

# PUBLIC SUBMISSION

<b>As of:</b> 9/12/22, 12:02 PM
<b>Received:</b> August 29, 2022
<b>Status:</b> Pending Post
<b>Tracking No.</b> 17e-s40a-vv64
<b>Comments Due:</b> August 30, 2022
<b>Submission Type:</b> Web

**Docket:** NRC-2015-0070

Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning

**Comment On:** NRC-2015-0070-0229

Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning

**Document:** NRC-2015-0070-DRAFT-2232

Comment on FR Doc # 2022-03131

---

## Submitter Information

**Name:** Phil Brochman

**Address:**

Rockville, MD, 20852

**Email:** phil.brochman@nrc.gov

---

## General Comment

See attached file(s)

---

## Attachments

Comments on proposed rule

29 August 2022

Secretary, U.S. Nuclear Regulatory Commission (NRC)  
ATTN: Rulemakings and Adjudications Staff

SUBJECT: Comments on Proposed Rule, "Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning," (RIN 3150-AJ59)  
[Docket ID No. NRC-2015-0070]

Dear Madam Secretary:

I am writing in overall support of the NRC's proposed rule on transition to decommissioning that was published in the *Federal Register* (87 FR 12254; March 3, 2022); and recommend the NRC issue of a final rule, subject to the following comments and recommendations.

1. **Comment:** In the Statements of Consideration, Section IV.B.2, "Dry Cask Storage," (pp 12284, 1<sup>st</sup> column and 2<sup>nd</sup> column), the NRC provides a justification for the proposed change that would permit a general license ISFSI subject to § 72.212(b)(9) to elect to shift from the security requirements of § 73.55 to the security requirements of § 73.51. The NRC stated:

Although the physical security requirements that apply to general license ISFSIs and specific license ISFSIs provide equivalent levels of protection, there are differences. For instance, § 73.55 requires licensees to ensure they maintain the capability to **detect, assess, interdict, and neutralize** threats. Section 73.51 requires licensees to **detect and assess threats and communicate** with an appropriate response organization. The additional requirements in § 73.55 that support interdiction and neutralization of threats is only one example of differences that lead to licensee requests for exemptions once all fuel has been placed in dry cask storage. (emphasis added)

While the NRC is correct that under § 73.55(b)(3)(i) the protective strategy required for a reactor licensee is to "detect, assess, interdict, and neutralize threats up to and including the design basis threat of radiological sabotage." The NRC is incorrect that a general-license ISFSI under § 73.55 is required to "interdict and neutralize threats." This is because under the NRC's current regulations in § 72.212(b)(9)(v), a general licensee "**is exempt** from requirements to **interdict and neutralize threats in § 73.55.**" (emphasis added)

While the NRC has stated this issue is "only one example of differences that lead to licensee requests for exemptions once all fuel has been placed in dry cask storage" it has not articulated any other specific reasons, but has only provided a general statement that:

Many decommissioning licensees have submitted license amendment requests, requests for exemptions, and requests for approval of alternative measures to remove § 73.55 physical security requirements that are no longer applicable once the licensee enters the third decommissioning level when all SNF has been moved to a dry cask storage system.

Consequently, given the current exemption language of § 72.212(b)(9)(v), the absence of an articulated valid specific rational for this proposed change is inconsistent with the NRC's *Principals of Good Regulation* for openness, clarity, and integrity; and is also inconsistent

with the degree of specificity provided for the justifications of other proposed changes elsewhere in this proposed rule.

**Recommendation:** That the NRC remove this provision in any final rule or articulate a valid specific rationale as to why this change is necessary.

2. **Comment:** In the Statements of Consideration, Section IV.B.2, (pp 12284, 2<sup>nd</sup> column), the NRC describes the proposed change to § 72.212(b)(9) that would add new subparagraph (vii) which would permit a general licensee to protect the ISFSI in accordance with the security requirements of § 73.51, instead of the security requirements of § 73.55. Under this change, a general licensee would have to continue to address the applicable post-9/11 security orders issued to ISFSI licensees.

However, this description of the proposed change is completely absent a discussion of the need for and implications of the removal of the requirement for a general licensee to protect the **spent nuclear fuel (SNF) against the design basis threat (DBT) for radiological sabotage** (emphasis added). This would occur if a general licensee was permitted to shift from the security requirements of § 73.55 to the security requirements of § 73.51. Under current § 72.212(b)(9) introductory text, the licensee is required to “[p]rotect the spent fuel against the design basis threat of radiological sabotage in accordance with the same provisions and requirements as are set forth in the licensee’s physical security plan pursuant to § 73.55.” Under § 73.55(b)(2) the licensee’s “physical protection program must protect against the design basis threat of radiological sabotage.” The requirement in § 72.212 to protect the SNF against the DBT for radiological sabotage was established in the final rule that originally promulgated the Part 72 general license provisions (55 FR 21191; July 18, 1990) and still remains in effect, unchanged, today. In contrast, § 73.51 does not contain any language requiring that SNF (subject to its requirements) be protected against the DBT for radiological sabotage.

The requirement for a general licensee to protect the SNF against the DBT for radiological sabotage remains an essential underpinning of the basis for the Commission’s conclusion that the storage of SNF in the dry storage casks of a general license ISFSI provides high assurance of adequate protection of public health and safety and the common defense and security. Under the NRC’s current requirements in § 73.55, the licensee is required to protect the SNF in the reactor, in the spent fuel pool, and in a general license ISFSI from the same DBT for radiological sabotage. Consequently, it is not clear why a general licensee should be relieved of a requirement to meet this same standard under § 73.51. Moreover, I view this DBT language as providing the public, government officials, and other stakeholders the requisite degree of confidence to support the general license process via rulemaking (under Sec. 133 of the NWSA of 1982; 42 U.S.C. 10153).

Finally, the absence of any articulated valid specific rationale for this proposed change removing the requirement to protect SNF from the DBT for radiological sabotage is not consistent with the NRC’s principals of openness and transparency. This lack of articulation of a rationale removing the applicability of the DBT for radiological (through the vehicle of allowing a licensee to follow one regulation versus another) and could be viewed as arbitrary and capricious rulemaking.

**Recommendation:** That the NRC remove this provision in any final rule or articulate a valid specific rationale as to why then DBT for radiological sabotage should not apply to the security requirements applicable to the SNF being stored by a general licensee.

Moreover, if the NRC takes the path of removing requirements to protect the SNF against the DBT for radiological sabotage, then I believe that issue is of such gravity and need for clarity so important as to warrant a further notice and opportunity for the public to comment on any new NRC action to remove the requirement to protect the contained SNF against the DBT for radiological sabotage.

3. **Comment:** In Item 46 (proposed new text for § 72.212(b)(9)(vii)) (pp 12334) the NRC states that “the licensee may, as an alternative to the requirements of § 72.212(b)(9)(i) through (vi), provide for physical protection of the spent fuel under subpart H of this part and § 73.51 of this chapter.” However, under this new language, the introductory text of § 72.212(b)(9) would still remain in effect for a general licensee to both follow the current provisions using § 73.55 and the alternate provisions of § 73.51 (i.e., the new language in subparagraph (vii) does not affect the introductory text in (b)(9)). The current introductory text states, “Protect the spent fuel against the design basis threat of radiological sabotage in accordance with the same provisions and requirements as are set forth in the licensee’s physical security plan pursuant to § 73.55 of this chapter with the following additional conditions and exceptions:” Additionally, in Item 49 (proposed revised text for § 73.51) (pp 12335) the NRC has not included any new language requiring a general licensee to protect the SNF against the DBT for radiological sabotage.

**Issue 3A:** The NRC’s proposed changes in § 72.212(b)(9)(vii) and § 72.212(b)(9) introductory text would be inconsistent and it is unclear on whether a general licensee (under the alternate approach) is required to protect the contained SNF against the DBT for radiological sabotage.

**Issue 3B:** The NRC’s proposed changes in § 72.212(b)(9) introductory text and § 73.51 would be inconsistent and it is unclear on whether a general licensee is required to protect the contained SNF against the DBT for radiological sabotage.

**Issue 3C:** The NRC’s proposed changes in § 72.212(b)(9) introductory text and the current § 72.180 (unchanged by this proposed rule) would be inconsistent and it is unclear on whether a general licensee (who would be subject to § 72.180 under the proposed rule) is required to protect the contained SNF against the DBT for radiological sabotage.

**Recommendation 3A:** That the NRC remove the proposed changes to § 72.212(b)(9) and § 73.51 from a final rule.

**Recommendation 3B:** As an alternative to recommendation 3A, that the NRC could retain the concept of a general licensee protecting the SNF against the DBT for radiological sabotage in § 72.212(b)(9) and add clarifying language to § 73.51 requiring a general licensee to protect the contained SNF against the DBT for radiological sabotage.

The NRC would then also need to include a corrective change to § 72.180 to clarify that a general licensee is required to protect the contained SNF against the DBT for radiological sabotage.

Additionally, the NRC should also consider adding a conforming change to § 73.1(a) introductory text to indicate that a licensee subject to § 73.51 is exempt from the requirement in § 73.1(a)(1)(iv) regarding a waterborne vehicle bomb assault. This conforming change would be similar to the current language exempting licensees subject to § 72.212.

Thank you.

Phil Brochman, P.E. (emeritus)  
Sr. Policy Analyst  
USNRC's Office of Nuclear Security and Incident Response