program is structured to provide a comprehensive response to an alleger's concerns in a timely manner. It includes provisions to protect the identity of the alleger; to provide timely resolution of the issues specific to an allegation; and to communicate the staff's understanding of those issues, status of the staff's review efforts, and ultimate resolution of the issues in a timely manner. Industry consolidation could potentially impact these and other aspects of the allegation program.

As discussed in Issue 3.c., licensee efforts to increase efficiency of operations could result in changes to corporate policies, programs, and procedures. Since consolidation results in more reactor facilities under a single licensee's control, corporate-wide changes would affect more reactor facilities and more employees. The impact of these changes could result in larger numbers of allegations relating to technical concerns. Similarly, corporate cultural initiatives such as maintaining a safety conscious work environment (SCWE), could have a bigger impact on safety given the increased number of affected reactor sites. Additional NRC inspection may be necessary to evaluate whether a SCWE exists or was adversely affected by changes in corporate policies, programs, or procedures. In addition, reductions in licensee staff could result in an increased number of discrimination allegations.

As is the case with enforcement actions (Issue 3.c), it is equally likely that consolidation may result in a reduced number of allegations because of stronger licensee management and more effective regulatory programs. However, staff experience to date with consolidated licensees has not shown any noticeable increase or decrease in allegations.

Under the current program, the NRC may elect to refer a particular allegation to the licensee for evaluation with the licensee reporting back to the NRC on the results of its review, or decide to conduct an independent inspection to determine the validity of the allegation. If a consolidated licensee crosses regional boundaries, absent some coordinating efforts on the part of the NRC, one regional office could decide to follow up an allegation with inspection to protect the alleger's identity, while another regional office could decide to refer a similar allegation from another employee to the licensee for followup. With different approaches to following up on similar allegations, NRC staff in the respective regions may reach a different conclusion on the validity and disposition of the allegation issues, although this is unlikely. These and other potential inconsistencies in implementing the allegation program would be more apparent to cross-regional licensees.

The roles and responsibilities of NRC staff in implementing the allegation program is another area potentially impacted by consolidated licensees that cross regional boundaries. If the NRC

receives an allegation concerning a programmatic issue which cross-cuts regional boundaries because it pertains to activities at multiple sites in different regions, there must be a standard method for determining which NRC organization would take the lead for followup.

**Preliminary Impact Assessment:**

While industry consolidation may impact some aspects of the NRC's allegation program, as described above, the impact relates to implementation issues vice policy issues. It appears that the NRC can address these implementation issues within the context of the existing NRC allegation program framework/infrastructure. For example, NRC follow-up action to address similar allegations received in different regions, stemming from corporate-wide changes to policies, programs, and procedures, may require coordination of efforts among regional offices to ensure consistency and alleger identity protection. Allegations involving programmatic issues which cross-cut regional boundaries, i.e., pertain to activities at multiple sites in different regions, can be effectively addressed by defining which internal NRC organization has the lead responsibility for follow-up. The potential increased number of allegations, including those involving discrimination complaints, as well as increased inspection activities to validate corporate cultural issues, e.g., SCWE, may require additional resources dedicated to the allegation program.

**Recommended Followup:**

While experience to date with the effects of industry consolidation on effective implementation of the allegation program is limited, there appears to be the need for developing guidance to assure consistent treatment of similar allegations received in different regions, and to define which organization should take the lead in addressing programmatic issues that cross-cut regional boundaries. In addition, the NRC should continue to monitor the number of allegations received to determine if industry consolidation activities are resulting in an increased allegation workload, and make resource decisions based on the results of this monitoring.

**Issue Category:** 4. Decommissioning

**Discussion:**

Nuclear industry consolidation can affect individual licensee decommissioning planning, financial assurance, and schedules for dismantling power reactor and fuel cycle facilities. Regulations applicable to decommissioning include radioactivity cleanup criteria for unrestricted and restricted release, financial assurance that funds will be available to decommission the site, decommissioning planning, and procedures for submitting applications requesting license termination. Decommissioning policy guidance for implementing the above regulations has been prepared and issued as standard format and content guides and standard review plans.

The potential impacts from nuclear industry consolidation on decommissioning planning, scheduling, and funding can vary. Industry consolidation can strengthen licensee business conditions to encourage license renewal or avoid early license termination, and can also result in closure of facilities no longer considered economical. For example, strengthened business conditions from consolidation have allowed power reactor licensees to continue operations at some plants (e.g., Oyster Creek) that were previously being considered for decommissioning. Consolidation has and will likely continue to result in an increased interest in license renewal. Actions that extend the operation of nuclear power plants will, in general, increase the available time to fund decommissioning if sinking funds are used.

Consolidation may also result in decommissioning schedule stretch-outs to accommodate consolidated company-wide decommissioning programs. Licensees may seek process and funding alternatives not specifically addressed or allowed in current regulations, and possibly request an increased number of exemptions. Licensees may also seek financial assurance rule changes to allow stretch-outs in the time required to fully fund decommissioning trusts, on the basis that consolidated decommissioning schedules can reduce the need for full funding if plant dismantlement will take place further in the future. Adverse impacts of delaying decommissioning include uncertainties in the availability of future low-level waste disposal sites that could result in higher decommissioning costs and the possible lack of licensed disposal facilities at the time decommissioning activities take place.

Industry consolidation can also result in premature closures of uneconomical nuclear power plants and fuel cycle facilities. NRC staff has addressed several premature power reactor decommissioning cases in the past. Some examples include Shoreham, Fort St. Vrain, Yankee Rowe, Maine Yankee, Rancho Seco, and Connecticut Yankee. Decommissioning funding issues, which have been the major concern for premature shutdown cases, are resolved on a case-by-case basis. For shut-down power reactors that delay dismantlement, the NRC has allowed the affected licensees to make payments into the decommissioning sinking fund over the originally licensed period. Unlike nuclear power plants, fuel cycle facility licensees, in accordance with their possession limits, are required to have fully funded decommissioning plans based on site-specific decommissioning cost estimates.

Nuclear power plant licensees that are no longer rate-regulated are required by the NRC's regulations to provide means of assuring any estimated unfunded decommissioning cost

through some surety, insurance, or equivalent method. The staff evaluates such changes either through license transfer applications pursuant to 10 CFR 50.80 or through biennial reports on decommissioning funding status required to be submitted by licensees.

**Preliminary Impact Assessment:**

License termination regulations apply to planned and premature decommissioning activities. Because regulations allow nuclear power plant licensees 60 years after permanently ceasing operations to complete decommissioning, there is substantial flexibility already allowed for consolidated utilities to delay decommissioning to take advantage of operational efficiencies. NRC staff has been able to successfully address cases involving immediate dismantlement, partial dismantlement, and delayed decommissioning alternatives.

Fuel cycle facility license termination regulations do not allow delayed decommissioning because studies have shown that delaying decommissioning of these facilities does not have a financial or radiological safety benefit. Thus, fuel cycle facility shutdowns due to industry consolidation efforts do not appear to introduce unique circumstances that require new license termination processes.

Power reactor decommissioning financial assurance regulations allow the use of sinking funds where licensees are either rate-regulated or can recover costs through the rate base (currently all states allow recovery of decommissioning costs through various rate base mechanisms; otherwise, full funding or guarantee of full funding would be required under NRC regulations). In premature decommissioning cases, full funding may not be available at the time of shutdown. However, experience with actual cases has not identified unresolvable funding issues. Reviews of power reactor licensee ownership changes include consideration of decommissioning funding. No decommissioning regulation or policy changes, other than the rulemaking to standardize trust fund provisions currently underway, appear necessary at this time to reflect industry consolidation impacts.

Fuel cycle licensee decommissioning financial assurance regulations should not be affected by industry consolidation because the regulations ensure that full funding would be available if a licensee is unable to complete decommissioning, for example due to bankruptcy or premature shutdown.

**Recommended Followup:**

At this time, it appears that current decommissioning regulations and policies are sufficiently flexible to accommodate situations resulting from industry consolidation. Therefore, industry consolidation appears to have no significant impact in the decommissioning area and no further effort is recommended. Some unique, unanticipated circumstances may arise in the future that result in requests for exemptions or require changes in decommissioning regulations or policies. For these situations, staff will continue to identify significant policy matters and make appropriate recommendations to NRC management.

**Issue Category:** 5. External Regulatory Interfaces

**Discussion:**

The Commission issued the "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry", 62 Fed. Reg. 44071 on August 19, 1997. The policy statement established the NRC's expectations for, and intended approach to, power reactor licensees as the electric utility industry moved from an environment of rate regulation toward greater competition. In its policy statement, the Commission anticipated changes, including consolidation, in the electric utility industry. The policy statement states:

> The electric utility industry is entering a period of economic deregulation and restructuring that is intended to lead to increased competition in the industry. Increasing competition may force integrated power systems to separate (or 'disaggregate') their systems into functional areas. Thus, some licensees may divest electrical generation assets from transmission and distribution assets by forming separate subsidiaries or even separate companies for generation. Disaggregation may involve utility restructuring, mergers, and corporate spinoffs that lead to changes in owners or operators of licensed power reactors and may cause some licensees, including owners, to cease being an 'electric utility' as defined in 10 CFR 50.2.[1]

In its policy statement, the Commission recognized the primary role that state and federal economic regulators have served, and in many cases will continue to serve, in setting rates that include appropriate levels of funding for safe operation and decommissioning. The NRC took a number of actions to increase cooperation with state and federal rate and financial regulators to promote dialogue and minimize the possibility of rate deregulation or other actions that would have an adverse effect on safety. The policy further elaborated on NRC's intent to continue to work and consult with the state public utility commissions, individually or through the National Association of Regulatory Utility Commissioners (NARUC), and with the Federal Energy Regulatory Commission (FERC) and other federal agencies to coordinate activities and exchange information. This increased level of interaction and consultation has also been beneficial to the NRC in industry consolidation efforts.

Several regulatory agencies at the federal and state level have jurisdiction over, or interest in, nuclear industry consolidation. Issues concerning nuclear industry consolidation and license transfers (see Issue 2.a.) involve a number of entities besides the NRC, including, as appropriate, state public utility commissions, the Department of Justice (DOJ), FERC, the Securities and Exchange Commission (SEC), and the Federal Trade Commission (FTC).

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[1] Section 50.2 defines "electric utility" as "any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation and distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and state and federal agencies, including associations of any of the foregoing, are included within the meaning of 'electric utility.'"

Traditionally, state public utility commissions have had jurisdiction over electric utilities with the general responsibility to assure safe, reasonable and adequate service at rates which are just and reasonable to customers and the utilities. DOJ is responsible for maintaining competitive markets by enforcing federal antitrust laws. Among other things, FERC has responsibility for regulating the transmission and sale of wholesale electricity. SEC administers federal securities laws that seek to provide protection for investors and to ensure that securities markets are fair and honest. The role of the FTC is to maintain the competitive enterprise and to prevent the free enterprise system from being fettered by monopoly or restraints on trade or corrupted by unfair or deceptive trade practices. The NRC has worked with FERC, SEC and DOJ to develop methods by which the NRC can minimize the duplication of effort on antitrust reviews and still carry out its statutory responsibilities. For example, NRC recently amended its regulations to clarify that it will no longer require owners of operating nuclear power plants to include antitrust information in license transfer applications, eliminating duplication of a review performed by other federal and state agencies. However, NRC continues to require antitrust information for new license applications (see Issue 8.b.). NRC is supporting legislation to eliminate its antitrust review mandate. Other such jurisdictional issues (i.e., antitrust and merger reviews by multiple jurisdictions) between regulatory authorities may emerge as a result of further industry consolidation.

In addition, industry consolidation may affect NRC's interfaces with other federal and or state agencies having collateral jurisdiction, responsibility or interest in nuclear licensees. Potential consolidation issues discussed elsewhere in this document have external regulatory interface elements. These issues include: high-level radioactive waste and low-level radioactive waste management (see Issue 1.d. - Department of Energy (DOE), Environmental Protection Agency (EPA) and state agencies), spent fuel storage and transportation (see Issue 1.c. - DOE, Department of Transportation and state agencies), decommissioning (see Issue 4. - EPA and state agencies) emergency preparedness (see Issue 1.e. - Federal Emergency Management Agency and the associated state agencies) and grid stability and reliability (see Issues 1.f. and 8.a. - DOE and FERC).

Nuclear industry consolidation may also have additional impacts on NRC's interactions with external regulatory agencies. For example, new license applications (see Issue 2.b.) and license renewals (see Issue 2.c.) require consultation or interaction with a number of federal, state and local governmental agencies in the preparation of the environmental impact statement. In the event of bankruptcy (see Issue 7.e.), to ensure that NRC's interests and responsibilities and a licensee's obligations with respect to public health and safety are properly recognized, NRC would ask DOJ to intervene on behalf of the NRC in any bankruptcy proceeding.

**Preliminary Impact Assessment:**

As identified in the Commission's policy statement, the NRC took a number of actions to increase cooperation with state and federal rate and financial regulators to minimize the possibility that rate deregulation or other actions would have an adverse effect on safety. This open dialogue with these regulators has been helpful in minimizing potential adverse effects on nuclear safety as a result of electric utility industry deregulation and restructuring by assuring

appropriate levels of funding for safe nuclear power plant operation and decommissioning. As electric utility industry consolidation continues, a reassessment may be needed of its impact on NRC's role in approving license transfers and on NRC's interfaces with other regulatory bodies at the federal and state levels.

**Recommended Followup:**

There does not appear to be a need for any additional near-term action to address the potential impacts of industry consolidation on NRC's external regulatory interfaces. However, NRC interaction and dialogue with other federal and state regulatory authorities, including national associations representing these authorities, as well as foreign regulatory authorities, should continue in order to identify emerging policy issues related to new trends in industry consolidation. In addition, NRC should continue to consult with its stakeholders to identify emerging policy issues. Through this consultation, the NRC may identify areas of jurisdictional overlap or redundancy which could be eliminated.

**Issue Category:** 6. Fuel Cycle Facilities

**Discussion:**

Industry consolidation activities are occurring throughout the entire fuel cycle as global market conditions become more competitive and force companies to eliminate excess capacity and less economically beneficial operations. Consolidation of fuel cycle facilities has occurred in the past, as most recently experienced in the Westinghouse and ABB merger, which is resulting in the closure of the former ABB fuel fabrication operation (CE Nuclear Power) in Hematite, MO. Other significant past consolidations include Westinghouse and BNFL, Framatome's purchase of the B&W fuel operation, and the reorganization of GE with its Japanese shareholders to create Global Nuclear Fuels (GNF).

Even in light of this recent flurry of consolidations within the nuclear fuel cycle, this consolidation trend appears to be continuing. The staff is currently reviewing an application for the transfer of ownership and control of a materials license as a result of the planned merger of the world-wide nuclear businesses of Siemens AG (Siemens) and Framatome S.A. (Framatome). Also, information from licensees indicates that the Honeywell facility will be acquired by General Electric; and the fact that the United States Enrichment Corporation (USEC) is planning on closing portions of the enrichment cascade at the Portsmouth Gaseous Diffusion Plant and turning them over to the Department of Energy within the next year, coupled with the expiration of USEC stock ownership restrictions in July 2001, may make them a target for acquisition. In addition, due to low uranium market prices, uranium mining and milling companies throughout the world are discussing consolidation, which may lead to further consolidation or possible closure of U.S. fuel cycle facilities that are not fiscally viable under increased global competition. New construction may also involve multiple corporations pooling their resources to build new fuel facilities, as evidenced by Duke, Cogema, and Stone & Webster's plan to build a mixed oxide (MOX) fuel fabrication facility at the Savannah River site.

All commercial nuclear fuel facilities in the United States are required to be licensed or certified by the NRC. Existing domestic fuel facilities are divided into three groups: those that involve the processing of uranium ore into uranium hexaflouride ($UF_6$); those that enrich the $UF_6$ in the $^{235}U$ isotope; and those that fabricate enriched uranium into nuclear reactor fuel. The NRC issues and maintains licenses or certificates for fuel facility operators to authorize their possession and use of source, special nuclear, and byproduct material in accordance with the requirements promulgated in 10 CFR Parts 40, 70, 73, 74, and 76 upon NRC approval of the license or certificate applications. Certain facilities are also subject to Agreement State regulation for source and byproduct materials.

The potential impacts from further fuel cycle industry consolidation will depend on the licensee and the objectives of the consolidation. In cases where a consolidated facility can operate in a more profitable environment, license renewal applications may be submitted to the NRC. Recent inquiries during the ongoing Siemens/Framatome merger indicate that the consolidated company may want to license both facilities under one license, thereby avoiding an additional license fee. Staff is currently preparing a Commission paper that describes the NRC fee methodology and associated constraints on agency action in order to reduce unnecessary

burden, while making regulatory improvements, especially for a declining licensee population. In other cases, the economics of the newly formed conglomerate may lead to facilities closing down, as in the case of the Westinghouse/CE Hematite merger, which would require decommissioning on an earlier schedule than previously forecasted.

In addition, the staff is currently considering whether to realign the fuel cycle inspection program partly because of the trend in industry consolidation, but also to attain improved efficiency and effectiveness. This may involve a range of options, including consolidation of the program in a region, consolidation within NMSS, or maintenance of the status quo.

**Preliminary Impact Assessment:**

The NRC has addressed fuel cycle consolidations in the past, and in all cases the existing regulations and NRC staff resources have been sufficient to ensure the safety of the facilities involved in the mergers. However, due to the consolidation and decommissioning of fuel cycle facilities, there is now only one domestic source of uranium ore conversion to $UF_6$ (Honeywell), and within the next fiscal year there will only be one domestic source of $UF_6$ enrichment (Paducah Gaseous Diffusion Plant). If either of these plants were to close, there could be significant impact on the three remaining civilian nuclear fuel fabricators, and likewise on the entire nuclear industry due to domestic fuel unavailability.

Although the fuel fabrication field has become fairly narrow, with only a handful of fuel cycle facilities now in operation, further consolidation of companies is not out of the question. The international conglomerates BNFL and Cogema have been aggressively acquiring a wide range of fuel cycle operations around the world, which would seem to indicate that they intend to become the predominant companies in the marketplace. Although foreign ownership and transfer of companies is not uncommon in the fuel cycle, complete reliance on foreign sources for nuclear fuel may need to be addressed. This may have national security implications, as noted by Congress and by the FY2001 Energy and Water Appropriations Act, which required DOE to assess the implications for uranium conversion and enrichment.

There are other impacts of fuel cycle facility industry consolidation on NRC oversight and regulation of the industry. For example, although the Commission approved staff plans to proceed with a rulemaking to establish a stand-alone, risk-informed, and performance-based rule for uranium recovery in August 2000, the staff is sending a paper to the Commission stating that the number of facilities to which the rule would apply has reduced significantly since the staff originally made the recommendation, and that the potential future for uranium recovery is bleak over the next several years. This may mean that rulemaking is not needed at this time, is not affordable, or that too few licensees would benefit from such an effort.

**Recommended Followup:**

Many of the impact assessments discussed in other areas are applicable to licensed fuel cycle facilities as well as licensed reactor sites. NRC experience in handling past and pending consolidations within the fuel cycle industry has demonstrated that the existing regulations, guidance, and processes have been able to handle the various consolidation efforts. No

obvious impacts from industry consolidation were identified that could affect the staff's future ability to regulate fuel cycle facilities. However, two followup efforts are recommended. Staff should consider options to consolidate the fuel cycle inspection program, in parallel with efforts to revise the oversight process and the ongoing Phase II Byproduct Materals Review. Staff should also stay aware of pending competition-related business decisions by licensees such as those to shut down portions of operations and outsource that work, similar to what is currently happening at Global Nuclear Fuels-Americas, which is shutting down its uranium recovery circuit and is planning on sending their waste for processing by other facilities. This is to enable the staff to plan for the necessary resources to process the licensing actions that may follow such decisions.

**Issue Category:** 7. Financial

**Issue:** 7.a Foreign Ownership

**Discussion:**

This issue addresses potential unique concerns associated with foreign ownership of reactor facilities that might occur as a result of industry consolidation.

The Atomic Energy Act of 1954, as amended, and the NRC's regulations in 10 CFR 50.38 provide that any person who is a citizen, national, or an agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license. The NRC staff evaluates license transfer applications that involve foreign ownership considerations by using the Final Standard Review Plan (SRP) on Foreign Ownership, Control, or Domination, which was issued on September 28, 1999. In addition, the NRC is required to make a finding that the approval and issuance of a licensing action, including license transfers, would not be inimical to the common defense and security of the United States.

Ownership of domestic operating nuclear power plants has been explored by several foreign utilities. One joint venture, AmerGen, was formed to buy domestic nuclear power plants. This venture was structured as a joint partnership with a U.S. utility owning 50% and a foreign entity owning 50%.[2] Based on a "negation action plan" developed pursuant to the SRP to mitigate foreign ownership, control, or domination, the NRC found that the foreign partner did not control or dominate the safety-related decision making related to the plant. Based on this assessment, the NRC was able to approve AmerGen's purchase of Three Mile Island, Unit 1, as well as subsequent license transfers involving AmerGen. The NRC has similarly analyzed proposals by other entities with some degree of foreign involvement. As industry consolidation progresses, it is anticipated that there will be additional situations in which foreign organizations seek to acquire domestic nuclear power plants and domestic utility organizations. However, the Atomic Energy Act significantly inhibits any foreign acquisitions and the NRC's review will be performed within these constraints as reflected in the Commission's regulations and the SRP. The Commission developed and submitted proposed legislation in 1999 that would remove restrictions on foreign ownership. There has been no action on this proposal.

**Preliminary Impact Assessment:**

Industry consolidation is not likely to have an impact on the complexity of the NRC's process for evaluating foreign ownership, control, or domination. An applicant for several plant licenses would be required to meet the same standards as a single-plant applicant to address any foreign ownership, control, or domination issues in a negation action plan pursuant to the SRP.

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[2] Other than 100 percent ownership by a foreign entity of a U.S. nuclear reactor, there is no pre-established limit above which foreign ownership would be absolutely prohibited.

For example, AmerGen has bought three U.S. nuclear plants so far and has bid on several others. The NRC's review of AmerGen's additional acquisitions essentially followed the same template laid out in AmerGen's initial acquisition. A suitable negation action plan would also likely allow the NRC to make its required findings.

At this time, it appears that current financial regulations and policies are sufficiently flexible to accommodate situations associated with foreign ownership resulting from industry consolidation, within the provisions of current law.

**Recommended Followup:**

Since there is no significant impact, no further effort is recommended at this time.

**Issue Category:** 7. Financial

**Issue:** 7.b License Fee Structure

**Discussion:**

Since FY 1991, the NRC has been required by the Omnibus Budget Reconciliation Act of 1990 to recover approximately 100 percent[3] of its budget, less any amount appropriated to the Commission from the Nuclear Waste Fund and the General Fund, by assessing fees. Additionally, in recent Appropriations Acts, Congress has permitted NRC to perform certain limited activities that are not subject to fee recovery.

The NRC assesses two types of fees to recover its budget authority. First, license and inspection fees, established in 10 CFR Part 170 under Title V of the Independent Offices Appropriation Act of 1952, recover NRC's costs for special services rendered to an individual licensee or applicant. These services include things like inspections and review of applications for the issuance of licenses (new, amended, or renewal). Second, annual fees, established in 10 CFR Part 171 under the authority of the Omnibus Budget Reconciliation Act of 1990, recover generic and other regulatory costs not recovered through 10 CFR Part 170 fees. The generic and other regulatory costs are allocated to classes of licensees on an annual basis.

Continued consolidation is expected to result in fewer owners having more licenses under their domain. It does not appear that industry consolidation will have an effect on the total number of licenses held by the industry.

**Preliminary Impact Assessment:**

NRC's assessment of fees is based on the filing of a request for NRC review and approval, or the existence of an NRC license or approval for individual facilities or licenses. There does not appear to be a need to change NRC's fee structure at this time due to industry consolidation.

**Recommended Followup:**

Since there is no significant impact, no further effort is recommended at this time.

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[3] In order to address fairness and equity concerns related to charging NRC licensees for agency expenses that do not provide a benefit to the licensee, the FY 2001 Energy and Water Development Appropriations Act requires that 98 percent of the NRC's new budget authority, less the appropriations from the Nuclear Waste Fund and from the General Fund, be collected from fees in FY 2001, decreasing by 2 percent per year to 90 percent by FY 2005.

**Issue Category:** 7. Financial

**Issue:** 7.c Insurance

**Discussion:**

This issue is concerned with whether industry consolidation will affect the availability and maintenance of insurance and indemnity for both off-site and on-site coverage.

The Atomic Energy Act of 1954, as amended, and the NRC's regulations at 10 CFR Part 140 require licensees to provide financial protection for the off-site consequences of accidents at nuclear power plants. Insurance and indemnity programs have been developed to provide coverage for third-party liability claims that may arise from any accidents that may occur. Coverage includes $200 million of primary insurance from commercial insurers. In addition, each power reactor licensee is required to provide secondary financial protection through an agreement to pay a retrospective premium that would, if necessary, be assessed against each power reactor licensee up to a maximum of $83.9 million per reactor per accident, with an annual cap of $10 million per reactor. The total available financial protection currently available is about $9 billion per accident.

Additionally, 10 CFR 50.54(w) requires power reactor licensees to provide on-site property damage insurance of $1.06 billion per unit. The NRC imposed this requirement after the Three Mile Island, Unit 2, accident in order to ensure that licensees had sufficient funds to stabilize and clean up a reactor site after an accident. The insurers and insured in the industry adopted a retrospective premium methodology (similar to Price-Anderson) to reduce the up-front premiums associated with on-site insurance. The insurers have performed their own assessments of license transfer applicants' ability to pay retrospective premium assessments. The NRC's policy has been to accept, although not necessarily endorse, the use of retrospective premiums for on-site insurance since it was developed in the early 1980s.

**Preliminary Impact Assessment:**

With respect to Price-Anderson liability coverage, each reactor that a licensee owns will expose it to a potential retrospective premium assessment of $10 million per year. For example, in the event of a major accident, a licensee with 20 reactors could be required to pay retrospective premiums of $200 million annually for about 9 years. If a major accident forced the shutdown of a class of reactors for safety reasons, a consolidated licensee could lose a portion of its primary source of revenue for paying its retrospective premiums.

With respect to on-site insurance, licensees are also exposed to potential retrospective premium payments. These payments would be in addition to the retrospective premium payments required to be made under the Price-Anderson system and could impose additional financial stress on some licensees. Licensees with several plants will likely have access to a greater revenue stream than licensees with fewer plants. Nevertheless, the impact of being required to pay retrospective premiums for many units could be significant if a licensee was otherwise financially stressed.

The NRC has programs in place to evaluate a licensee's or license applicant's ability to pay retrospective premiums for both liability and on-site insurance. With respect to license transfers, this evaluation is part of the safety evaluation that the staff prepares to support approval (or denial) of license transfer applications. In addition, licensees are required pursuant to 10 CFR 140.21 to demonstrate annually that they are able to pay retrospective premiums for their reactors that may be assessed under the Price-Anderson system.

However, for those licensees not involved in license transfers, there is no requirement similar to that under 10 CFR 140.21 for licensees to demonstrate annually their ability to pay on-site insurance premiums. With industry consolidation, the potential burden of such retrospective payments on licensees, especially when coupled with Price-Anderson retrospective payments, could be significant.

**Recommended Followup:**

Since a potentially significant impact has been identified, consideration should be given to developing a rulemaking to establish an annual requirement to demonstrate the licensee's ability to pay on-site retrospective insurance premiums specified in 10 CFR 50.54(w), in parallel with those in 10 CFR 140.21.

In addition, the Commission may be asked to testify on the renewal of the Price-Anderson Act. The potential financial burden associated with the payment of retrospective premiums on those licensees with significant numbers of reactor units may be appropriate to highlight.

**Issue Category:** 7. Financial

**Issue:** 7.d Joint and Several Liability

**Discussion:**

The NRC views all co-owners as co-licensees who are responsible for complying with the terms of their licenses. Co-owners and co-licensees generally divide costs and output from their facilities by using a contractually-defined, pro rata share standard. The NRC has implicitly accepted this practice in the past and believes it should continue to be the operative practice. Most power reactor owners and operators believe that each co-owner should be limited to its pro rata share of operating costs and decommissioning expenses and that the NRC should not look to one owner to "bail out" another owner by imposing joint and several liability on the co-owners. Joint and several liability refers to the legal doctrine of holding all or any one of the co-owners financially responsible for the default of any co-owner.

The Commission addressed the issue of joint and several liability by nuclear power reactor licensees in its "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry" 62 Fed. Reg. 44071 (August 19, 1997). The Commission stated that it

> reserves the right, in highly unusual situations where adequate protection of public health and safety would be compromised if such action were not taken, to consider imposing joint and several liability on co-owners of more than *de minimis* shares when one or more co-owners have defaulted.

On July 25, 2000, the Commission denied a petition for rulemaking to amend the regulations to preclude the imposition of joint and several liability. 65 Fed. Reg. 46661 (July 31, 2000). The Commission emphasized its already articulated policy not to impose operating and decommissioning costs on co-owners in a manner inconsistent with their agreed-upon shares, except in highly unusual circumstances when required by public health and safety considerations, and that it would not seek more than pro rata shares from co-owners with *de minimis* ownership. The Commission stated, however, that granting the petition would unnecessarily limit the Commission's flexibility when highly unusual circumstances affecting the public health and safety would require action by the Commission. The Commission's policy on joint and several liability applies only to nuclear power reactor licensees.

**Preliminary Impact Assessment:**

In its recent denial of the petition for rulemaking, the Commission addressed this issue in the midst of the trend toward industry consolidation. It, therefore, is unlikely that the issue warrants reconsideration in the near future. Indeed, the trend toward consolidation arguably makes it even more important to maintain the Commission's position.

**Recommended Followup:**

Since there is no significant impact, no further effort is recommended.

**Issue Category:** 7. Financial

**Issue:** 7.e Bankruptcy Protection

**Discussion:**

This issue addresses whether industry consolidation raises unique concerns with respect to licensee bankruptcy. The provisions in 10 CFR 50.54(cc) require a licensee to notify the NRC when a voluntary or involuntary petition for bankruptcy is filed under Title 11 of the United States Code against it or its parent or affiliate. Notifications of petitions for bankruptcy are required for fuel cycle facilities under 10 CFR 40.41(f)(1) and 70.32(a)(9)(i) and for spent fuel storage licenses under 10 CFR 72.44(b)(6)(i). The NRC needs information with respect to bankruptcy filings against its licensees in order to determine whether additional action is warranted. Specifically, the NRC must be able to participate in bankruptcy proceedings when necessary to ensure the adequate protection of the public health and safety.

**Preliminary Impact Assessment:**

Industry consolidation, in and of itself, is not expected to increase or decrease the frequency of bankruptcy filings by licensees. However, a bankruptcy filing (either under Chapter 7 or Chapter 11) by a licensee with many plants could have a proportionately greater potential health and safety impact, with respect to sufficiency of operating or decommissioning funds, than a licensee with only one or a few plants. Such impacts would likely be further exacerbated if a licensee with few assets other than nuclear plants were to file for bankruptcy protection.

**Recommended Followup:**

The NRC will continue to monitor licensees' financial health using the reports filed under 10 CFR 50.71(b) and financial trade press resources to determine whether any bankruptcy filings appear to be imminent. As in the past, if a licensee files for bankruptcy protection, the NRC will work to ensure that health and safety interests are adequately represented in bankruptcy proceedings. No additional action appears to be necessary at this time.

**Issue Category:** 7. Financial

**Issue:** 7.f Financial Qualifications

**Discussion:**

The provisions of 10 CFR 50.33(f) require that power reactor licensees demonstrate that they are financially qualified to construct and operate their nuclear plants safely. Licensees that are "electric utilities" are exempt from demonstrating financial qualifications at the operating license stage pursuant to 50.33(f). Currently, the provisions of § 50.33(f) require licensees or applicants to demonstrate financial qualifications, in essence, by showing that projected revenues exceed expenses over the first five years following the licensing action. Additionally, applicants for the transfer of the Three Mile Island, Unit 1, Pilgrim, Clinton, and other plants recently sold have provided parent company guarantees of additional operating expenses. NUREG-1577, Rev. 1, provides additional information on how licensees and applicants may demonstrate financial qualifications for initial licensing and license transfers. The issue is whether industry consolidation will affect the ability of applicants and licensees to demonstrate financial qualifications.

**Preliminary Impact Assessment:**

As industry consolidation proceeds, licensees with a large number of reactor units may be vulnerable to financial stress if a significant number of their units are shut down at one time or are otherwise unable to operate over sustained periods at costs less than revenues received for output from the plants. This situation could be exacerbated for licensees that are no longer diversified companies with substantial non-nuclear assets (e.g., transmission lines, distribution networks, non-nuclear generating units) to provide offsetting revenues. On the other hand, industry consolidation may actually reduce some financial risk by spreading out risk among several units -- that is, it is unlikely that several nuclear units would be shut down at the same time. The remaining operating units could provide sufficient funds to cover expenses for the shutdown plants. Of course, if a consolidated licensee had reactors predominantly of one design, and that design was found to have sufficient safety concerns to cause an extended shutdown of all the units of that design, the financial stress would likely increase significantly.

Once a plant is permanently shut down and enters decommissioning status, financial qualification for operations is no longer a health and safety issue. Rather, the issue then concerns the adequacy of decommissioning funds. However, the ability to provide safety expenditures during the transition period between a permanent shutdown and decommissioning could be affected if the licensee is financially stressed. It is not clear, at present, whether industry consolidation would positively or negatively affect access to funds during such a transition period.

**Recommended Followup:**

The potential impacts of industry consolidation on licensees' financial qualifications are uncertain at present. There doesn't appear to be a need for any immediate response, but the NRC should continue to evaluate its financial qualification program for the transition period between permanent plant shutdown and decommissioning to determine whether any changes are needed to 10 CFR 50.33(f).

**Issue Category:** 8. Non-NRC Regulatory Considerations

**Issue:** 8.a Grid Stability/Reliability

**Discussion:**

As discussed in Issue 1.f, reliability of off-site power and grid stability are safety-significant issues. There is a large and diverse combination of situations possible when the issues of electric industry consolidation, economic deregulation, and separation of generation and transmission functions are considered simultaneously. A consolidation of companies may occur with or without economic deregulation. The parties involved in a deregulated electrical industry could include companies generating electricity, regulated entities such as an Independent System Operator in charge of transmission and distribution, and regulatory agencies such as the Federal Energy Regulatory Commission which may have significant impacts on the market environment in which nuclear power plants operate. Given the complex range of possibilities coming into play in a market environment, the effects on grid stability/reliability cannot be predicted with any confidence. It is prudent to monitor grid stability around nuclear power plants and anticipate scenarios that may require NRC actions.

Deregulation and restructuring of the electric power industry prompted the NRC to conduct studies and initiate interaction with entities such as the National Electricity Reliability Council. A Commission paper was issued on May 11, 1999, on "Effects of Electric Power Industry Deregulation on Electric Grid Reliability and Reactor Safety" (SECY-99-129). A study was commissioned at the University of Wisconsin to examine how deregulation has worked in other industries relative to safety. The staff also responded to grid-related events that have occurred at some plants by getting stakeholders such as the Nuclear Energy Institute and Institute of Nuclear Power Operations involved in discussions regarding industry-sponsored initiatives, and the adequacy of the existing regulatory requirements, such as those in General Design Criterion 17. On the basis of the insights gained so far, it appears that grid reliability issues are primarily a consequence of economic deregulation rather than industry consolidation. This was demonstrated by the California experience of the 2000-2001 time period.

**Preliminary Impact Assessment:**

Experience in other industries has shown that the transition phase from a regulated to a de-regulated activity is often accompanied by unanticipated difficulties. This may be the case with the impacts of deregulation on electrical grid performance. Prior to consolidation and economic deregulation, licensees of nuclear power plants were "utilities" who controlled both the generating plants and the distribution grid. With consolidation and economic deregulation, these two functions are generally within separate corporate entities. Thus, NRC licensees may no longer have direct control of the grid; and NRC regulations which addressed grid reliability by the licensee would not apply to the grid operator.

At this time, operational experience appears to indicate that grid stability/reliability will be strained without additional capacity in transmission and generation. In a deregulated market, if sufficient economic incentives are not provided for maintaining adequate reserve capacity, cost

control will lead to a decrease in reserve capacity with corresponding problems during peak periods, power system disturbances, etc. The heavy cost burden of maintaining sufficient spinning reserve that does not produce revenue may or may not be transferrable to the consumer.

Reductions in system reserve margins and unregulated fluctuations may increase the likelihood of trips that can challenge safety systems in ways not considered in the plant's probabilistic risk assessment (PRA). Grid stability/reliability responsibility may move from the licensees to independent grid operators. The frequency and voltage level under degraded grid conditions may present safety concerns relative to supporting safety system operations. Licensees must assure that they have adequate procedures to monitor grid reliability and stability, and deal with their effects on plant operations.

Experience has shown that nuclear power plants that perform well tend to be low cost producers, thus offering strong economic incentives for the licensee to keep operations proceeding smoothly. As a consequence, licensees are likely to pay close attention to conditions outside the immediate confines of the plant. This may increase the likelihood that grid disturbances will be noticed by licensees and that they will anticipate potential problems. Additionally, if a licensee operates plants at multiple sites which feed power into a grid, there would be an incentive to assure grid stability on a company-wide basis. This is likely to lead consolidated licensees to coordinate activities among their sites to improve grid stability. For example, on-line maintenance performed at each of the sites may be coordinated to reduce the probability that more than one plant might trip off-line.

The NRC has sufficient regulatory and inspection mechanisms in place to identify and respond to nuclear safety concerns that may develop as a result of grid-related stability and reliability issues. As experience is gained with the deregulated industry, changes to the regulatory framework may be required. The NRC has informed the industry stakeholders of its concerns and has observed that organizations such as Nuclear Energy Institute and the Institute for Nuclear Power Operations are responding with their own initiatives to address the concerns. Any proposals to change the regulatory framework will be based on information from the NRC's monitoring activity as well as assessments of operational experience.

**Recommended Followup:**

The NRC has established communication channels with industry stakeholders and other government and non-governmental institutions to obtain accurate and timely information. The recommended followup is to monitor the developments unfolding in different parts of the country and continue the current efforts to assimilate information.

**Issue Category:** 8. Non-NRC Regulatory Considerations

**Issue:** 8.b Antitrust Considerations

**Discussion:**

On June 18, 1999, the Commission issued a Memorandum and Order in the Wolf Creek license transfer proceeding dismissing a petition to intervene on antitrust grounds. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999) (Wolf Creek). In *Wolf Creek*, the Commission "concluded that the Atomic Energy act does not require or even authorize antitrust reviews of post-operating license transfer applications, and that such reviews are inadvisable from a policy perspective." The Commission directed the staff to initiate a rulemaking to clarify the Commission's regulations to remove any ambiguities and ensure that the rules clearly reflect the views set out in the *Wolf Creek* decision. On August 18, 2000, the final rule became effective. The Commission stated that "because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct this type of review and has decided that it no longer will conduct them, no antitrust information is required as part of a post-operating license transfer application. Because the previous regulations did not clearly specify which types of applications are not subject to antitrust review, these clarifying amendments bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews." 65 Fed. Reg. 44649 (July 19, 2000).

The *Wolf Creek* decision and the clarifying rule, which apply only to post-operating license transfers, eliminate antitrust reviews for transfers of facility operating licenses which occur after the issuance of the initial operating license for the facility. They do not affect the Commission's continuing statutory obligation to conduct antitrust reviews of applications for new facility operating licenses. The Commission has repeatedly sought legislation to eliminate all Commission antitrust reviews, but such legislation has not been enacted. Therefore, antitrust reviews for new facilities must continue to be conducted.

**Preliminary Impact Assessment:**

The Commission's decision in the *Wolf Creek* case, and the final rule affirming that decision, reflect the Commission's conclusion that the trend toward increased consolidation and deregulation in the nuclear power industry warranted a close look at the limited antitrust authority conferred upon the Commission by the Atomic Energy Act. The result was the Commission's conclusion that the Act does not require antitrust reviews for post-operating license transfers and, even if they are authorized, they no longer will be conducted as a matter of sound policy. Although that result applies only to operating license transfers occurring after the initial operating license has been issued, the Commission's policy reasons for eliminating those reviews which it was not required to conduct under the Atomic Energy Act apply equally to antitrust reviews of initial operating license applications for new facilities. It is, therefore, likely that the Commission will continue to seek legislation to eliminate all Commission antitrust reviews because such reviews duplicate responsibilities of other agencies that have more expertise in this area. Until and unless such legislation is enacted, however, antitrust reviews

for new facilities must continue to be conducted. In a consolidated and deregulated industry, and where licensees are not electric utilities, those reviews could be more complex for an applicant that already owns a number of nuclear (and other electric generating) facilities. If so, the antitrust reviews conducted by the staff may require more resources than have been used for such reviews in the past.

**Recommended Followup:**

No further effort is recommended at this time, except that projected resource needs for new applications should account for more complex antitrust reviews.

## Feedback From Working Group Meeting With Exelon

The Working Group held a public meeting with Exelon Generation Company on February 8, 2001, to get Exelon's perspective on selected issues related to industry consolidation. Significant points made by Exelon follow.

1. The licensee was asked to provide its views on the suitability and adequacy of the reactor oversight process (ROP) for identifying significant performance trends and incipient problems in a deregulated and consolidated environment. The NRC staff was interested in the licensee's perspective on potential weaknesses and problems with the ROP. The licensee commented that it was satisfied with the current regulatory structure. In the licensee's view, the ROP is relatively transparent to its regional operating groups and individual reactor sites. The licensee further commented that it did not see the need for any changes to the current NRC organizational alignment, expressing confidence in continuing to use the Nuclear Energy Institute as a forum to address potential inconsistencies in ROP implementation among regions. However, the licensee suggested that the NRC consider conducting one consolidated problem identification and resolution (PI&R) inspection, rather than separate PI&R inspections at each of the licensee's sites. The licensee's rationale for this approach is that their corrective action program, and likely other consolidated licensees' programs, consist of processes that are common across the sites. These common processes could be effectively evaluated with one corporate-level inspection. The implementation aspects of the corrective action program could be assessed using a sampling-type inspection at selected sites. The licensee suggested that the scope of the site inspections be a function of the level of confidence the NRC has in the licensee's self-assessment efforts. The more comprehensive a licensee's self-assessment activities, the more limited the inspection sample size. In summary, the licensee suggested that the NRC take advantage of the "economies of scale" concept inherent in consolidation by looking for ways to consolidate inspection activities.

2. Exelon plans to make combined licensing submittals wherever there is applicability to more than one unit. Exelon has already done this on several occasions with power uprate, improved standard technical specification, and relief request applications that involved two project directorates. In each case the staff assigned a single lead project manager with satisfactory outcomes. No difficulties have been experienced to date in interfacing with two project directorates.

3. Exelon is sensitive to the potential grid and offsite power reliability impacts of industry deregulation and restructuring and is paying careful attention to this issue. Exelon coordinates closely with grid operators and participates in industry initiatives relative to assuring offsite power and grid reliability.

**Attachment 3**

4. Exelon's experience with the NRC's license transfer process was positive. The process was efficient and timely, there was no observed overlap or redundancy with other regulatory agencies, and the assignment of a single lead project manager was effective.

5. The NRC should review relevant current regulations, processes, and guidance and implement necessary changes to enable efficient and predictable processing of anticipated new reactor license applications.

6. Legislation should be changed to ease foreign ownership restrictions.

7. The NRC's right to impose joint and several liability on co-owners is a disincentive to minority ownership of a nuclear power plant.

8. Effective communications between NRC staff and cross-regional licensees are critically important.

*PROPOSED FEDERAL REGISTER NOTICE REQUESTING STAKEHOLDER COMMENTS*

NUCLEAR REGULATORY COMMISSION

PRELIMINARY IMPACT ASSESSMENT OF ELECTRIC INDUSTRY CONSOLIDATION ON NRC OVERSIGHT;

REQUEST FOR COMMENTS

AGENCY: Nuclear Regulatory Commission (NRC)

ACTION: Request for comments

SUMMARY: Economic deregulation of the electric utility industry has resulted in consolidation and restructuring of the nuclear power industry. The transformation of the once strictly regulated industry has led to separation of the generation, transmission and distribution sectors, corporate mergers and asset transfers, acquisitions by outright purchase, and a general transition to a nationwide competitive market. There have also been numerous nuclear power plant license transfer applications, which the NRC staff must review and approve before a license can be transferred to a new entity.

The NRC staff has identified and performed a preliminary assessment of the impacts of nuclear electric industry consolidation on the NRC and whether the NRC needs to change its regulations, policies, processes, guidance, and organizational structure to continue to meet its strategic public health and safety goals. The initial object of this effort is to identify impacts that need to be considered further.

The NRC staff has identified a number of consolidation and a few deregulation-related, impacts on NRC oversight of the nuclear industry, grouped them by category, and performed preliminary impact assessments. The individual assessments follow this notice.

**Attachment 4**

**NOTE: SENSITIVE INFORMATION - LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE**

The NRC staff requests comments and suggestions from stakeholders on the identified issues and the preliminary impact assessments. The NRC staff will consider all comments received. A public meeting will be held on _____ at the NRC Headquarters to discuss the impact issues, the preliminary impact assessments, and the comments received. The product of this effort will be staff recommendations of impacts that the Commission needs to consider further.

Dates: The comment period ends ____(30 days)_____, 2001. Comments received after this date will be considered if it is practical to do so, but the staff guarantees consideration only of comments received on or before this date.

Addresses: Mail written comments to Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Comments may also be sent by completing the online comment form for _____ at http//www.nrc.gov.

Deliver comments to Room 6D59, Two White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

For further information contact Herbert N. Berkow, Mail Stop_____, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone (301) 415-_____ and e-mail at HNB@NRC.GOV.

**NOTE: SENSITIVE INFORMATION - LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE**

Dated at Rockville, Maryland this day of 2001.

FOR THE NUCLEAR REGULATORY COMMISSION

Herbert N. Berkow, Director
Project Directorate II
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

NOTE: SENSITIVE INFORMATION - LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE

# POLICY ISSUE
## INFORMATION

September 11, 2009 SECY-09-0126

FOR: The Commissioners

FROM: Thomas M. Boyce, Director
Office of Information Services

SUBJECT: STATUS OF THE CONTROLLED UNCLASSIFIED INFORMATION INITIATIVE

PURPOSE:

To provide the Commission with information regarding the Governmentwide transition to the Controlled Unclassified Information (CUI) Framework and its impact on the U.S. Nuclear Regulatory Commission (NRC).

SUMMARY:

This paper provides information on the progress made by the National Archives and Records Administration (NARA) CUI Office on implementing the CUI Framework. The effort is intended to standardize the handling of CUI across the Federal Government and establish procedures to make it easier to share CUI among Federal, State, local, tribal, and private sector entities and foreign partners. For the NRC, the transition to the CUI Framework will include Safeguards Information (SGI) and all Sensitive Unclassified Non-Safeguards Information (SUNSI).

CONTACT: Donna Sealing, OIS/IRSD
301-415-5804

BACKGROUND:

As a result of a post-September 11, 2001, study, Congress enacted Section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004 directing the President to establish an Information Sharing Environment (ISE) across the Federal Government. On December 16, 2005, then-President George W. Bush issued a memorandum for the heads of the executive departments and agencies entitled, "Guidelines and Requirements in Support of the Information Sharing Environment" (Presidential Memorandum). Guideline 3 of the Presidential Memorandum required an inventory of all Executive Branch sensitive but unclassified information (SBU). Guideline 3 also required the standardization of procedures for designating, marking, and handling SBU. It required submission, for the President's approval, of recommendations for the standardization of SBU procedures for homeland security information, law enforcement information, and terrorism information, hereafter collectively referred to as terrorism-related information. Recommendations for the standardization of procedures for all other types of SBU not considered terrorism-related information were required within 1 year of the date of the memorandum.

The resulting inventory revealed more than 107 unique markings and over 130 different handling processes for SBU, which includes categories such as "Official Use Only" and "Safeguards Information." Current processes and procedures—some driven by statute and regulation and some by department and agency policy—have confused producers and users of SBU; impeded the timeliness, accuracy, and flow of information that should be shared, particularly with first responders; and failed to control the flow of information that should not be shared.

To address these matters, on May 9, 2008, President Bush issued a memorandum for the heads of executive departments and agencies entitled, "Designation and Sharing of Controlled Unclassified Information (CUI)." This memorandum adopts, defines, and institutes CUI as the single categorical designation for all terrorism-related information referred to as SBU in the ISE. It also establishes a corresponding CUI Framework for designating, marking, safeguarding, and disseminating terrorism-related CUI. Furthermore, the memorandum designates NARA as the Executive Agent (EA) to oversee and implement the CUI Framework.

The EA established a CUI Council (CUIC), comprising Federal, State, and private sector stakeholders, including the NRC, to provide advice to the EA. The CUIC has established CUI working groups and is currently developing CUI policy standards and implementation guidance. While development of the CUI Framework and implementation of its standardized procedures will be required only within the Executive Branch of the Federal government, efforts proceed with the goal of developing a universal framework that simplifies and encourages voluntary compliance even among non-Federal information sharing partners, such as State, local, tribal, and foreign governments and the private sector. Staff members from the Office of Information Services (OIS) and the Office of Nuclear Security and Incident Response (NSIR) represent the NRC in the working groups, with support from the Office of the General Counsel (OGC). The Presidential Memorandum requires Federal departments and agencies to implement the CUI Framework within 5 years of its date of issuance. During this time, agencies will work with NARA to develop and issue CUI policy standards, define business processes, develop technology designs and testing strategies, and build performance measurement and training plans.

DISCUSSION:

The NRC received an exception for SGI within the current CUI Framework, one of only four Federal programs to be "grandfathered" from the CUI Framework because those programs have more stringent statutory or regulatory requirements than those contemplated by the CUI Framework. The U.S. Department of Homeland Security manages the other excepted programs, which are Chemical Vulnerability Information, Sensitive Security Information, and Protected Critical Infrastructure Information. The extent of the exception is limited, and the primary CUI Framework structure will be imposed on the excepted programs; however, some accommodations will be made to address the particular needs of each program. The CUI Framework will "grandfather" SGI in that the safekeeping and storage requirements for SGI will remain unchanged; however, changes will be required for SGI in terms of marking and training. The details regarding the integration of SGI into the CUI Framework, while still maintaining the integrity of the SGI program as established by the Atomic Energy Act, remain to be developed.

In Staff Requirements Memorandum (SRM) - COMSECY-05-0054, "Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)," dated June 29, 2006, the Commission directed the staff to develop a simplified policy, including a two-tiered handling regime, for SUNSI. Because of the development and anticipated implementation of the CUI Framework, the staff has deferred action on this SUNSI revision requirement. The CUI Framework aligns with the requirements outlined in the SRM. Therefore, the staff plans to apply the CUI Framework to include all SUNSI, not just terrorism-related information.

On May 27, 2009, President Obama issued a memorandum for the heads of executive departments and agencies entitled, "Classified Information and Controlled Unclassified Information." This memorandum echoes the principles and goals expressed in President Obama's memorandum of January 21, 2009, entitled "Freedom of Information Act," while acknowledging the need to prevent the public disclosure of information that would compromise privacy, national security, or other legitimate interests. The memorandum establishes an interagency task force to review CUI, recognizing that such an initiative has already commenced under the CUI Framework but expressing the desire for more deliberate action. It charges the interagency task force with examining the progress made on the CUI initiative, considering the proper balance between the necessary protection of relevant interests and appropriate sharing of information. Of note in this memorandum is a requirement for the task force to consider whether the CUI Framework should be expanded beyond terrorism-related information and include all SBU. As a practical matter, the NRC staff, along with that of most other agencies, had planned to apply the CUI Framework across the board to all SUNSI-like information; this direction would not impact the NRC beyond what the agency had already planned to implement under the present scheme.

The Obama memorandum directed the task force to present recommendations by August 27, 2009, on how the Executive Branch should proceed regarding the CUI Framework, considering the Administration's presumption in favor of openness; the value of standardizing procedures for designating, marking, and handling SBU; and the need to prevent improper public disclosure of SBU. The task force provided its report to the President on August 25, 2009. The President has not yet responded.

The CUIC has established working groups to help formulate new CUI policies. The CUIC refers to these new draft policies as straw men. The working groups are developing straw men in the areas described below.

**Safeguarding:** This policy will provide the physical and electronic protection guidelines for the storage, transmission, and destruction of CUI. All CUI will merit one of two levels of safeguarding procedures: standard (marked "Controlled") or enhanced (marked "Controlled Enhanced"). Standard safeguarding is a handling requirement that means that the information is subject to baseline safeguarding measures that reduce the risks of unauthorized or inadvertent disclosure. Enhanced safeguarding is a handling requirement that means that the information is subject to measures more stringent than the "Controlled" level because inadvertent or unauthorized disclosure would create a risk of substantial harm. It is envisioned that 90 percent of CUI will be at the "Controlled" level. Development of this straw man is "at rest" (i.e., completed), as it is considered to be fully developed but may receive minor editing before finalization (Enclosure 1).

**Dissemination:** Currently, sensitive information is disseminated based on the "need-to-know" principle. Under the CUI Framework, this principle shifts to information being "shared to further the execution of lawful or official mission purposes." There will be two levels of dissemination: "standard" and "specified." Most CUI will merit "standard" dissemination. Numerous "specified" dissemination working group meetings have taken place. The goal in writing the specified dissemination instructions is to standardize the instructions to the lowest possible common denominator so that all agencies can use one specified dissemination instruction for each type of information rather than developing their own instructions. Specified dissemination instructions are being developed for information falling into the following categories: procurement sensitive/source selection, business/proprietary, law enforcement, export controlled, security, information not releasable to foreign nationals, intellectual property, legal, and personally identifiable information (PII). The CUIC must approve specified dissemination instructions to be given for any documents, and the instructions must be published in the CUI registry. Development of this straw man is also "at rest" pending final editing (Enclosure 2).

**Dispute Resolution:** There will be two processes related to dispute resolution: one for interagency disputes and one for disputes involving entities outside of the Executive Branch. The CUIC's philosophy is that these disputes should be resolved at the lowest level possible. If this proves unsuccessful, the CUIC will be the final arbiter. Development of this straw man is also "at rest" pending final editing (Enclosure 3).

**Designation:** The agency head, or a senior agency official appointed by the agency head, will be responsible for designating, through specific written guidance, the categories of information within the agency that may be identified as CUI and carry an authorized marking. *Designation* is currently defined as the determination as to whether a general category of information (e.g., PII, business/proprietary information, etc.) may be protected as CUI and, if so, the level of protection required and dissemination authorized. *Identification* is currently defined as recognition by an authorized individual that specific information fits within a general category of information which has been previously *designated* as CUI. The agency written guidance must be provided to the CUI EA for review which must be completed before issuance of the guidance to the agency. Development of this straw man is also "at rest" pending final editing (Enclosure 4).

When the EA asks agencies to provide their designated CUI categories for review, the NRC staff would propose that the Commission appoint the Deputy Executive Director for Corporate Management, in his role as the agency Chief Information Officer, as the senior agency official responsible for designating NRC information categories as CUI. At this time, no decision is necessary. The staff will forward the appointment paperwork to the Commission when the EA requests agencies to provide their designated CUI categories for review.

**Marking**: Development of the straw man for marking has been the most contentious issue. CUI markings will require the name, office, and agency of the document originator, as well as the title of documents from which the CUI was derived, on the first page of the created document and in e-mail, if not readily apparent from the e-mail address. According to many agencies, this requirement would impose an onerous administrative burden, especially the need to list the name of the creator. Because staff members leave or change jobs, having the name of the creator on the document would add little value.

In defense of the requirement, the Chairman of the CUIC, who is also the Director of the NARA Information Security Oversight Office responsible for implementing Federal policy for classified national security information, explained, at the CUI working group meeting on May 28, 2009, the reasoning for imposing marking requirements for CUI that would be more stringent than most agencies expected or desired. He stated that 43 percent of markings on classified documents are incorrect and that the CUIC did not want to repeat the same mistakes in the marking of CUI documents. In his view, the primary purpose for including the originator's name on a CUI document is to engender individual accountability, stating that it is critical for individuals to take personal responsibility for the documents they produce. Thus, although recognizing that people will not stay in the same position indefinitely, the CUIC Chairman believes that the requirement to place one's name on a document will reduce the inclination to identify information as CUI when it should not be marked as such. To respect the information of agencies, identification of the source document will be required whenever a CUI document is created using information from another CUI document. The stringent requirements will therefore ensure rigor and specificity in the designation of CUI.

Portion marking will also be required within a CUI document so that paragraphs or sections that contain CUI will be easily identified; this may aid in identifying the information of other agencies. The CUIC will only require CUI procedures to apply prospectively, except when documents created before implementation of the CUI Framework, referred to as "legacy documents," enter the ISE. Thus, an agency would be required to perform CUI marking of legacy documents only if sharing the information outside the agency. Discussion is still ongoing about whether to require the re-marking of legacy documents in shared databases from which multiple agencies may retrieve the documents as needed.

The NRC staff will need to determine how to identify the particular type of CUI contained in documents. For example, to conspicuously indicate the presence of SGI in a document in accordance with regulatory requirements, double markings will be necessary. The specific markings have not been developed; however, there is verbal agreement with the EA that the marking will include the term "Safeguards Information." Current SUNSI markings in use by the NRC indicate the category of SUNSI (e.g., proprietary information, security-related information, Privacy Act/PII). This information is used to determine profiling in the Agencywide Documents Access and Management System (ADAMS). This profiling aids the ADAMS staff in identifying

documents for periodic review and documents that should not be made publicly available. With the implementation of the CUI Framework, the NRC will need to incorporate this scheme of document marking and identification to aid in ADAMS profiling. This straw man is still in draft (Enclosure 5).

**Life Cycle:** "Life cycle" refers to the duration of CUI controls on the information and records management retention of a document. The life cycle straw man specifies that the information should be decontrolled as soon as it no longer requires the protection of the CUI Framework. It requires automatic decontrol of CUI after 10 years unless a statute requires longer controls. However, agency heads may request control periods beyond 10 years at the time a document is created. Any variation from this 10-year period, either shorter or longer, will be indicated by a statement placed conspicuously on the face of the document that identifies the decontrol date or event.

The NRC appears to be the only Federal agency that already has a periodic review policy for its documents. NRC policy requires a review after 7 years for certain categories of SUNSI to determine whether the information should be decontrolled. The agency will need to rescind this policy when the CUI Framework is implemented. This straw man is still in draft (Enclosure 6).

**CUI Registry:** The CUI Registry will contain precise, detailed guidance on safeguarding and document dissemination standards and will constitute the definitive authority for document marking and handling. (The NRC was unsuccessful in its attempts to convince the CUIC to refrain from using the term "safeguarding," in the sense of "protection," to avoid confusion with NRC's SGI program.) Examples of the planned guidance include detailed specified dissemination instructions, encryption criteria, and guidance on exceptions. The registry has not yet been developed.

**Regulatory Changes:** The EA will explore whether existing laws need to be changed for the "grandfathered" CUI categories. The NRC will eventually need to revise its regulations on SUNSI and SGI to comport with the changes imposed by the CUI Framework. A straw man for regulatory changes will not be developed.

**Training:** NARA is developing a CUI Web-based training and awareness program aimed at both general and specialized stakeholder audiences. NARA will also develop and provide a classroom training course and will provide onsite briefings, meetings, and conferences, as requested. NARA's initial timetable to develop the training has been extended from July 2009 to April 2010. Agencies will be responsible for developing their own CUI-specific training (e.g., SGI training for NRC staff and stakeholders). A straw man for training will not be developed.

**Exceptions:** This topic area pertains to the four categories of information that are "grandfathered" into the CUI Framework, as indicated earlier. Working group meetings related to exceptions have yet to take place, although representatives from the CUI Office have visited the NRC to discuss SGI with NSIR and OIS staff. In an effort to address questions raised by the task force, representatives from each of the excepted programs met with the Chair and Co-Chair of the task force to explain why the various categories of information could not be and

should not be made a part of the standard requirements currently being written for CUI. Task force representatives made no commitments and did not indicate that a modification was pending for the current categories of exceptions.

**Conclusions:** For the NRC, the major impacts and changes arising from this initiative will include the following areas: document marking and encryption, regulatory revisions for SUNSI (Title 10 of the *Code of Federal Regulations* (10 CFR) 2.390, "Public Inspections, Exemptions, Requests for Withholding") and SGI (10 CFR 73.21, "Protection of Safeguards Information: Performance Requirements"; 10 CFR 73.22, "Protection of Safeguards Information: Specific Requirements"; and 10 CFR 73.23, "Protection of Safeguards Information—Modified Handling: Specific Requirements"), management directive changes, management of legacy documents, implementation of the CUI milestones, and training. Currently there are sufficient budgeted resources to support work on the CUIC and working groups in FY 2010 and 2011. Until we know the final requirements that will result when the straw men are finalized, the true future resource impacts remain uncertain. Therefore, resources will be addressed in future Planning, Budgeting, and Performance Management processes.

Given the complexity of the task to implement the CUI Framework at the NRC, the representatives of OIS, NSIR, and OGC intend to keep the Commission informed on a regular basis of the progress of this effort. As agreed during the CUI briefing to the Commissioners' technical assistants on June 2, 2009, in addition to this Commission paper, OIS and NSIR representatives will prepare Commissioner's Assistants Notes to keep the Commission informed on future progress in the transition to the CUI Framework. By doing so, when the NRC receives the CUI Framework for final comment, especially if it is a short turnaround comment period, the Commission will have been fully informed.

COORDINATION:

OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

On August 20, 2009, NARA, the EA for the CUI Framework, informed the NRC that the information outlined in this paper and the enclosed straw men cannot be released to the public as it has been designated as "Official Use Only – Predecisional Information."

**/RA/**
Thomas M. Boyce, Director
Office of Information Services

Enclosures:
As stated (6)

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*/RA/*
Thomas M. Boyce, Director
Office of Information Services

Enclosures:
As stated (6)

**ADAMS Accession No.: Pkg ML092220578; Paper ML092220553** *e-mail concurrence

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# Subpart AA. Safeguarding

## Section 1.0 – General Policy

(a) The executive branch strives to share information to the widest extent possible. In all cases, care should be taken not to place undue burdens on the recipients of CUI. Reasonable safeguarding measures are required for all CUI to protect it from unauthorized or inadvertent disclosure. Measures to protect data confidentiality shall be implemented to manage the risks associated with the processing, storage, transmission, and destruction of CUI. The CUI Executive Agent shall identify reasonable safeguarding measures in detail in the CUI Registry.

(1) At the "Controlled" level: The purpose is to enable rapid, efficient, and affordable sharing of CUI. Required safeguards are limited to measures that are believed to be practicable for authorized recipients of CUI.

(2) At the "Controlled Enhanced" level: More stringent safeguarding measures are required due to the particularly sensitive nature of the information. Safeguarding this CUI is sufficiently critical to justify the imposition of potentially significant operational inefficiencies, delays, or financial burdens.

(b) The Controlled level shall be the standard, baseline safeguarding level. Providers of CUI shall require safeguards at the "Controlled Enhanced" level only when the necessity for doing so is clear. Agency heads shall limit the designation of information as "Controlled Enhanced."

(c) The originator of CUI shall not impose additional safeguards beyond those published in the CUI Registry upon a recipient outside of the originating Agency.

(d) Authorized recipients outside of the executive branch shall safeguard CUI in accordance with this Directive. Entities outside of the executive branch may adopt alternative equivalent measures, using risk management principles.

## Section 2.0 – Waivers for Exigent Situations

(a) Agency heads, or their Designees, may authorize temporary waivers to the safeguarding requirements within their organization in emergency situations. At the resolution of the emergency situation, the Agency shall reinstitute the safeguarding requirements.

(b) Agency heads, or their Designees, may authorize temporary waivers to the safeguarding requirements for personnel conducting field operations where the operating environment precludes their ready access to the means to adhere to the safeguarding requirements.

(c) Agency heads, or their Designees, shall report waivers in writing to the CUI Executive Agent promptly.

(d) The CUI Executive Agent shall publish notice of waivers in the CUI Registry.

(e) The CUI Executive Agent may rescind safeguarding waivers for cause.

**Section 3.0 – Controls in Use**

(a) Agency heads are responsible for implementing a system of control measures, in accordance with applicable guidance published in the CUI Registry, for CUI in their possession or control. These control measures shall be designed to reduce the risk that CUI can be exposed to or directly observed by an unintended recipient or that conversations regarding CUI can be overheard by an unintended recipient.

(b) All CUI shall be marked as per Subpart XX of this Directive.

(c) CUI may be reproduced without the permission of the originator as required to carry out official duties, provided that the reproduced material is marked in the same manner as the original material. Printing of copies from electronic media shall be considered reproduction.

| For future development: policy for when CUI is incorporated, paraphrased, restated, or generated in new form into a new document to be developed with the marking section, specifically portion marking. |
|---|

(d) CUI may be processed only on information systems which employ state-of-practice computer security measures published in the CUI Registry.

| For CUI Registry: FISMA standards for executive branch. |
|---|

(e) CUI shall not be processed on devices where physical access to the device is available to the general public.

| For CUI Registry: This applies to use of computers in libraries, internet cafes, hotel business centers, etc. |
|---|

(f) *Personally owned electronic devices.* CUI shall not be processed on personally owned electronic devices unless the Agency head or his/her Designee has a process in place to adequately protect CUI on the device. The process must require control measures on the device to be approved by an Agency Information Security official. The following safeguards also apply:

(1) At the Controlled Level: the agency process shall limit the saving of CUI on personally owned electronic devices based on risk management principles.

(2) At the Controlled Enhanced Level: the agency process shall prohibit individuals from saving CUI on personally owned electronic devices.

(g) When CUI is processed on mobile devices outside of a Controlled Environment, authentication procedures are required according to the standards published in the CUI registry.

> For CUI Registry: Use a "time-out" function requiring user re-authentication after 30 minutes inactivity. E-authentication identity proofing and authentication at level 2 or higher is required.

**SECTION 4.0 – Storage**

(a) *General.* When CUI is not under the direct control of an individual authorized to access it, the CUI shall be protected by:

(1) At the Controlled Level: For each access path, one physical or electronic barrier that shall deter access from those not authorized to access the CUI.

(2) At the Controlled Enhanced level: For each access path, two physical or electronic barriers that shall deter access from those not authorized to access the CUI. A physical barrier and an electronic barrier can be combined to satisfy the two barrier requirement.

(b) *Physical barriers.* Examples of physical barriers include, but are not limited to, an area protected by a human guard, a key card system or lock, and locked receptacles (e.g., file drawer, desk drawer). Specific standards shall be published in the CUI Registry.

(c) *Electronic barriers.* An electronic barrier shall control access in a way that requires authentication of the user or provides encryption at the standards published in the CUI registry. A controlled interface that meets standards set forth by the CUI Executive Agent shall be used on an Internet facing path. This controlled interface shall constitute one barrier on the Internet facing path.

> For CUI Registry: In order for authentication to qualify as a storage barrier, for either level, the standard shall be at e-authentication level 2 or higher which requires a username and password. In order for encryption to qualify as a storage barrier at the Controlled Level, the standard would be FIPS 140-2 Security Level 1. In order for encryption to qualify as a storage barrier at the Controlled Enhanced Level, the standard would be FIPS 140-2 Security Level 2.

(d) Knowledge of the password or access to the key necessary to penetrate the barrier shall be limited based on operational requirements to the personnel who are authorized to access the CUI.

(e) *Storing in the open.* Agency heads may allow unattended storage openly on desks or tables, or in unlocked containers within a Controlled Environment in which there exists adequate

physical barriers and access controls as indicated in section (b) above, sufficient to deter unauthorized entry.

(f) *Removable electronic media.* All CUI on removable electronic media shall be protected by an electronic barrier of encryption at the standards published in the CUI Registry.

| For CUI Registry: Encryption at the FIPS 140-2 Security Level 1 for Controlled and at FIPS 140-2 Security Level 2 for Controlled Enhanced. Controlled Enhanced CUI will still need an additional barrier. |
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**SECTION 5.0 – Transmission**

(a) CUI shall be transmitted and received in a manner that reduces the risk of inadvertent or unauthorized disclosure and that provides a method which assures timely delivery to the intended recipient. While transmitting or receiving CUI, the CUI Dissemination policy shall be followed.

(b) The sender is responsible for compliance with the safeguards established by the CUI Executive Agent when sending CUI. The sender is not responsible for ensuring that the recipient properly safeguards the CUI. The recipient has the responsibility of safeguarding received material in accordance with the CUI Memorandum, this Directive, and guidance published in the CUI Registry.

(c) Agency heads shall establish internal procedures, based on the CUI Memorandum, this Directive, and guidance published in the CUI Registry, that are designed so that CUI is received in a manner that reduces the risk of inadvertent or unauthorized disclosure.

(d) In addition to the general policy set forth in subsections (a) through (c), certain methods of transmission require additional safeguards in order to protect CUI from unauthorized or inadvertent disclosure. These additional transmission safeguards are set forth in Sections 5.1 through 5.3.

**Section 5.1 - Physical transmission**

(a) While in transit outside of a Controlled Environment and not under the direct control of a person authorized to access the CUI, unencrypted CUI shall:

(1) At the Controlled Level: be enclosed in a single layer of either a sealed, opaque wrapping or a sealed or locked opaque container.

(2) At the Controlled Enhanced level:

(i) be enclosed in two layers of sealed opaque wrappings or sealed or locked opaque containers, both of which provide reasonable evidence of tampering and which conceal the contents. The outer wrapping or container shall not contain an

indication that CUI material is enclosed. The inner wrapping or container must be marked to indicate the designation of the CUI contained therein.

(ii) be transmitted only by express mail, registered mail, certified mail or first class/priority mail with a prohibition against forwarding if transmitted by U.S. Postal Service. A signature receipt is required.

(iii) be transmitted by courier only if the courier utilizes receipts upon pickup and delivery.

(iv) be transmitted by commercial delivery service only if the commercial delivery service provides automated in-transit tracking of the CUI. The signature waiver block shall not be executed.

(b) While in transit outside of a Controlled Environment and not under the direct control of a person authorized to access the CUI, CUI encrypted at the standard published in the CUI registry:

(1) At the Controlled level: shall not require a wrapping or container.

(2) At the Controlled Enhanced level: shall require a single layer of either a sealed, opaque wrapping or a sealed or locked opaque container.

**Section 5.2 - Voice and fax transmission**

(a) Fax transmission of CUI is permitted:

(1) At the Controlled Level: when the receiving fax machine is within a Controlled Environment or the sender has confirmed that someone authorized to receive the CUI will attend the fax machine until the transmittal is complete.

(2) At the Controlled Enhanced level: when the sender has confirmed that someone authorized to receive the CUI will attend the fax machine until the transmittal is complete. The recipient shall promptly acknowledge receipt of the facsimile.

(b) *Voice transmission*:

(1) At the Controlled Level: Broadcast radio transmission over unencrypted channels shall be avoided when operationally feasible.

(2) At the Controlled Enhanced level: Voice telephone transmission and reception should avoid the use of cordless or mobile phones when operationally feasible. Broadcast radio transmission over unencrypted channels is prohibited.

**Section 5.3 - Electronic transmission**

(a) If CUI is transmitted on a stand-alone system or a system that is connected to others in a Controlled Environment but has no transmission path over a public telecommunications network, no further safeguards are required for electronic transmission.

(b) When CUI is transmitted on an information processing system with physical or logical connections outside of a Controlled Environment, the following safeguards apply:

(1) CUI shall be transmitted using technology/processes that encrypt the data or secure the transmission path. The technology/processes shall meet the standards published in the CUI registry.

(2) CUI shall only be accessed through a system that authenticates users or systems. The authentication shall meet the standards published in the CUI registry.

(3) The administrator of a transmitting system shall implement procedures to provide for transmission security of information available on the system.

| For CUI Registry: |
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| Encryption shall be implemented in accordance with FIPS 140-2, Security Level 1 which provides basic encryption.<br><br>A Virtual Private Network (VPN) and secured sockets (https) are examples of secured paths.<br><br>Authentication standard: e-authentication level 2 or higher which requires a username and password.<br><br>A LAN is an example of a system that is connected to others in a Controlled Environment but has no access/transmission paths over public telecommunications network. |

(c) Transmission via Website: In addition to the requirements specified in subsection 5.3 (b) (1)-(3) above,

(1) CUI may not be posted to websites that are publicly available or that limit access only by domain/IP restriction.

(2) At the Controlled Level: CUI shall be posted only to websites that meet the standards published in the CUI Registry. Access control may be provided at the network level (e.g., intranet) where the Agency head or his/her Designee determines is appropriate.

(3) At the Controlled Enhanced level: CUI shall be posted only to websites that require two-factor authentication for access where one of the factors is provided by a device separate from the device gaining access.

(4) Specified Dissemination: CUI shall be posted only to websites that limit dissemination to those with authorized access in accordance to dissemination limitations. Access control measures shall meet the standard published in the CUI registry.

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| For CUI Registry: Access control: System shall have a means of vetting users equivalent to e-authentication identity proofing level 2 and allow the equivalent of e-authentication level 2: user identification/password, user certificates, or other technical means that preclude unauthorized access. Use a "time-out" function requiring user re-authentication after 30 minutes inactivity.<br>Protection measures: secure sockets or equivalent technology. |

## SECTION 6.0 – Destruction

(a) *General.* CUI shall be destroyed in a manner that precludes routine recognition or reconstruction of the information.

(b) *Physical.* The methods approved to destroy CUI are burning, cross-cut shredding, wet-pulping, melting, mutilation, chemical decomposition, or pulverizing.

(c) *Electronic.* CUI in electronic form shall be deleted and also removed from any desktop trash or recycling file. When any electronic device that has stored CUI is sold, transferred, or reassigned to a person not authorized access to the CUI, it shall be sanitized at the standard set by the CUI Executive Agent.

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| For CUI Registry: Standards from NIST SP 800-88 – "clear" for Controlled and "purge" for Controlled Enhanced. |

**(These sections should be in directive, but not in Safeguarding Part)**

**Section VV – Definitions *[still in development]***

Agency: When used in this directive, has the same meaning as "Departments and Agencies" as defined in the President's May 9, 2008 memorandum regarding Designation and Sharing of Controlled Unclassified Information.

Controlled Environment: a physical location where access is restricted or where procedural measures are in place to limit CUI access to individuals authorized at a particular CUI safeguarding and dissemination level.

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CUI Memorandum: the President's May 9, 2008 memorandum regarding Designation and Sharing of Controlled Unclassified Information.

External storage device: a data storage device that is not permanently installed in a personal computing device, such as a memory card, thumb or USB 'flash' drive, DVD, CD ROM, diskette, or comparable device.

Mobile device: removable and/or portable computing device such as a laptop computer, a personal digital assistant, or a smart phone.

Removable electronic media: Includes both mobile devices and external storage devices

State-of-practice: the conditions most generally existing or common at a given time.

Website: the collection of information, Internet media, services, supporting technology and system available at a Uniform Resource Locator (URL) (i.e., a Web address that begins with the protocol indicator of ftp, http, or https). Includes Web portals, Really Simple Syndication (RSS), Web logs (BLOGs), video and audio streaming, file downloading and other Internet media and services initially accessed via a URL.

**Section WW - Establishment of a CUI Program *[still in development]***

(a) Agency heads shall establish a CUI Program to safeguard CUI, appropriate to the environment in which the access occurs and the nature and volume of the information. The Program shall include technical, physical, and procedural measures.

(b) As part of an agency's CUI Program, the agency head shall include procedures for internal reviews and inspections.

(c) The agency head shall refer any matter pertaining to the implementation of this Directive that cannot be resolved to the CUI Executive Agent for resolution.

**Section YY – Loss, violation, or unauthorized disclosure *[still in development]***

(a) *Duty to report.* Persons authorized to access CUI shall promptly report any suspected or actual violation of safeguarding procedures, the loss or misplacement of CUI and any suspected or actual unauthorized or inadvertent disclosure of CUI to the Agency Head or an official designated for that purpose.

(b) *Inquiry/investigation.* Agency heads shall establish appropriate procedures to conduct an inquiry/ investigation of a suspected or actual violation of safeguarding procedures, the loss or misplacement of CUI, and any suspected or actual unauthorized or inadvertent disclosure of CUI in order to implement appropriate corrective actions.

# Subpart BB. Dissemination

## Section 1.0 – General Policy

(a) Most CUI merits Standard Dissemination and shall be disseminated to the widest extent possible, provided its dissemination furthers the execution of a lawful or official mission purpose. Dissemination of CUI shall be limited beyond Standard Dissemination only in accordance with a Specified Dissemination Instruction published in the CUI Registry.

(b) Agency heads shall consider the impact that limiting dissemination would have on the utilization of the information.

## Section 2.0 – Requirements for Specified Dissemination Instructions

(a) A Specified Dissemination Instruction shall:

(1) state objective criteria such that an individual or an information system can readily determine the extent to which access is permitted,

(2) be sufficiently unique from other instructions in order to avoid duplication and enable standardized handling of CUI, and

(3) not state safeguarding requirements.

## Section 3.0 – Specified Dissemination Instruction Review Process

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| The initial, bulk submission of Specified Dissemination Instructions will occur through a different process that will allow for collaboration and de-confliction. The process in the draft Directive will apply to subsequent submissions. |

(a) Agency heads, or their Designees, shall submit a proposal for a new Specified Dissemination Instruction or for revision to an existing Specified Dissemination Instruction to the CUI Executive Agent in writing for approval.

(b) The CUI Executive Agent will review the proposal according to the following criteria:

(1) Whether the specified dissemination instruction meets the requirements defined in Section 2.0,

(2) Whether the proposed limitation supports the overall purpose of the CUI Framework,

(3) Whether the proposed limitation is authorized by statute, regulation, directive, or specific guidance issued by the Agency head as set forth in the CUI Memorandum, and

(4) Whether there is a justified need, taking into consideration mission impact and costs, to limit dissemination beyond Standard Dissemination.

(c) Within 10 business days of receipt of a proposal, the CUI Executive Agent will either render a decision and inform the Agency head in writing or notify the Agency head in writing that additional time is needed to consider the proposal and the anticipated date that the CUI Executive Agent will render a decision.

(1) If the proposed Specified Dissemination Instruction is approved, the CUI Executive Agent shall inform the CUI Council and publish the approved Specified Dissemination Instruction in the CUI Registry.

(2) In cases where the CUI EA does not approve the proposed Specified Dissemination Instruction, the CUI EA shall provide a statement of reasons to the Agency head.

(3) The Agency head may revise the proposal and re-submit it to the CUI Executive Agent for reconsideration.

**NOTE:** Language will be developed to address exceptions in Exceptions Working Group.

**For Registry:** A Specified Dissemination Instruction may contain a blank to be filled in.

**Section 4.0 – Use of Specified Dissemination**

(a) If a recipient receives CUI materials marked with a Specified Dissemination Instruction that is not listed in the CUI Registry, the recipient shall

(1) promptly notify the originating Agency in writing,

(2) strike the unauthorized Specified Dissemination Instruction, and

(3) apply the Specified Dissemination Instruction listed in the CUI Registry that has been provided by the originating Agency.

(b) If the originating agency fails to provide a Specified Dissemination Instruction listed in the CUI Registry and there is a time sensitive need to disseminate the information, the recipient shall refer the matter to the CUI Executive Agent for resolution.

**For Registry:** Will clarify that this provision is intended to address the use of unapproved markings, not issues like typographical errors and the like.

(c) If a recipient concludes that greater or lesser dissemination is warranted than is indicated by the Specified Dissemination Instruction applied by the originating Agency, the recipient shall follow the process set forth in Subpart CC to resolve the issue. Pending the resolution of the issue, the recipient shall continue to follow the Specified Dissemination Instruction applied by the originating Agency.

Subpart CC – Dispute Resolution Process is under development.

**Section 5.0 - Waivers for Exigent Situations**

(a) In exigent situations, Agency heads, or their Designees, may authorize temporary waivers to any Specified Dissemination requirement.

(b) While a temporary waiver is in effect, individuals shall apply the standard waiver language as listed in the CUI Registry.

For Registry: Exact content to be finalized after completion of marking section of policy.

Marking should contain duration [could be until X event has concluded] and a Point of Contact if recipients have questions about the waiver and/or further dissemination.

(c) Agency heads or their designee(s) shall report waivers in writing to the CUI Executive Agent promptly.

(d) The CUI Executive Agent shall publish notice of the waiver in the CUI Registry.

(e) At the resolution of the emergency situation, the Agency shall reinstitute the Specified Dissemination requirements. The Agency is not required to attempt to regain control of information disseminated while the waiver was in effect.

(f) The CUI Executive Agent may revoke dissemination waivers for cause.

**Section VV – Definitions** ***[add to section - still in development]***

Dissemination: the authorized exchange of CUI between and among the Federal government and authorized recipients. Dissemination does not authorize or address release of CUI to the general public.

## Subpart CC. DISPUTE RESOLUTION

### Section 1.0- Purpose

This directive establishes two processes to resolve complaints and disputes (herein after referred to as "disputes") when parties disagree on matters of CUI designation and marking.

### Section 2.0- Interagency Dispute Resolution

(a) Agency heads shall implement, as part of an Agency CUI program, a CUI Dispute Resolution Process that is consistent with the Presidential Memorandum and the CUI Dispute Resolution Process outlined in this directive.

(b) Parties to an interagency dispute shall make every effort to resolve the dispute expeditiously. Disputes should be resolved within a mutually-agreed time period, taking into consideration the mission, sharing, and protection requirements of the parties concerned.

(c) If the parties to the dispute cannot reach agreement, they shall bring the issue to their Agency CUI Council members who shall continue attempts to resolve the dispute. If one or neither of the Agencies has a designated CUI Council member, the dispute shall be submitted directly to the CUI Council through the CUI EA.

(d) If the parties cannot reach a mutually acceptable resolution, either Agency's CUI Council member may begin the formal dispute resolution process by submitting the dispute to the CUI Council through the CUI EA.

(e) The CUI Council member shall provide a complete description of the dispute and proposed resolution(s) in the submission to the CUI EA.

(f) The CUI Council, in consultation with other parties to the dispute and experts, shall resolve the dispute expeditiously.

(g) The CUI EA shall act as the impartial mediator of the dispute.

(h) Once the CUI Council resolves the dispute, the CUI EA shall promptly transmit the decision to the pertinent Agencies and any non-Federal parties as appropriate.

(i) The CUI EA shall maintain records of the formal dispute resolution and shall update the Registry as needed.

### Section 3.0- Dispute Resolution Involving Entities Outside of the Executive Branch

(a) State, local, tribal, and private sector parties should first seek resolution of a dispute informally.

(b) If the parties cannot reach agreement, they may bring the dispute to the relevant Agency or Agencies, who shall work with the non-federal parties and make every effort to resolve the dispute expeditiously.

(c) If after bringing the dispute to the relevant Agency or Agencies agreement is not reached, either party may bring the dispute to the Agency CUI Council member who shall continue attempts to resolve the dispute.

(d) If the parties cannot reach an acceptable resolution, either party may forward the dispute to the CUI EA. The submission to the CUI EA shall provide a complete description of the dispute and the proposed resolution(s). The CUI EA shall determine if information in the CUI Registry would resolve the dispute.

(e) If information in the CUI Registry does not result in resolution, the CUI EA may begin the formal dispute resolution process by submitting the dispute to the CUI Council.

(f) Thereafter, the dispute will be resolved according to the process in paragraphs 2(f)-(i) of this Subpart.

# Subpart EE. Designation

## Section 1.0 – General Policy

(a) Designation of information as CUI shall be limited to information which requires the protections afforded by the CUI Framework.

(b) Agencies shall establish adequate procedures to prevent information from being improperly designated as CUI.

(c) Agencies shall establish adequate procedures to notify agency personnel with responsibility to identify CUI when information marked as CUI has been released to the public under proper authority and therefore is ineligible for identification as CUI.

(1) Such procedures will apply to release decisions after the effective date of this CUI directive.

(2) Agencies are not required to retroactively identify information released prior to the effective date of this directive. However, agencies are expected to take reasonable precautions to prevent such information from being improperly identified as CUI.

## Section 2.0 – Designation and Identification

(a) Designation

(1) An Agency head, or a senior official appointed by the Agency head, shall designate, through specific written guidance, the types of information within the agency that may be identified as CUI and carry an authorized marking. This designation guidance shall:

(i) reference the statutes, regulations, directives, or other specific authorities for the designation;

(ii) establish criteria and rationale for identifying information as CUI;

(iii) provide examples of information commonly handled in the agency that, given the established criteria, may be identified as CUI;

(iv) distinguish and provide examples of information that is not CUI;

(v) indicate which of the three combinations of CUI safeguarding procedures and dissemination controls shall apply to the information; and

(vi) indicate by attribute or position which individuals are authorized to identify information as CUI, if an Agency head determines to so limit identification.

(2) Prior to issuance, Agency heads shall provide written designation guidance to the CUI Executive Agent for review. The CUI Executive Agent shall review all designation guidance for consistency across the Executive branch and will establish Government-wide criteria in order to standardize the designation of information within the CUI Framework.

(b) Identification

(1) Individuals shall identify information as CUI only according to the written designation guidance issued by the Agency head, or senior official appointed by the Agency head, or when necessary to respect the identification of information as CUI by another agency.

(2) Once an individual has identified information as CUI, the individual shall mark the material in accordance with this Directive.

(3) If the written designation guidance issued by the Agency head, or senior official appointed by the Agency head, does not address information that an individual concludes may be eligible for identification as CUI, the individual shall notify the Agency head or senior official appointed by the Agency head. The Agency head, or senior official appointed by the Agency head, shall promptly determine if the information should be identified as CUI and update the written designation guidance as necessary.

**Section VV – Definitions** ***[add to section - still in development]***

Designation: the determination by the Agency head, or a senior official appointed by the Agency head, that particular information may be identified as CUI.

Identification: the recognition by an individual that information is CUI based on the designation guidance issued by the Agency head or a senior official appointed by the Agency head.

## Subpart DD. Marking

### Section 1.0 – General Policy

(a) The CUI Framework requires that standardized markings be applied to information designated as CUI. The only documents that shall receive the protection of the CUI Framework are those marked according to this Subpart and the CUI Registry.

(b) The CUI Registry will contain all approved CUI markings and will provide current guidance, including examples of the appropriate application and use of these markings. Only markings approved and listed in the CUI Registry shall be used to identify CUI.

(c) The markings prescribed by this Subpart shall uniformly and conspicuously appear on or be conveyed in all documents containing information designated as CUI, regardless of the medium. Specific examples of the placement of markings for various types of media shall be posted in the CUI Registry.

> **Note**: A CUI marking guide will be created to provide specific examples and instructions for applying CUI markings.

(d) CUI markings shall not be used to determine an agency's decision whether to disclose or release information to the public.

(d) Three marking elements shall be used to identify the presence of CUI within a document: overall markings, origination markings, and portion markings. Each of these is described in the following sections.

### Section 2.0 – Overall Markings

(a) The following overall marking format shall be used to represent the CUI categories:

"CONTROLLED STANDARD" for Controlled with Standard Dissemination;
"CONTROLLED SPECIFIED-[insert designator(s)]" for Controlled with Specified Dissemination; and
"CONTROLLED ENHANCED-[insert designator(s)]" for Controlled Enhanced with Specified Dissemination.

(b) The following overall marking format shall be used on all documents:

(1) The overall marking shall be placed at the top of each page. The placement of an overall marking at the bottom of each page is neither required nor prohibited unless the document contains both CUI and classified information.
(2) The overall marking shall convey the most stringent of the safeguarding procedures and all applicable specified dissemination designators included in the document.

(3) Only specified dissemination designators that have been approved may be used. All approved specified dissemination designators will be listed in the CUI Registry. Within the overall marking, the specified dissemination designator(s) shall follow the marking that represents the general CUI category, either "CONTROLLED SPECIFIED" or "CONTROLLED ENHANCED". When multiple specified dissemination designators apply to a document, each specified dissemination designator shall be included in the overall marking and be separated by a comma, followed by a space.

**Section 3.0 – Origination Markings**

(a) All documents containing CUI shall identify the originating individual, agency, and office. The originating individual may be identified by name or personal identifier. Unless otherwise readily apparent, this information shall appear on the face or at the beginning of a document.

**Section 4.0 – Portion Markings**

(a) Each portion (usually a paragraph, but including subparagraphs, subjects, titles, graphics, bulleted lists, etc.) shall be marked to indicate the most stringent of the safeguarding procedures and all applicable specified dissemination designator(s) by the placement of a portion marking immediately preceding the portion to which it applies.

(b) The following portion markings shall be used to represent the CUI categories:

"(CUI-SD)" for Controlled with Standard Dissemination;
"(CUI-SP-[insert designator(s)])" for Controlled with Specified Dissemination; and,
"(CUI-EN-[insert designator(s)])" for Controlled Enhanced with Specified Dissemination.

(c) For documents that contain both CUI and other unclassified information, or that contain multiple categories of CUI, each CUI portion shall be marked as identified in this Subpart.

**Section 5.0 – Additional Requirements**

(a) Source Documentation. When information previously identified as CUI in one document is incorporated, paraphrased, or restated into a new document, the CUI markings shall be carried forward into the new document and be marked consistent with this Subpart. A listing of the CUI source document(s) shall appear conspicuously in the new document.

(b) Transmittal documents. A transmittal document shall indicate on its face the appropriate overall marking of the CUI in the document being transmitted. The transmittal document shall also include conspicuously on its face the following:

"When separated from the transmitted document, this transmittal document is [insert appropriate marking or statement]."

(c) Additional Markings. Any additional CUI markings other than those set forth in this Subpart must be approved by the CUI Executive Agent prior to use. In such instances, agency heads or their designees must submit a formal written request to the CUI Executive Agent for approval. The written proposal will include the citation of the specific, extraordinary circumstances warranting the use of such additional markings.

(d) Waivers from CUI Marking Requirements. Agency heads or their designees shall submit requests for temporary waivers to the CUI Executive Agent in writing for consideration. The CUI Executive Agent will respond to requests within 30 days of receipt of the request.

(e) Re-marking of legacy material.

(1) Departments and agencies need not redact or obliterate existing legacy markings. When information bearing legacy markings is disseminated, the legacy markings shall be struck through with a single, straight line when practicable, and the information shall be re-marked as directed in this Subpart.

(2) When information with a legacy marking is incorporated, paraphrased, or restated in a new document, the legacy marking shall not be carried forward and the appropriate CUI markings shall be applied to the new document per this Subpart.

**Section 6.0 – Definitions**

(a) CUI category: One of the three combinations of safeguarding procedures and dissemination controls identified in the President's CUI memorandum.

(b) Designator: Abbreviation, typically three letters, found in the CUI Registry that conveys additional instructions on what dissemination is permitted.

(c) Document: Any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(d) Legacy markings: Markings applied by the Federal government prior to the effective date of this directive to documents sufficiently sensitive to warrant some level of safeguarding and protection from disclosure but that did not warrant classification .

(e) Originator: The person responsible for identifying and marking information as CUI.

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| For CUI marking guide: When a document is prepared on behalf of another individual, the individual who approves the final version of the document is the originator, e.g., when an assistant prepares a memo on behalf of an executive, the executive who approves the final version is the originator of the document. |

(f) Public Release: The act of making information formerly designated as CUI available to the general public through the approved processes of each agency. Release does not include the authorized dissemination of CUI to State, local, tribal, or private sector entities.

**Subpart FF. Life Cycle**

**Section 1.0 - General Policy**

(a) Agencies shall decontrol CUI as soon as it no longer requires the protections of the CUI Framework.

(b) The CUI Executive Agent may require an originating agency to decontrol information determined to be controlled in violation of the Presidential Memorandum or CUI Directive.

(c) Decontrol is separate from public release. If decontrolled CUI is authorized for release, the CUI markings shall be struck through with a single, straight line prior to such release.

**Section 2.0 - Automatic Decontrol**

(a) CUI will be automatically decontrolled on December 31 of the tenth year of its origination unless a statute explicitly requires the protection of information from unauthorized disclosure, requires special handling safeguards, or prescribes limits on its exchange or dissemination beyond ten years.

(b) In extraordinary cases, agency heads or their designees may also request approval from the CUI Executive Agent to control information for more than ten years. The request shall be made in writing and shall specify the proposed duration of control and the extraordinary circumstances warranting such extended controls.

(c) Agencies may identify durations of control for less than ten years without approval of the CUI Executive Agent.

(d) Any variation from the ten year decontrol period, either of shorter or longer duration, shall be indicated by a statement placed conspicuously on the face or at the beginning of the document that indicates the decontrol date or event.

(e) When records containing CUI are transferred to the physical or legal custody of the National Archives and Records Administration (NARA), the agency must inform NARA through specific written instructions if the information still requires the protections of the CUI Framework. If such instructions are not provided, the information will be presumed to have been decontrolled prior to transfer, regardless of any CUI markings on the records.

**Section XX. Definitions**

Decontrol: The removal of the protections afforded by the CUI Framework.

# POLICY ISSUE
## INFORMATION

March 18, 2011 SECY-11-0040

FOR: The Commissioners

FROM: Thomas M. Boyce, Director
Office of Information Services

SUBJECT: THE NRC'S IMPLEMENTATION OF THE NOVEMBER 4, 2010, EXECUTIVE ORDER ON CONTROLLED UNCLASSIFIED INFORMATION AND ASSOCIATED SECY TICKETS

PURPOSE:

The purpose of this paper is to inform the Commission of the U.S. Nuclear Regulatory Commission (NRC) staff's general plan for transitioning to the Controlled Unclassified Information (CUI) program and for resolving associated tickets from the Office of the Secretary (SECY) on CUI and Sensitive Unclassified Non-Safeguards Information (SUNSI). This paper does address new commitments or resource implications.

BACKGROUND:

On November 4, 2010, the President issued Executive Order (EO) 13556, "Controlled Unclassified Information," establishing a standardized system for the treatment of sensitive unclassified information. The system will result in uniform standards throughout the executive branch for marking, safeguarding, and controlling the dissemination of CUI. The EO designates the National Archives and Records Administration (NARA) as the Executive Agent (EA) for the CUI program. After consulting with other agencies, including the NRC, the EA will develop and issue an initial implementation directive(s) (ID(s)) by May 3, 2011. Within 180 days of issuance of the initial ID, agencies must provide the EA with an agency-specific plan to implement EO 13556, including target milestones. In consultation with the Office of Management and Budget (OMB), the EA will then establish deadlines for the agencies' phased implementation of EO 13556 and will submit periodic reports to the President on the status of the implementation.

CONTACT: John Linehan, OIS/IRSD
301-415-6702

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Limited to NRC Unless the Commission Determines Otherwise

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Also by May 3, 2011, agencies must submit to the EA a catalogue of all categories and subcategories of CUI and proposed associated markings for information designated as CUI. The catalogue must define each proposed category and subcategory and identify the basis in law, regulation, or government wide policy for safeguarding or dissemination controls. The EA will review the proposals; resolve any conflicts; and approve categories, subcategories, and associated CUI markings. By November 4, 2011, the EA will use this information to populate a public registry of authorized CUI categories and subcategories, with associated markings, and applicable safeguarding, dissemination, and decontrol procedures that agencies must apply uniformly.

The NRC delayed staff action on the following related SECY tickets until EO 13556 was issued. OIS staff were concerned that issuing a revised two-tiered SUNSI policy followed by a new CUI policy could be confusing to NRC staff. The two-tiered SUNSI policy would use scarce financial and staff resources to develop and provide training that would become obsolete when the CUI program was implemented. The existing SUNSI program was working, accepted, and understood by the staff.

- COMSECY-05-0054, "Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)," dated October 26, 2005 (Work Item Tracking System (WITS) No. 200600301), directed the staff to develop a simplified policy for SUNSI, including a two-tiered handling regime. Action was deferred because of the development and anticipated implementation of the CUI program.

- WITS No. 200900185 directed the staff to keep the Commission informed on its progress in transitioning to the CUI framework, including the new process for encrypting SUNSI and CUI.

- WITS No. 200600395 directed the staff to provide SUNSI training to employees and stakeholders and to develop a computer-based training module on SUNSI. Action was contingent upon the Commission's approval of the revised, two-tiered handling regime, which was deferred.

- WITS No. 200200193 directed the staff to revise Management Directive (MD) 12.6, "NRC Sensitive Unclassified Information Security Program," dated December 20, 1999, to cover the handling and marking of sensitive unclassified information in response to Office of the Inspector General (OIG)-03-A-01, "Review of NRC's Handling and Marking of Sensitive Unclassified Information," dated October 16, 2002. Action was deferred until the development and anticipated implementation of the CUI program.

- WITS No. 20061057 directed the staff to provide OIG with a copy of MD 12.6 when it completed the revision.

DISCUSSION:

On November 30, 2010, the Executive Director for Operations designated Mr. Darren Ash, the NRC's Deputy Executive Director for Corporate Management, in his role as the agency's Chief

Information Officer, as the Senior Agency Official responsible for CUI, including the implementation of EO 13556 and the designation of NRC information categories and associated markings.

For a number of years, the NRC staff has participated in NARA activities related to the development of a CUI program. After the President issued EO 13556, the NRC staff formed a CUI team with representatives from all NRC offices and regions to address EO implementation. On December 1, 2010, the CUI team met for a briefing and discussion on the requirements of EO 13556, with emphasis on the catalogue that the NRC would submit to the EA by May 3, 2011. The staff is currently in the process of determining whether the NRC's Intranet SUNSI Web pages adequately encompass and define the SUNSI that the agency currently generates and receives. In addition, the staff is evaluating whether any of the SUNSI material that it generates or receives should be controlled at a higher level for safeguarding or dissemination. These analyses will allow the NRC's representative(s) at the meetings that the EA holds with agencies to support the NRC's positions and to influence, as appropriate, the discussions and any decisions.

In its proposed CUI catalogue, the NRC staff plans to propose a two-tier handling regime, as directed in COMSECY-05-0054. Although final decisions have not been made by the staff, a higher tier of handling could include Privacy Act information, security-related information, allegation information, and investigative information. Additionally, in a November 4, 2010, letter to the Chairman, the EA indicated that Safeguards Information (SGI) would be accepted as a category in the CUI Program without any changes to its current implementation, except for some generic markings applicable to all CUI. Therefore, the staff expects that the SGI handling requirements will remain the same as they currently are and could be more stringent than other types of CUI at NRC.

On January 18, 2011, the EA held a CUI Working Group (CUIWG) meeting at NARA, which the NRC staff attended, to discuss a draft of the initial implementing directive (ID). The draft ID directs agencies to develop their own CUI programs by developing internal agency policies, establishing a training program, and creating a self-inspection mechanism and directs the EA to establish an oversight program that includes formal reviews, onsite liaison visits, and audits. Overall, the draft ID was less prescriptive than the staff anticipated based on previous meetings with NARA. However, the initial ID is only a draft; therefore, it is premature to predict the requirements in the final version of this initial ID. In addition, it could be the first of a number of IDs, on other NARA guidance.

Two major issues that the NRC staff identified to date are training and the cultural change of first transitioning from document designation policies for "Official Use Only" and "Sensitive" to those for "SUNSI" and now from "SUNSI" to "CUI." Prior to the issuance of the EO, NARA had indicated it would develop a significant training program and offer to conduct on-site training for agencies. However, EO 13556 is silent on such training, which had been covered in previous draft versions of the EO. While the NRC always understood that agency-specific training would be needed, it had expected that such training could be built upon a thorough training program developed by NARA. At the CUIWG meeting, the EA clarified that agencies will be required to develop their own training based on their internal CUI Program needs and the EA will not be developing Government-wide training. NRC's development of a CUI training program will be a major activity requiring time and resources yet to be determined.

Regarding the need to address cultural change, which is associated with training, the staff plans to put in place a number of communication tools. On February 9, 2011, the NRC Reporter included a summary article to notify the staff about the CUI program, noting that implementation posters will not occur for some time. One key challenge will involve determining the best time for these activities, given the uncertainty regarding NARA requirements and the associated budget implications.

Other areas in which staff action and resources will be necessary include data and e-mail encryption and changes to relevant rules and MDs. In these and other areas, significant uncertainty will exist until NARA clarifies its requirements. Executive Order 13556 is binding on the NRC, and the NRC should comply with the ID(s). However, through its participation in the EA CUIWG, the NRC staff will attempt to influence the EA, as appropriate.

The staff is developing a project plan to identify and track all activities discussed above and to begin work in areas in which the NRC has sufficient resources and does not need to wait for NARA's final positions. Additionally, the staff intends to close all tickets listed above and incorporate these actions into the NRC CUI project plan.

In summary, the staff plans to continue its involvement in NARA's CUI activities. The staff will inform the Commissioners' Technical Assistants of any significant issues or items, such as the submittal of the agency's proposed catalogue and sub-catalogue of CUI categories due in May 2011.

RESOURCES:

The staff can complete the described interactions with NARA and other agencies and the development of the catalogue and the plan for implementation of EO 13556 using existing budgeted resources, mainly from the Office of Nuclear Safety and Incident Response, the Office of the General Counsel (OGC), and the Office of Information Services. The NRC staff expects that the implementation of the plan to satisfy the requirements of EO 13556 and the associated EA-issued ID(s) will require significant resources. However, quantifying these resources will be difficult until the EA issues the ID(s) and the public registry of authorized CUI categories and subcategories, with associated markings, and the applicable safeguarding, dissemination, and decontrol procedures that agencies must apply uniformly. EO 13556 recognizes that implementation of the CUI program is not currently budgeted. In consultation with OMB, the EA will establish deadlines for agencies' phased implementation of EO 13556 and will submit periodic reports to the President on the status of implementation.

COORDINATION:

OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer reviewed this paper for resource implications and has no objections.

*/RA/*

Thomas M. Boyce, Director
Office of Information Services

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The OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer reviewed this paper for resource implications and has no objections.

*/RA/*

Thomas M. Boyce, Director
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**ADAMS ACCESSION NO.: ML11040A016** ***email concurrence**

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