

POLICY ISSUE NOTATION VOTE

August 30, 2012

SECY-12-0118

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: RESOURCE ESTIMATES AND REQUEST FOR FINAL RULE SCHEDULE
EXTENSION AND DELEGATION OF SIGNATURE AUTHORITY FOR THE
ENHANCED WEAPONS RULEMAKING

PURPOSE:

This paper informs the Commission of the additional resources needed to complete both the Enhanced Weapons, Firearms Background Checks and Security Event Notifications (hereafter referred to as enhanced weapons) final rulemaking and the supplemental proposed rule to expand the scope of the enhanced weapons rulemaking to include co-located independent spent fuel storage installations (ISFSIs). Additionally, the staff requests that the Commission approve a schedule extension for the final enhanced weapons rule and a delegation authorizing the Executive Director for Operations (EDO) to issue a supplemental proposed rule on co-located ISFSIs.

SUMMARY

This paper responds to two directions from the Commission in Staff Requirements Memorandum (SRM)-SECY-12-0027 related to the enhanced weapons rulemaking. First, the Commission directed the staff to expand the scope of the enhanced weapons rulemaking to include co-located ISFSIs. Accordingly, the staff is preparing the necessary supplemental proposed rule. Second, the Commission directed the staff to seek Commission approval for additional resources to complete the enhanced weapons rulemaking as promptly as possible. The staff estimates an additional 0.9 full-time equivalents (FTE) in fiscal year (FY) 2013 and 0.5 FTE in FY 2014 are needed to complete the supplemental proposed and draft final rules.

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To expedite the rulemaking, the staff requests that the Commission approve delegation to the EDO to issue the enhanced weapons supplemental proposed rule. There is past precedent for delegating this authority to the EDO under similar circumstances, and it is consistent with the policy described in Management Directive (MD) 6.3, "The Rulemaking Process." The scope of the supplemental proposed rule is limited to only co-located ISFSIs, as directed by the Commission. In order to allow the public adequate time to comment on the supplemental proposed rule and to address the public comments received in the draft final rule, the rulemaking schedule will need to be extended to November 2013, should the Commission approve the delegation of issuing the supplemental proposed rule to the EDO. Without the delegation authority, staff estimates completion of the final rule around March 2014.

BACKGROUND:

The U.S. Nuclear Regulatory Commission (NRC) published the proposed rule for the enhanced weapons rulemaking in the *Federal Register* (FR) on February 3, 2011 (76 FR 6200). The principal purpose of the proposed rule was to designate power reactor facilities and Category 1 strategic special nuclear material (Cat. 1) facilities as the classes of facilities eligible to apply for preemption authority under Section 161A of the Atomic Energy Act of 1954 (AEA), as amended.

The proposed rule also stated that other classes of facilities, including co-located ISFSIs, would be addressed in a later rulemaking. After the proposed rule was published, several licensees submitted letters to the NRC requesting preemption authority under Section 161A of the AEA. In SECY-12-0027, "Preemption Authority Pursuant to Section 161A, Use of Firearms by Security Personnel, of the Atomic Energy Act of 1954, As Amended," (Agencywide Documents Management System (ADAMS) Accession No. ML113130015), the staff recommended issuing confirmatory orders in response to these requests. The Commission disapproved the staff's proposed approach to resolving these requests for preemption authority in SRM-SECY-12-0027 (ADAMS Accession No. ML12124A377). In addition, the Commission directed the staff to expand the scope of the enhanced weapons rulemaking to consider co-located ISFSIs and to complete the enhanced weapons rulemaking as promptly as possible.

Section 653 of the Energy Policy Act of 2005 amended the AEA by adding a new Section 161A. Section 161A provides new statutory authority to the Commission to authorize the security personnel of designated licensees and certificate holders to transfer, receive, possess, transport, import, and use certain weapons notwithstanding State, local, and certain Federal firearms laws and regulations that prohibit such actions. This is generally referred to as preemption authority. This statutory authority also allows the Commission to permit designated licensees and certificate holders to obtain weapons not previously permitted to be owned or possessed under Commission authority. This is generally referred to as enhanced weapons authority. For more information about this statutory authority and the NRC's implementation of this authority through rulemaking, please see the proposed rule.

DISCUSSION:

The February 2011 proposed enhanced weapons rule limited the classes of facilities eligible to apply for preemption authority to power reactor and Cat. 1 facilities. The Commission has directed that the scope of the rule be expanded to consider co-located ISFSIs. To comply with the requirements of the Administrative Procedures Act, the public must be provided with notice and an opportunity to comment on the expanded scope of the enhanced weapons rulemaking.

Therefore, the staff is preparing a supplemental proposed rule expanding the scope of the enhanced weapons rulemaking to include co-located ISFSIs as a designated class of facilities eligible to apply for preemption authority. The supplemental proposed rule will be published in the FR for a limited time. Upon completion of the public comment period, the staff will develop a single draft final rule package that addresses the public comments from both the proposed enhanced weapons rule and the supplemental proposed rule. The staff will provide the draft final enhanced weapons rule package to the Commission for review and approval in accordance with the standard final rule process.

The following provides a discussion of resource estimates and schedule impacts for the supplemental proposed rule, the resulting impacts to the final enhanced weapons rulemaking, as well as a request that the Commission delegate the authority to issue the supplemental proposed rule to the EDO to expedite the completion of that supplemental rulemaking process.

Resources for the Supplemental Proposed Rule

The staff currently anticipates delivering the supplemental proposed rule package to the EDO by early November 2012. The supplemental proposed rule would then be published for a 30-day public comment period before the end of the year, if the Commission approves the delegation of authority to the EDO to issue the supplemental proposed rule as discussed below.

The current budget formulation for FY 2013 and FY 2014 does not include a supplemental rulemaking phase for the enhanced weapons rulemaking in the Operating Reactors business line. As a result, staff will need additional resources to develop the supplemental proposed rule. In addition, because of the expansion in scope of the enhanced weapons rulemaking, it is necessary to add staff with expertise in ISFSIs to the rulemaking process. The budget request for the enhanced weapons rulemaking did not account for this additional staff.

The staff estimates that the following additional resources will be needed in the Operating Reactors business line to complete the supplemental proposed rulemaking:

Office	FY 2013 (FTE)
NRR	0.1
NSIR	0.1
NMSS	0.1
OGC	0.1
Total	0.4

Impact on the Proposed Schedule for the Final Rule

The proposed final rule schedule is largely driven by the need to coordinate with other Federal agencies (i.e., the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms, and Explosives). Each of these agencies generally needs 30 to 45 days to review the draft final rule language. The staff will need additional time to address and incorporate any comments received from these agencies into the draft final rule package that will be submitted for the Commission's approval.

In addition, the supplemental proposed rulemaking will follow a similar process as the proposed rule, which can take between nine months and one year to complete. The staff is able to achieve some efficiency in the final rule schedule by working on the supplemental rule and the final rule simultaneously. However, the staff will need to review and incorporate public comments on the expanded scope supplemental proposed rule prior to completing work on the final rule. For this reason, and because of the additional coordination needed with other Federal agencies mentioned above, the staff has determined that additional resources for the final rule phase will not expedite the rulemaking schedule.

Taking these factors and efficiencies into account, the staff requests that the due date for delivery of the comprehensive final rule to the Commission be extended from the current due date of May 16, 2012, to November 22, 2013. This extension represents an expedited schedule that will allow the staff to develop a supplemental rule package, issue it for public comment, and incorporate any new public comments into the final rule package and supporting regulatory guidance. If the Commission denies the delegation authority, staff anticipates the final rule will not be completed until March 2014.

Impact on Resources for the Final Rule

The delay in the final rule schedule will make it necessary for staff to work on the final rule during FY 2014. Resources for this work were included in the budget request for FY 2014. The staff estimates that the following resources will be needed to complete the final rule:

Office	FY13 (FTE)	FY14 (FTE)
NRR	0.2	0.2
NSIR	0.1	0.1
NMSS	0.1	0.1
OGC	0.1	0.1
Total	0.5	0.5

As noted previously, following the enhanced weapons rulemaking, the Commission directed the staff to conduct a follow-on rulemaking to designate licensees other than power reactors or Cat. 1 facilities (SRM-SECY-2008-0590). During budget formulation this year, the staff requested resources in FY 2013 and FY 2014 to work on that follow-on rulemaking. Since the enhanced weapons rulemaking schedule now extends into FY 2014, work on that follow-on rulemaking will begin later than budgeted. Therefore, the resources that were requested for FY 2013 and some of the resources requested for FY 2014 to support the follow-on rulemaking will be redirected to completing the enhanced weapons rulemaking. Both the resources for the supplemental proposed rulemaking and the final enhanced weapons rule will be addressed through the planning, budgeting, and performance management (PBPM) process.

Delegation of Authority to the EDO

The staff recommends that the Commission approve the delegation of authority to issue the supplemental proposed rule to the EDO. Delegation of authority to the EDO to issue the supplemental proposed rule is consistent with the agency policy in Management Directive (MD) 6.3, "The Rulemaking Process." In particular, MD 6.3 states that the EDO is delegated authority to issue a rule involving a minor new issue and provides four criteria:

1. The issue was previously considered by the Commission in a similar context;
2. The rule has a limited impact;
3. The rule does not present important health, safety, environmental, or safeguards or security questions; or
4. The rule requires limited resources to implement.

Each of the four criteria applies to the enhanced weapons supplemental proposed rule. The sole purpose of the supplemental proposed rule for the enhanced weapons rulemaking is to implement Commission direction given to the staff in SRM-SECY-12-0027. Therefore, the content of the supplemental proposed rule involves an issue that the Commission has already considered in the context of the overall enhanced weapons rulemaking. Also, the staff anticipates that the supplemental proposed rule will have a limited impact on affected stakeholders because there is little, if any, difference between the set of facilities potentially affected by the supplemental proposed rule and the set of facilities potentially affected by the proposed enhanced weapons rule issued on February 3, 2011. In most, if not all, cases, a co-located ISFSI facility is protected by the same guard force as the associated nuclear power plant facility, which was the subject of the February 2011 proposed rule. In addition, because the content of the supplemental proposed rule will have a limited impact on affected stakeholders, it will require limited resources to implement. The staff has determined that this scope expansion, which will result in little, if any, difference from the set of facilities potentially affected by the proposed enhanced weapons rule issued on February 3, 2011 does not present any new important health, safety, or environmental or safeguards of security questions that have not been considered by the Commission. Accordingly, the EDO may be delegated the authority to issue the supplemental proposed rule consistent with the direction in MD 6.3.

There is also past precedent delegating to the EDO issuance of supplemental proposed rulemakings. In a similar circumstance, the EDO issued the supplemental proposed rule for the Alternate Fracture Toughness Requirements for Protection against Pressurized Thermal Shock (PTS) rulemaking (73 FR 46557). The supplemental proposed PTS rule, like the supplemental proposed enhanced weapons rule, involved a minor change to the proposed rule, the content of which was previously considered by the Commission. For more information about the PTS rule delegation, see the memo transmitting the supplemental proposed PTS rule to the EDO (ADAMS Accession No. ML081560352).

Delegation of this authority to the EDO would expedite the supplemental proposed rule process and consequently lessen the schedule impact the supplemental proposed rule has on the publication of the final enhanced weapons rule. After the supplemental proposed rule is published in the FR, the staff will develop a single draft final rule package that addresses the public comments from both the proposed rule and the supplemental proposed rule. The staff will provide the draft final rule package to the Commission for review and approval in accordance with the standard final rule process.

Cumulative Effects of Regulation

The staff issued three supporting regulatory guidance documents for public comment along with the February 2011 proposed rule. One of those guidance documents was Draft Regulatory Guide (DG)-5020, "Applying for Enhanced Weapons Authority, Applying for Preemption Authority, and Accomplishing Firearms Background Checks Under 10 CFR Part 73" (ADAMS

Accession No. ML100321956). Publishing DG-5020 at that time was in accordance with SRM-SECY-11-0032, "Consideration of the Cumulative Effects of Regulation in the Rulemaking Process" (ADAMS Accession No. ML112840466), in which the Commission directed the staff to publish draft guidance with proposed rules. SRM-SECY-11-0032 also stated that the EDO should promptly inform the Commission of any instances, and the associated reasons, in which a proposed rule package will be provided to the Commission without having completed the draft guidance. Having already issued the draft guide for public comment, the staff recommends not re-issuing a revised DG-5020 for additional public comment. The scope of the supplemental proposed rule is very limited, and minimal additional supporting regulatory guidance is necessary to address the change in scope from the supplemental proposed rule. Instead, the staff recommends including language in the supplemental proposed rule pointing to the previous issuance of DG-5020 and indicating that the scope of designated facilities in the final regulatory guide will be expanded to include co-located ISFSIs. This will give the public the same information as issuing a revised draft guidance document, while saving considerable resources and minimizing schedule impacts.

RECOMMENDATIONS:

The staff recommends that the Commission approve delegation authority to issue the supplemental proposed rule for publication in the FR to lessen the impact of the supplemental proposed rule on the draft final rule schedule.

The staff also recommends that the Commission approve extending the schedule for the Enhanced Weapons rulemaking to November 15, 2013, so that public comments on the supplemental proposed rule can be incorporated into the final rule.

Lastly, the staff recommends not re-issuing a revised DG-5020 for public comment, and instead including the revised guidance language in the supplemental proposed rule Federal Register Notice

RESOURCES:

The following resources are currently included in the Operating Reactors business line of the FY 2013 budget allocation and the FY 2014 budget request:

Office	FY 2013 (FTE)	FY 2014 (FTE)
NRR	0.5	0
NSIR	0	0
FSME	0	0
NMSS	0	0
OGC	0.1	0
Total	0.6	0

The staff anticipates that the following additional resources will be necessary to complete the supplemental proposed and final enhanced weapons rulemaking and will be addressed through the PBPM:

Office	FY 2013 (FTE)	FY 2014 (FTE)
NRR	0.3	0.2
NSIR	0.2	0.1
NMSS	0.2	0.1
OGC	0.2	0.1
Total	0.9	0.5

COORDINATION:

The Office of the General Counsel has reviewed this package and has no legal objection. The Office of the Chief Financial Officer has indicated that, because resources did not exceed 1 full-time equivalent in any fiscal year, it did not need to review the paper.

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