
POLICY ISSUE

(Notation Vote)

February 29, 2016

SECY-16-0021

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: DISCONTINUATION OF RULEMAKING ACTIVITIES

PURPOSE:

To request Commission approval to discontinue a number of planned or proposed rulemaking activities and to publish the enclosed *Federal Register* notice (FRN) to inform the public of this decision. If approved, these rulemaking activities would no longer be reported in the U.S. Nuclear Regulatory Commission's (NRC's) portion of the Unified Agenda of Regulatory and Deregulatory Actions (the Unified Agenda).

SUMMARY:

The NRC staff has identified nine rulemaking activities, in various stages of development, for which staff is seeking Commission approval to discontinue. For efficiency and transparency, the staff is including in this action an additional tenth activity for which the Commission has already provided initial direction to discontinue. The rationale for discontinuing each rulemaking activity is discussed in this paper and in the enclosed FRN. If approved, the staff will publish the enclosed FRN in the *Federal Register* to inform members of the public that these rulemaking activities are being discontinued and to provide a brief discussion for the NRC's decision to discontinue them. The Office of Administration is sponsoring, on behalf of the Rulemaking Coordinating Committee, this final action that will resolve 10 separate rulemaking activities in an efficient and transparent manner, and facilitate the orderly reporting and closure of these rulemaking activities in the Unified Agenda.

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BACKGROUND:

Each year the NRC staff develops the NRC's Common Prioritization of Rulemaking report, which is used to develop rulemaking program budget estimates and to determine the relative priority of rulemaking activities. During the most recent review of ongoing and potential rulemaking activities, the staff identified nine rulemaking activities in various stages of development that can be discontinued. These nine activities, and a tenth activity that the Commission has already provided initial direction to discontinue, are discussed in the following section.

DISCUSSION:**Process for Discontinuing Rulemaking Activities**

In the staff requirements memorandum (SRM) for SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated February 3, 2016 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16034A441), the Commission approved the NRC staff's recommendation that when a rulemaking activity is identified to be discontinued, they will request, through a Commission paper, approval from the Commission to discontinue it. If the Commission approves discontinuing the rulemaking activity, the NRC will inform the public of the decision to discontinue it.

A rulemaking activity may be discontinued at any stage in the rulemaking process. For a rulemaking activity that has received public comments, the NRC will consider those comments before discontinuing the rulemaking activity; however, the NRC will not provide individual comment responses.

After Commission approval to discontinue a rulemaking activity, in the next edition of the Unified Agenda, the NRC will update the entry for that rulemaking activity to indicate that it is no longer being pursued. The rulemaking activity will appear in the completed section of that edition of the Unified Agenda but will not appear in future editions.

Rulemaking Activities Recommended for Discontinuation

This section summarizes each rulemaking that the NRC staff recommends to be discontinued and provides the staff's rationale for the recommendation. The enclosed FRN contains additional detail and, as appropriate, a high-level summary of any comments received from the public.

I. Controlling the Disposition of Solid Materials (RIN 3150-AH18; NRC-1999-0002)

The NRC began an enhanced participatory process to evaluate alternative courses of action for control of solid materials at NRC-licensed facilities that have very low amounts of, or no amount of, radioactivity. As part of this process, the NRC published an Issues Paper in the *Federal Register* on June 30, 1999 (64 FR 35090), requesting public comment on various alternatives, including rulemaking.

In SECY-05-0054, "Proposed Rule: Radiological Criteria for Controlling the Disposition of Solid Materials," dated March 31, 2005 (ADAMS Package Accession No. ML041550790), the NRC staff submitted a draft proposed rule to the Commission that would have amended Part 20 of

Title 10 of the *Code of Federal Regulations* (10 CFR), “Standards for Protection against Radiation.” This proposed rule would have added radiological criteria for controlling the disposition of solid materials that have no, or very small amounts of, residual radioactivity resulting from licensed operations, and which originate in restricted or impacted areas of NRC-licensed facilities. In the SRM for SECY-05-0054, dated June 1, 2005 (ADAMS Accession No. ML051520185), the Commission disapproved publication of the proposed rule *at that time* [emphasis added] because the NRC was “faced with several high priority and complex tasks, the current approach to review specific cases on an individual basis is fully protective of public health and safety, and the immediate need for this rule has changed due to the shift in timing for reactor decommissioning.” This rulemaking continued to be on hold while the Commission was focused on enhancing security and emergency preparedness and response as well as beginning preparations for new authorizations under the Energy Policy Act of 2005, including new nuclear facility licensing and regulation.

The staff recommends not proceeding with this rulemaking activity because even though there has been a recent increase in decommissioning, the current regulatory framework provides for case by case approval of alternative disposal procedures under 10 CFR 20.2002. To date, the NRC has received a limited number of licensee requests per year. The staff is conducting a low-level waste programmatic assessment. As part of this assessment, the staff will conduct a scoping study of various low-level waste issues. If the staff determines a need to pursue rulemaking as a result of this study, then the staff will request Commission approval for the rulemaking.

II. Entombment Options for Power Reactors (RIN 3150-AG89; NRC-2001-0012)

On October 16, 2001 (66 FR 52551), the NRC published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* to request public comment on the issues surrounding the feasibility of entombment for decommissioning a power reactor. The ANPR also included a discussion of dose criteria that would permit license termination under restricted and unrestricted release conditions. In general, comments from the eight utilities and the Nuclear Energy Institute stated that they would like to have entombment available as a decommissioning option; however, none unequivocally committed to using entombment as a decommissioning process.

The NRC staff recommends not proceeding with this rulemaking activity because the three decommissioning options, which include entombment for power reactors, are currently being considered within the rulemaking for reactor decommissioning. Specifically, in the SRM for SECY-14-0118, “Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements,” dated December 30, 2014 (ADAMS Accession No. ML14364A111), the Commission directed the staff to proceed with rulemaking on reactor decommissioning. The Commission further directed that the rulemaking address issues discussed in SECY-00-0145, “Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning,” dated June 28, 2000 (ADAMS Accession No. ML003721626), which includes the entombment option for power reactors.

III. Transfers of Certain Source Materials by Specific Licensees (RIN 3150-AG64; NRC-2002-0013)

On August 28, 2002 (67 FR 55175), the NRC published a proposed rule in the *Federal Register*

that would have required prior NRC approval for transfers of source material derived from specifically licensed material to ensure that these transfers do not pose a health and safety concern.

The NRC staff recommends not proceeding with this rulemaking activity because the concerns are being considered in other regulatory processes. Specifically, there is ongoing work related to SECY-03-0068, "Interagency Jurisdictional Working Group Evaluating the Regulation of Low-Level Source Material or Materials Containing Less than 0.05 Percent by Weight Concentration Uranium and/or Thorium," dated May 1, 2003 (ADAMS Package Accession No. ML030920468), and recent discussions with the U.S. Environmental Protection Agency that would allow certain low-level wastes to be disposed of in Resource Conservation and Recovery Act (commonly known as RCRA) sites. In addition, the staff recommends not proceeding with this rulemaking activity because the NRC has on a case-by-case basis, successfully dealt with the issues this rulemaking activity would have addressed.

IV. Approach to Risk-Informed, Performance-Based Requirements for Nuclear Power Reactors (RIN 3150-AH81; NRC-2006-0008)

On May 4, 2006 (71 FR 26267), the NRC published an ANPR in the *Federal Register* to request public comment on an approach that would establish a comprehensive set of risk-informed and performance-based requirements applicable for all nuclear power reactor technologies as an alternative to current requirements. At the time the ANPR was published, the NRC already had an ongoing effort to revise some specific regulations to make them risk-informed and performance-based.

In SECY-07-0101, "Staff Recommendations Regarding a Risk-Informed and Performance-Based Revision to 10 CFR Part 50," dated June 14, 2007 (ADAMS Package Accession No. ML070790253), the NRC staff requested that the Commission defer the rulemaking activity until after the development of the licensing strategy for the Next Generation Nuclear Plant (NGNP) or receipt of an application for design certification or a license for the Pebble Bed Modular Reactor. In the SRM for SECY-07-0101, dated September 10, 2007 (ADAMS Accession No. ML072530501), the Commission approved the staff's recommendation to defer the rulemaking activity. In the same SRM, the Commission approved the staff's proposal to provide a recommendation on initiating a rulemaking 6 months after the development of the licensing strategy for the NGNP. Subsequently, the NGNP project was terminated and the NRC no longer had a viable demonstration project. The NRC is open to new opportunities to explore such a licensing strategy. In the past 2 years, there has been renewed U.S. industry and Executive Branch interest in advanced non-light water reactors (LWRs). The NRC is working to develop a regulatory process to address the unique aspects of these designs within the current regulatory framework. A new risk-informed, performance-based framework has the potential to address some of these unique aspects assuming that the necessary supporting data is available. Currently the advanced non-LWR designs have not reached a level of maturity that would support development of a regulatory basis for rulemaking.

The staff recommends not proceeding with this rulemaking activity until such time that advanced non-LWR designs reach a state of maturity that would generate the supporting data needed to develop a new risk-informed performance-based framework. The staff does not recommend continuing to expend resources tracking this particular rulemaking. When supporting data is available, the staff would reevaluate the need for rulemaking and propose to initiate a new

rulemaking to the Commission. Furthermore, the NRC has several initiatives underway that would further risk-inform and performance-base the regulatory framework. Discontinuing this particular rulemaking would not preclude other ongoing or future risk-informed, performance-based initiatives.

V. Geologic Repository Operations Area Security and Material Control and Accounting Requirements (RIN 3150-AI06; NRC-2007-0670)

On December 20, 2007, the NRC published a proposed rule in the *Federal Register* (72 FR 72522) regarding security measures for the protection of spent nuclear fuel, high-level radioactive waste, and other radioactive material at a geologic repository operations area (GROA) licensed under 10 CFR Part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada." The NRC proposed new requirements for training, access authorization, defensive strategies, and reporting. The proposed rule would have established general performance objectives and corresponding system capabilities for the GROA material control program, with a focus on strengthening, streamlining, and consolidating all material control and accounting regulations specific to a GROA. In addition, the proposed rule would have required the emergency plan to address radiological emergencies.

The NRC staff recommends not proceeding with this rulemaking activity because of the lack of funding to complete this rulemaking.

VI. Expansion of the National Source Tracking System (RIN 3150-AI29; NRC-2008-0200)

On April 11, 2008, the NRC published a proposed rule in the *Federal Register* (73 FR 19749) that would have expanded the current National Source Tracking System (NSTS) to include certain additional sealed sources. This rule would have required licensees to report certain transactions involving these sealed sources to the NSTS; these transactions included the manufacture, transfer, receipt, disassembly, or disposal of the nationally tracked source. Each licensee would have had to provide its initial inventory of nationally tracked sources to the NSTS and annually verify and reconcile the information in the system with the licensee's actual inventory.

Based on public comments, the NRC staff requested the Commission to defer completion of the NSTS final rule (SECY-09-0011, "Deferral of Rulemaking: Expansion of National Source Tracking System (RIN 3150-AI29)," dated January 15, 2009 (ADAMS Accession No. ML083540566)). The Commission was unable to reach a decision on the staff's recommendation (see the SRM for SECY-09-0011, dated May 28, 2009 (ADAMS Accession No. ML091480775)). Instead, the Commission directed the staff to conduct a data and system operations and performance analysis of the NSTS based on system operation with Category 1 and 2 sources, and report to the Commission. The staff conducted these analyses and reported to the Commission.

The staff recommends not proceeding with this rulemaking activity because the existing regulatory basis, draft proposed rule, and final proposed rule are now out of date. This rulemaking was developed and proposed as the NSTS was being developed and deployed in late 2008. Since 2009, the NRC published 10 CFR Part 37, "Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material" (78 FR 16922; March 19, 2013); gained significant experience in the management and operation of the NSTS (see

<http://www.nrc.gov/security/byproduct/ismp/nsts.html>); and deployed two on-line applications to support validation of licenses, the Web-Based Licensing System (see <http://www.nrc.gov/security/byproduct/ismp/wbl.html>) and the License Verification System (see <http://www.nrc.gov/security/byproduct/ismp/lvs.html>). The staff is conducting a program review of 10 CFR Part 37, which includes an assessment of whether additional measures are warranted for Category 3 materials. Following completion of the 10 CFR Part 37 assessment, if the staff determines that the NSTS should be expanded, then the staff will request Commission approval for the rulemaking. The staff will be reporting to the Commission and the Congress on this review in 2016.

VII. GROA Fitness-for-Duty Requirements (RIN 3150-AI38; NRC-2009-0089)

The NRC staff determined that the final rule published in the *Federal Register* on March 31, 2008 (73 FR 16966), "Fitness for Duty Programs," should have included conforming changes to 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories," and 10 CFR Part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada," as the agency intended to apply select requirements of 10 CFR Part 26, "Fitness for Duty Programs," to licensees licensed under 10 CFR Parts 60 and 63.

The NRC staff recommends not proceeding with this rulemaking activity because of the lack of funding to complete this rulemaking.

VIII. Sabotage of Nuclear Facilities, Fuel, or Designated Material (RIN 3150-AI68; NRC-2009-0227)

In SECY-12-0066, "Criminal Penalties for the Unauthorized Introduction of Weapons into Facilities Designated by the U.S. Nuclear Regulatory Commission and for Sabotage of Nuclear Facilities or Fuel," dated April 26, 2012 (ADAMS Accession No. ML120200150), the NRC staff recommended, in part, that the Commission defer its decision on whether to proceed with a rulemaking to revise 10 CFR 73.81, "Criminal penalties," to add certain radioactive materials or other property to the scope of criminal penalties for sabotage authorized under Section 236, "Sabotage of Nuclear Facilities or Fuel," of the Atomic Energy Act (AEA) of 1954, as amended. Staff based this recommendation on the need for the Commission to first consider action on chemical security and Recommendation 2 of the 2010 Radiation Source Protection and Security Task Force Report [task force recommendations appear in SECY-11-0169, "U.S. Nuclear Regulatory Commission Implementation Plan for the Radiation Source Protection and Security Task Force Report" (ADAMS Package Accession No. ML113070551)]. The Commission approved the staff's recommendation in the SRM for SECY-12-0066, dated June 18, 2012 (ADAMS Accession No. ML121700765).

The staff completed the additional activities discussed in SECY-12-0066 and informed the Commission that there was no compelling reason to revise 10 CFR 73.81 to implement the scope authority provided by Section 236 of the AEA to provide criminal sanctions for sabotage of certain nuclear facilities, nuclear waste, and nuclear fuel or other property.

The staff recommends not proceeding with this rulemaking activity because the staff has concluded that rulemaking to modify 10 CFR 73.81 to implement the new authority of Section 236 of the AEA would not serve as an effective deterrent for individuals intent on committing sabotage of nuclear facilities, nuclear waste, or nuclear fuel or other property and is not warranted at this time.

IX. Security-Force Fatigue at Nuclear Facilities (No RIN or NRC Docket)

In COMSECY-04-0037, "Fitness-for-Duty Orders to Address Fatigue of Nuclear Facility Security Force Personnel," dated June 21, 2004 (ADAMS Accession No. ML040790094), the NRC staff requested Commission approval to issue security orders concerning fitness-for-duty enhancements to address fatigue concerns for security force personnel at five classes of NRC-licensed facilities: (1) Independent Spent Fuel Storage Installations, (2) Decommissioning Reactors, (3) Category 1 Fuel Cycle Facilities, (4) Gaseous Diffusion Plants, and (5) the Natural Uranium Conversion Facility. In the SRM for COMSECY-04-0037, dated September 1, 2004 (ADAMS Accession No. ML042450533), the Commission directed the staff to pursue the rulemaking process rather than issuing security orders for those materials facilities and personnel for whom the staff believes fatigue-related requirements are necessary.

On June 18, 2014 (79 FR 34641), the NRC published a draft regulatory basis for public comment in the *Federal Register* to support the potential amendments to revise a number of existing security-related regulations relating to physical protection of special nuclear material at NRC-licensed facilities and in transit, as well as the fitness-for-duty programs for security officers at Category 1 fuel cycle facilities. The draft regulatory basis encompassed three separate rulemaking efforts: (1) Enhanced Security at Fuel Cycle Facilities, (2) Special Nuclear Material Transportation Security, and (3) Security-Force Fatigue at Category 1 Fuel Cycle Facilities.

During the public comment period the two Category 1 fuel cycle licensees proposed an alternative to the Security-Force Fatigue rulemaking. Specifically, the affected licensees proposed adding a fatigue management program for security officers into their security plans. On April 22, 2015 (80 FR 22434), the NRC published the final regulatory basis that explained that the NRC had decided to separate the regulatory basis activities for the Security-Force Fatigue at Category 1 Fuel Cycle Facilities to allow staff time to explore the alternative to rulemaking proposal.

The staff recommends not proceeding with the Security-Force Fatigue rulemaking activity because, after reviewing the two licensees' proposed changes to their security plans to manage security officer fatigue, NRC licensing staff considers the proposal a viable option because it will establish fatigue requirements that can be readily inspected and enforced for the two Category 1 fuel cycle licensees within their security plans.

X. Domestic Licensing of Source Materials—Amendments and Integrated Safety Analysis (RIN 3150-AI50; NRC-2009-0079)

In COMSECY-15-0002, "Termination of Rulemaking to Revise Title 10 of The *Code of Federal Regulations* Part 40, 'Domestic Licensing of Source Material' and Staff Plans to Address Other Items in Staff Requirements Memorandum for SECY-12-0071 (RIN 3150-A150)" (ADAMS The

Accession No. ML13331A559), the NRC staff proposed terminating this rulemaking. The Commission approved termination of this rulemaking in the SRM for COMSECY-15-0002, dated April 17, 2015 (ADAMS Accession No. ML15107A488). The staff will include discussion of this decision in the enclosed FRN to inform members of the public.

RECOMMENDATION:

The NRC staff recommends that the Commission approve the following:

1. Approve discontinuation of the nine rulemaking activities discussed in I-IX, above.
2. Approve for publication the enclosed FRN informing the public that the NRC is discontinuing 10 rulemaking activities.

Upon Commission approval, staff will inform the appropriate congressional committees of this action and ensure orderly closure of these rulemaking activities in the NRC's portion of the Unified Agenda.

RESOURCES:

No additional resources are required to implement the recommendations.

COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and determined there are no resource implications.

/RA/

Victor M. McCree
Executive Director
for Operations

Enclosure:
As stated

April 17, 2015 (ADAMS Accession No. ML15107A488). The staff will include discussion of this decision in the enclosed FRN to inform members of the public.

RECOMMENDATION:

The NRC staff recommends that the Commission approve the following:

Approve discontinuation of the nine rulemaking activities discussed in I–IX, above.

Approve for publication the enclosed FRN informing the public that the NRC is discontinuing 10 rulemaking activities.

Upon Commission approval, staff will inform the appropriate congressional committees of this action and ensure orderly closure of these rulemaking activities in the NRC’s portion of the Unified Agenda.

RESOURCES:

No additional resources are required to implement the recommendations.

COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and determined there are no resource implications.

/RA/

Victor M. McCree
Executive Director
for Operations

Enclosure:
As stated

ADAMS Accession No.: ML15336A324

*concurrence via e-mail

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