

June 28, 2000

COMMISSION VOTING RECORD

DECISION SECY-00-0117

ITEM:

TITLE: RULEMAKING PROCESS FOR REVISING 10 CFR PART 71 FOR COMPATIBILITY WITH IAEA TRANSPORTATION SAFETY STANDARDS [ST-1], AND TO MAKE OTHER CHANGES

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum ([SRM](#)) of June 28, 2000.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette Vietti-Cook
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-00-0117

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	6/22/00
COMR. DICUS	X				X	6/6/00
COMR. DIAZ	X				X	6/14/00
COMR. McGAFFIGAN	X				X	6/13/00
COMR. MERRIFIELD	X				X	6/21/00

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on June 28, 2000.

Commissioner Comments on SECY-00-0117

Chairman Meserve

I approve the staff recommendations to 1) publish the Federal Register Notice (FRN) containing the issues paper, for public comment and 2) use an enhanced-public-participation process (web-site and public meetings) in the 10 CFR Part 71

rulemaking, subject to the following comments.

1. I share the views by Commissioners Diaz, McGaffigan and Merrifield that it would have been preferable for the issues paper to express the staff's views on the resolution of the issues, thereby promoting more focused public comment. In light of the limited time before the first public meeting, such a revision of the paper cannot realistically be accomplished. Therefore, I reluctantly agree to publication without this modification. However, I share the views of my colleagues that the staff should be prepared at the public meetings to explain its or the Commission's previous positions on the issues and to discuss staff's current views, subject to acknowledgment that the staff's and the Commission's final views have not been determined.
2. I endorse Com. McGaffigan's requests for staff 1) to revise Appendix A of the FRN to include the referenced tables and figures from ST-1 and 2) to provide a schedule for the rulemaking. I take this step because I believe this modification can be readily accomplished.
3. I share Commissioner McGaffigan's interest in obtaining comment on the 4 Bq/cm² surface contamination standard and aspects of the exempt concentration standards for packages. Because limited time will preclude significant modification of the issues paper to include these points, I urge the staff to seek public feedback on these issues at the public meetings.

Commissioner Dicus

I support staff's recommendation of utilizing the 10 CFR Part 71-IAEA ST-1 Issues Paper as the fundamental outreach vehicle to engage the public during this summer's public meetings and the resulting workshop. As staff has indicated and as identified in the June 1, 2000, ACNW 2000 Action Plan and Priority Issues letter from the EDO to ACNW Chairman, John Garrick, the 10 CFR Part 71 Issues Paper is being provided to guide development of options for Commission consideration, prior to drafting rule language. Additionally, I also support staff's development of the "Factors for Consideration" for each of the identified issues, as well as the generic cross-cutting factors, which I believe adequately bounds the fundamental issues at hand (i.e., technical, cost, regulatory, and implementation burden, as well as risk considerations).

Commissioner Diaz

I approve the staff's recommendation to publish the Federal Register notice that outlines the major issues associated with revising 10 CFR Part 71. Prompt publication of this paper is important so that the public has time to review the issues and cross-cutting factors prior to the public meetings scheduled for July and August.

While I support publication of the paper, I do so reluctantly. I would have much preferred that the paper had included staff positions or options for each issue, rather than the list of "factors for consideration." Previous experience with enhanced-public-participation rulemakings has clearly shown the benefit of providing the public with options or alternatives on which to comment. When the public has had an idea of where the NRC stands on an issue the NRC has received more relevant comments, e.g., on exposure data, cost information, etc. The ST-1 regulations have been under consideration by the NRC staff for several years so it seems reasonable that the staff has formulated some options, albeit preliminary, on the issues. Sharing the staff's thoughts would help the general public work through these complex issues at the "townhall" meetings. For example, it would be helpful if the staff provided basic information on whether a particular change is being considered because it could result in improved protection of public health and safety, or solely because the change would make the US regulations consistent with ST-1.

Once the staff has considered the early public input and developed firm options for the issues, the staff should make the options available for public comment. Feedback on these more focused comments should be part of the feedback provided to the Commission prior to staff developing the proposed rule.


Commissioner McGaffigan

I approve the staff's plan to engage stakeholders through public meetings and use of the NRC website, and publish the proposed issues paper on changes being considered to Part 71 subject to the following comments. I clearly would have preferred that the issues paper contain options and recommendations on each issue, but now we find ourselves tied to a publicly known meeting schedule, which according to the staff precludes such a significant modification to the paper. Therefore, the changes I would have proposed in an ideal situation are not available to me now. Therefore, I offer the following comments, based on a review of the paper and a very informative meeting with the staff subsequent to receiving the paper, in an attempt to enhance stakeholder input during the rulemaking process.

Supplemental Information Section in the Federal Register Notice:

The Federal Register notice should be revised to include a schedule with key milestones for development of a revised Part 71 consistent with the briefing slides used by the staff which indicates that a final rule would be submitted to the Commission for approval in June 2002 concurrent with the timing of a final Department of Transportation (DOT) rule.

The Federal Register notice should also be revised to state that, contrary to NRC's rulemaking process under the Administrative Procedure Act, development of the International Atomic Energy Agency's (IAEA) Safety Series No. ST-1 for the

transport of radioactive material did not involve the public or other stakeholders or include a cost-benefit analysis. In contrast, NRC is bound, as then Executive Director for Operations James Taylor stated in his May 31, 1996 letter to the IAEA ([attached](#) ) , to consider costs and benefits in its regulatory analyses, and is prepared to differ from the ST-1 standards, at least for domestic purposes, to the extent the standards can not be justified from a cost-benefit perspective.

Finally, Appendix A of the Federal Register notice should be revised to include the referenced Tables I and II and Figures 2, 3 and 4 from ST-1 to enhance the public's participation in the rulemaking process.

General Comments Regarding the Issues:

While I approve issuance of the proposed issues paper for the purposes of facilitating discussions at the upcoming scheduled public meetings, I am concerned that the paper does not reflect the fact that the staff has an initial view or position, on certain issues, based on its extensive experience in regulating the transportation of radioactive materials. For example, in the May 1996 NRC letter to IAEA mentioned above, NRC expressed concern, on behalf of the U.S., with three principal issues in the draft ST-1. Those issues were Type C package standards, uranium hexafluoride transport provisions, and the incorporation of exemption values. In the absence of initial views on certain key issues such as these, I believe that NRC will appear disingenuous to the knowledgeable public participants who are aware of previous staff positions. Also, if NRC does not take an initial position on certain issues, I am concerned that the public will not know what specifically to comment on or where to focus its input and, as a result, the value of the public meetings, particularly the less structured "town hall" meetings identified in the paper, will be questionable. In my experience with other NRC rulemakings (e.g. Parts 35, 50 and 70), an early "strawman" has been a very useful tool as a starting point for discussion during meetings with stakeholders. Those recent rulemakings obviously demonstrate to the public that NRC positions can, and will, change based on stakeholder input. Nevertheless, I assume that an informed public will be aware of previous staff positions. Thus, reluctantly, I approve issuance of the issues paper, as supplemented by my comments below, in time for the mid-July public meetings. However, like Commissioner Merrifield, I also strongly recommend that the staff be prepared to explain and, in some cases, defend during the public meetings its or the Commission's previous positions on these issues.

Add a New Issue and Modify an Existing Issue:

I strongly suggest that the issues paper be supplemented by adding a new issue and modifying an existing one prior to its release. Specifically, a new issue should be added as issue eighteen to discuss the current IAEA standard for package surface removable contamination (i.e., 4 Becquerel per centimeter squared) applied to spent fuel and high-level waste (HLW) containers. Also, Issue 2., "Radionuclide Exemption Values," which allows certain packages containing radioactive material to be shipped without being labeled as or considered radioactive, should be modified as discussed below to solicit a broader range of stakeholder comment.

1. Regarding the 4Bq/cm² surface contamination standard, I firmly believe that this issue should be discussed in the issues paper as an eighteenth issue even though it was not revised by IAEA in the 1996 Edition of ST-1. I am disappointed that this issue is not included in the issues paper since the Commission directed the staff, within the context of this rulemaking, in the staff requirements memoranda for the 1998 and 1999 rulemaking activity plans (SECY-98-168 and SECY-99-036), to work with DOT and IAEA on this issue. Also, I have personally raised this issue during discussions with the staff, most recently, during the February 23, 2000 Commission briefing on the status of the Spent Fuel Project Office.

As the paper points out, IAEA transportation standards and our national regulations are only revised about once every ten years. In my opinion, we should not let this rulemaking opportunity go by without fostering a dialogue on a regulatory standard originally intended for hand-held packages, that is applied widely to the transport of spent fuel casks. There is no clear health and safety basis or cost-benefit analysis that I am aware of that would justify applying the 4Bq/cm² standard to spent fuel casks. To simply propagate such a standard without such analyses would be contrary to our agency's overall goal of promulgating regulations which are more risk-informed and, in my opinion, ill-advised from a public policy perspective. This standard has been defended as a "cleanliness standard" by one of its French proponents, but no one claims there are commensurate health and safety benefits that derive from it. Indeed, workers get real doses as they survey the casks to insure compliance with the standard. There is a chance that in the next decade, before any new transportation rulemaking, the U.S. will be engaged in the transport of significant quantities of spent fuel and HLW. In my view that transport should be subject to a surface contamination standard that makes sense, not the 4Bq/cm² standard in ST-1 and previous IAEA transportation standards.

2. Regarding the exempt concentration values for packages, I believe that the current discussion in the issues paper should be expanded to more clearly discuss the fact that the DOT current exempt material standard of 2000 picoCurie per gram (2000 pCi/gm), based on previous IAEA transportation standards, has applications by cross reference outside the domain of transportation. It serves in some States as the definition, for example, of exempt naturally-occurring radioactive material in the waste disposal arena. Certain industries, who might not normally pay attention to NRC or DOT rulemakings, will be negatively impacted if NRC and DOT adopt the new IAEA values, which Mr. Taylor's May 1996 letter so forcefully objected to. For example, some materials, such as ores containing naturally occurring radionuclides (NORM), e.g. coal, could be brought into the scope of the regulations for the first time if provisions are not included to exempt materials at these low levels. While staff points out that ST-1 allows bulk transport up to 10 times the exempt values, nevertheless large numbers of people in the minerals extraction industries may suddenly be confronted with the need to sample and justify their exemptions on a cargo by cargo basis. Even more importantly, the oil and gas industries' efforts to clean up slag containing technologically-enhanced

NORM or TENORM rely on DOT's 2000 pCi/gram standard for shipment and disposal of certain materials. At present, these materials are in some cases shipped off-site to State regulated Resource Conservation and Recovery Act Subtitle C sites for permanent disposal without being managed as radioactive material. Similarly, coal ash, while recognized as TENORM, generally is considered exempt NORM under the current DOT concentration values. It will likely no longer be exempt under the new IAEA exempt concentration values. Therefore, I urge the staff to engage the industries, organizations, and State and Federal agencies most likely to be potentially impacted from adopting the new IAEA values to ensure that all stakeholders have an opportunity to provide input on this matter. I would suggest that the discussion and factors for consideration of this issue be appropriately modified to capture the possibility of unintended consequences in implementing ST-1's concentration values in areas outside of transportation and to request stakeholder help in assessing those consequences.

Finally, I look forward to receiving feedback from the staff on the public meetings scheduled this summer on the Part 71 rulemaking and the comments received, as well as the status of DOT's rulemaking effort. I would also suggest to my fellow Commissioners that, consistent with our approach to Parts 35 and 70, each office identify a point of contact for periodic briefings by and informal communications with the staff on this important rulemaking initiative. The contact for my office is Janet Schlueter.

Commissioner Merrifield

It is rare that I choose to amend a vote once I have voted on a particular issue. Rather, I typically prefer to resolve differences in votes through the SRM process. That having been said, in this case I believe that it is proper to make an exception to my normal practice. While the bottom line of my vote (approval with comment) does not change, I want to formally express my support and concurrence for the well crafted vote of Commissioner McGaffigan. He articulates several important points that the staff should address both in the Federal Register notice and in the public meetings and I would like to publicly go on record with my support for his position.