

October 12, 2012

MEMORANDUM TO: Chairman Macfarlane
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff

FROM: Mark A. Satorius, Director /RA/
Office of Federal and State Materials
and Environmental Management Programs

SUBJECT: ADDITIONAL INFORMATION RESPONDING TO STAFF
REQUIREMENTS – SECY-11-0175 – PROPOSED RULE:
AMENDMENTS TO MATERIAL CONTROL AND ACCOUNTING
REGULATIONS (RIN 3150-AI61)

In the subject Staff Requirements Memorandum (SRM), dated April 12, 2012, the Commission approved publication of the draft *Federal Register* Notice (FRN) for the proposed amendments to 10 CFR parts 40, 70, 72, 74, and 150, subject to the changes and comments in the bolded excerpts, below, which are copied from the SRM. The Commission also directed the staff to provide the revised draft FRN to the Commission for its information, 5 days prior to its submittal for publication in the *Federal Register*. Enclosed is the revised draft FRN that staff prepared in response to the SRM. A summary of the draft FRN revisions in response to each of the issues identified in the SRM follows.

The staff should revise the draft FRN to provide a full and clear justification for the staff's proposed changes and clearly delineate how each new requirement will be applied to each class of facility.

To address this SRM direction, the staff revised draft FRN Section II, Introduction and Summary of Proposed Revisions to Material Control and Accounting (MC&A) Regulations, to describe and justify each of the proposed regulatory changes, and to delineate how the requirements would be applied to each class of licensee and facility to strengthen the information collection and reporting requirements. A new Table 1 shows the new MC&A requirements that would be located in 10 CFR part 74. The table clarifies the types of facilities that would be subject to the new requirements.

Rather than establishing a 350 gram threshold, the staff should seek input from stakeholders in the form of a question regarding the appropriate threshold for an item control system under 10 CFR part 74. This input can then be applied to analysis that can result in a clear technical basis that staff can then provide to the Commission.

CONTACT: Thomas Young, FSME/DILR
301-415-5795

The staff proposes that the existing item control system requirements be extended to cover 10 CFR part 50 or 52 licensees, and independent spent fuel storage installation (ISFSI) licensees under 10 CFR part 72. Such licensees would be required by proposed 10 CFR 74.19(d) to establish, document, implement, and maintain an item control system. This proposed requirement would not contain a 350 gram threshold.

The staff revised draft FRN Section III, Specific Request for Comments on the Proposed New Requirements, to include a specific question to elicit comments about an appropriate threshold quantity for an item control system under 10 CFR part 74.

The staff also revised draft FRN Section IV, Discussion, Question D (How does the NRC use a graded approach for MC&A?) to include a new Table 2 that lists the existing threshold quantities of special nuclear material (SNM) and the corresponding requirements in 10 CFR part 74 that apply to certain types of facilities. Based on the quantity and form of material a licensee possesses, the licensee is subject to specific requirements that increase with the amount of SNM the licensee is authorized to possess. The table also shows the location of the proposed requirements that would be included within the existing risk-informed, graded approach for the information collection and reporting requirements.

The Federal Register notice should note that the Commission is evaluating the use of the two-person rule as part of the enhancements to the current regulation and is seeking public comment. Once stakeholder interaction has been completed and additional analysis completed, staff may be in a position to provide an improved recommendation to the Commission.

The staff revised the Summary section in the FRN to indicate that the NRC is seeking input and evaluating the use of a two-person rule to verify the accuracy of the information collected and reported to control and account for SNM.

Draft FRN Section III, Specific Request for Comments on the Proposed New Requirements, includes a question seeking comments about use of a two-person rule for specific tasks that involve information collection and reporting.

The staff should either include a more thorough discussion of how the requirements in this proposed rule satisfy one or more of the backfit exception provisions of 70.76(a)(4) or the staff should provide a backfit analysis if the proposed rule is determined not to qualify for an exception.

The draft FRN incorporates an alternative to this SRM direction that in the staff's view is consistent with longstanding agency practice. When the primary purpose of a regulation is to require that information be collected and reported, imposing such a requirement is not a backfit. While 10 CFR parts 50, 70, 72, and 76 contain backfit requirements, there is no backfit provision in 10 CFR part 74, and past MC&A rulemakings (e.g., 56 FR 55991; October 31, 1991, 67 FR 78130; December 23, 2002, and 73 FR 32453; June 9, 2008), were not considered to involve provisions that imposed backfits as defined in the backfit rule, because those provisions imposed information collection and reporting requirements. The staff thus maintains that the information collection and reporting requirements in the proposed rule are not backfits and are not subject to the backfit rule.

Additionally, the staff's view is that the backfit exception provisions of 10 CFR 70.76(a)(4) are not applicable here, because the establishment of information collection and reporting requirements is not backfitting as defined in 10 CFR 70.76(a)(1). Therefore, neither a backfit analysis nor a consideration of the backfit exception provisions of 10 CFR 70.76(a)(4), is necessary to support the proposed rule.

The staff continues to believe that all regulatory changes described in the proposed rulemaking are primarily information collection and reporting requirements. As discussed below, while the primary objective of the requirements is to ensure the accuracy of MC&A information collection and reporting, some of the requirements, such as the two-person rule, have additional safeguards-related benefits. This is evident when the MC&A provisions are viewed together with the requirements for the physical protection of facilities, and information security requirements. Collectively, these requirements constitute the NRC's SNM safeguards program. The MC&A component of the larger safeguards program helps ensure that SNM within a fuel cycle facility is not stolen or otherwise diverted from the facility, and promotes the NRC's strategic goal of maintaining adequate protection over the use and management of radioactive materials.

The Summary at the beginning of the draft FRN has been revised to state that the NRC's MC&A regulations specify requirements for collecting and reporting information about SNM that is held by a licensee, and that the primary purpose of the MC&A regulations is to ensure that the information about SNM is accurate, authentic, and sufficiently detailed to enable a licensee to manage its program for securing and protecting SNM. The staff revised Section XIV, Backfitting and Issue Finality, of the draft FRN, to include a new Table 3 (Characterization of Proposed Substantive Amendments to 10 CFR Part 74 as Information Collection and Reporting Requirements) which summarizes the key substantive provisions of the proposed rule, together with a short explanation of why each provision constitutes an information collection and reporting requirement.

In addition to further explaining the basis for the new requirements, the Statements of Consideration should also include specific questions regarding the need for the new requirements that go beyond consolidation and clarification in relation to the proportionate levels of risk represented by the processes and material quantities and forms at different types of licensee facilities.

The Summary at the beginning of the draft FRN has been revised to indicate that the NRC is seeking input for the proposed requirements that go beyond consolidation and clarification of existing requirements.

Draft FRN Section III, Specific Request for Comments on the Proposed New Requirements, includes a question seeking comments regarding the appropriateness of the requirements in relation to the proportionate levels of risk represented by the processes and material quantities and forms that are used at different types of licensee facilities.

The FRN should also solicit information on alternatives that might address any purported concerns with equivalent outcomes but lesser burden.

The Summary at the beginning of the draft FRN has been revised to indicate that the NRC is seeking input about less burdensome alternatives to the proposed requirements that would still ensure the information about SNM is accurate.

The revised draft FRN, Section III, asks for input about alternative ways that would strengthen existing MC&A requirements and that would impose less burden on the NRC licensees.

The staff should consider the cumulative effect of regulations as directed by the Commission (SRM-SECY-11-0032 – Consideration of the Effects of Regulation in the Rulemaking Process).

The revised draft FRN, Section IV, Discussion, includes Question R (Are there any cumulative effects of regulation associated with this rule?). The wording of Question R is similar to text that the staff provided to the Commission for its consideration in the FRN for the proposed rule discussed in SECY-12-0034.

The SRM specified edits for the Federal Register notice.

The specified edits have been made.

Enclosure:

Federal Register Notice of Proposed Rulemaking

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