

POLICY ISSUE
(Notation Vote)

August 1, 2014

SECY-14-0082

FOR: The Commissioners

FROM: Mark A. Satorius
Executive Director for Operations

SUBJECT: JURISDICTION FOR MILITARY RADIUM AND U.S. NUCLEAR
REGULATORY COMMISSION OVERSIGHT OF U.S. DEPARTMENT OF
DEFENSE REMEDIATION OF RADIOACTIVE MATERIAL

PURPOSE:

Inform the Commission of the outcome of discussions with the U.S. Department of Defense (DoD) to address DoD's comments on the draft Regulatory Issue Summary (RIS) for military radium-226 (hereafter referred to as radium) and recommend finalization of the draft RIS and the completion and implementation of a comprehensive Memorandum of Understanding (MOU) for the U.S. Nuclear Regulatory Commission's (NRC) oversight of DoD remediation of radium and other unlicensed radiological contamination. The staff is providing this notation vote paper because it is recommending an MOU instead of the licensing approach previously approved by the Commission in SRM-SECY-11-0023 and included in the draft RIS. The potential for an MOU was noted in the summary of public comments given to the Commission on February 9, 2012.

SUMMARY:

In a March 24, 2011, Staff Requirements Memorandum (SRM-SECY-11-0023), the Commission approved the staff's recommendation to prepare a guidance document and *Federal Register*

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notice clarifying the types of radium in the military's possession subject to NRC regulation, and describing regulatory approaches to be used to implement the NRC's authority. On July 8, 2011, the staff's proposed guidance, in the form of a draft RIS, was published in the *Federal Register* (76 FR 40282) for public comment. The DoD opposed the proposed clarification of the NRC's jurisdiction over military radium and identified several implementation challenges, particularly concerns about licensing. Despite its opposition, DoD expressed support for further joint discussions on how the NRC can be appropriately involved during the military's remediation activities. Seven formal discussions were conducted from February 2012 to July 2013, to address preliminary responses to DoD's major comments on the draft RIS. This paper summarizes the outcomes of these discussions, including the staff's recommendation to finalize an MOU providing for NRC involvement with DoD remediation of radium and other Atomic Energy Act of 1954, as amended (AEA), material subject to the NRC's regulatory authority. On August 1, 2013, the DoD submitted a letter supporting the remediation MOU and stating that this cooperative approach would resolve its concerns with the draft RIS (Enclosure 1).

BACKGROUND:

On February 16, 2011, the staff provided the Commission with a notation vote paper (SECY-11-0023) that informed the Commission of regulatory issues related to military radium and recommended approaches to resolve those issues. In a March 24, 2011, SRM, the Commission approved the staff's recommendation to prepare a guidance document and *Federal Register* notice clarifying the types of radium-226 in the military's possession subject to NRC regulation, and describing regulatory approaches to be used to implement NRC authority for radium contamination and radium in items and equipment in the military's possession. On July 8, 2011, the staff's proposed guidance, in the form of a draft RIS, was published in the *Federal Register* (76 FR 40282) for a 60-day public comment period. The DoD requested a 75-day extension of the public comment period so that it could meet with the NRC staff and prepare its formal comments. The staff granted the DoD request and reopened the public comment period until November 29, 2011 (76 FR 57006; September 15, 2011). During this extended public comment period, on November 1, 2011, the staff conducted a public meeting with the DoD, including representatives from the Air Force, Army, and Navy, to discuss the draft RIS and DoD preliminary concerns. On November 28, 2011, DoD submitted its formal comments on the draft RIS. The NRC received nine additional comments from other entities.

Five commenters supported the proposed clarifications in the draft RIS, and four commenters were neutral, but raised implementation challenges. The DoD opposed the proposed clarification of the NRC's jurisdiction over military radium and identified several implementation challenges, particularly concerns about licensing. Despite its opposition, DoD expressed support for further joint discussions on how the NRC can be appropriately involved during the military's remediation activities so as to avoid duplication of regulatory requirements and effort. Enclosure 2 provides a summary of the public comments, a list of comments received, and the Agencywide Document Access and Management System accession numbers that allow electronic access to each comment letter.

DISCUSSION:

1. Discussions with DoD to Address DoD Comments

A joint NRC-DoD working group was established to discuss resolution of DoD's comments. The working group consisted of NRC staff and Environmental Restoration program managers and legal staff from the Office of the Under Secretary of Defense, U.S. Department of the Air Force, U.S. Department of the Army, and U.S. Department of the Navy.

Seven formal interactions were conducted from February 2012 to July 2013, as well as numerous informal discussions for planning, coordination, and clarification purposes. These interactions primarily focused on preliminary responses to DoD's major comments on the draft RIS for radium in the following areas: remediation, legal issues, licensing, operational firing ranges, items and equipment, and implementation. The working group also discussed three new issues. The first issue concerns DoD's remediation of unlicensed radioactive material subject to the NRC's jurisdiction under the AEA, such as strontium-90 and cesium-137, using the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) process. The second issue concerns DoD's remediation of buildings where there is no release to the environment and, as such, CERCLA does not apply. In these instances DoD uses a CERCLA-like process for the remediation, but is not bound by the requirements of CERCLA. The third issue relates to DoD's view that it is not authorized to pay the NRC fees for the NRC's activities conducted under a license or MOU. These new issues and proposed resolution are described in Enclosure 3 along with DoD's major comment areas.

Discussions with DoD were constructive and provided an opportunity for both the NRC and DoD staff to discuss the complexities of their respective programs and clarify approaches to address the DoD's comments on the draft RIS. The majority of attention during these meetings was given to developing and discussing the pros and cons of various options for the NRC oversight of DoD's remediations occurring under the CERCLA process. Staff proposed a possession-only license (POL) that acknowledged the use of the CERCLA process instead of the NRC AEA-based decommissioning process as a specific way to coordinate the licensing approach that was directed by the Commission. However, DoD opposes any form of NRC licensing. This position is based primarily on DoD's view that the POL would be imposing permit requirements on its CERCLA remediation activities contrary to §121(e)(1) of CERCLA (42 U.S.C. §9621(e)(1)),¹ commonly referred to as the CERCLA permit waiver. Furthermore, DoD expressed the concern that the NRC's licensing process and requirements could impact the costs and schedules of DoD's remediation and transfers of property. As a result, DoD proposed an MOU option to document the extent of NRC's involvement with DoD's remediation of AEA material, including radium, at unlicensed sites. The MOU option would render the permit waiver issue moot. Although the NRC and DoD discussions also indicated continued differing views regarding the NRC's legal jurisdiction for military radium under the AEA, both the NRC staff and DoD agree that the MOU option would be an acceptable implementation approach for the NRC's involvement with the remediation of radium and other unlicensed AEA material. The working group discussed a draft remediation MOU. Further discussions resulted in the staff providing DoD with the key provisions of the proposed MOU to show a revised organization of the provisions and full scope of the MOU (Enclosure 4). At the staff's request, DoD provided an

¹ 42 U.S.C. §9621(e)(1) provides, in pertinent part, "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." (Emphasis added).

August 1, 2013, letter supporting the MOU option (Enclosure 1). The licensing and MOU options are further discussed below and described in Enclosure 5 along with pros and cons for each option.

2. Interactions with the U.S. Environmental Protection Agency (EPA)

The staff also conducted two conference calls with the EPA, including EPA staff from the Office of General Counsel, Office of Regional Counsel in Region 9, Federal Facility Restoration and Reuse Office, and the Office of Superfund Remediation and Technology. The EPA Region 9 had provided comments on the draft RIS. The primary purpose of these calls was to gain an understanding directly from EPA regarding: the permit/licensing exclusion under §121(e)(1) of CERCLA, views on the licensing and MOU options, dispute resolution under an MOU, and EPA's role at sites not listed on the National Priority List (NPL). Specifically, the staff explained that the intent behind the POL was not to regulate the CERCLA remedial action or mandate the use of the NRC's decommissioning process. Instead, the POL would authorize the possession of the AEA material on the site and the NRC would conduct activities and use its decommissioning expertise to independently gain additional confidence that, upon the completion of the CERCLA remedial action, the site would be eligible for unrestricted or restricted release and the NRC license could be terminated. The EPA acknowledged that it had not confronted this exact issue in its past CERCLA actions, but questioned whether an NRC license was necessary for the NRC to achieve its goals. The EPA did; however, indicate that if the remedial action was occurring on only a portion of the site and AEA material was also on another portion of the site that was not subject to the CERCLA action, NRC licensing of the latter portion of the site would in no way be affected by the permit waiver. The EPA also indicated that the MOU approach would be generally beneficial, but dispute resolution may be difficult under an MOU compared to licensing. The EPA confirmed the NRC staff understanding that EPA's authority and role is different for NPL and non-NPL sites. The EPA has regulatory oversight and the final word at NPL sites, but does not have the same authority or involvement at non-NPL sites.

3. Evaluation of Options for NRC Involvement

The licensing and MOU options for the NRC's involvement with DoD's remediation under the CERCLA process, including pros and cons, are described in Enclosure 5. Additional details about the scope of the MOU are also provided in the key provisions of the MOU in Enclosure 4; a description of the NRC's involvement under an MOU is presented in Enclosure 6.

In summary, the licensing option using a POL would retain NRC's licensing authority to resolve difficult disputes. In the staff's opinion, the POL would also reduce unnecessary dual regulation and be consistent with the CERCLA permit waiver because only the possession of the AEA material would be licensed and the POL would recognize that DoD's actual remediation of the site is occurring under the CERCLA process instead of the NRC decommissioning process. However, this form of licensing could be complicated to implement by both NRC and DoD, because this type of POL has not been implemented previously by either NRC or DoD. Further, DoD continues to object to any form of licensing and would likely challenge imposition of the POL. The MOU, on the other hand, appears to be the most constructive and consistent way to manage jurisdictional overlap and avoid unnecessary dual regulation. While it gives flexibility for the NRC involvement, the staff remains concerned that resolution of disputes that arise under the MOU could be difficult without the NRC's regulatory authority under a license. Finally, DoD's August 1, 2013, letter states that it believes an MOU would establish a cooperative NRC

and DoD process and would address DoD's concerns regarding the draft RIS (Enclosure 1). For these reasons, the staff recommends proceeding with the MOU option because it is the most practical way to ensure that the NRC remains informed and involved in the remediation of radioactive materials while simultaneously avoiding prolonged, resource intensive challenges from DoD. However, the staff recommends periodically evaluating the effectiveness of the MOU, particularly for dispute resolution, and taking appropriate actions, including regulatory actions, if the MOU is found to be ineffective. As discussed in Enclosure 6, the MOU, in lieu of licensing, would be used at all DoD unlicensed sites containing any type of AEA licensable material. Similarly, the MOU would apply whether the remedy DoD was pursuing would result in restricted or unrestricted release of the site.

4. NRC Fees for Implementing the MOU at Specific Sites

Under Section 161w of the AEA and the Omnibus Budget Reconciliation Act of 1990, the NRC lacks the statutory authority to charge DoD fees under either Part 170 (fees for services) or Part 171 (annual fees) because DoD is not a license applicant, licensee, or certificate holder. Accordingly, the regulatory costs associated with this MOU must be recovered through either annual fees to other licensees or included in the 10 percent of the NRC's budget that is off the fee base and recovered through Congressional appropriations. This latter approach would entail creating a new fee relief category for the regulatory activities under the MOU. This fee relief option has been discussed with the Office of the Chief Financial Officer and is considered preferable primarily because it would not result in raising the fees of other NRC licensees, and fairness dictates that licensees should not have to pay for services if they are not receiving any benefits from those services.

5. Recommended Path Forward

- Finalize and implement a comprehensive remediation MOU and periodically evaluate its effectiveness.

The working group would develop the specific wording of the MOU based on Commission direction and the key provisions identified in Enclosure 4. The completed MOU would be noticed in the *Federal Register*. The staff would implement the MOU and begin its site-specific involvement using a graded approach as described in Enclosure 6.

- Finalize the RIS.

The staff would finalize the RIS based on the Commission's direction and DoD's view that agreeing to an MOU would resolve its concerns with the draft RIS. Most of the draft RIS will remain unchanged, particularly the NRC's clarification of jurisdiction over certain types of radium. However, two major changes will be made in response to DoD's comments. First, the licensing approach noted in the draft RIS would be replaced by the MOU approach. The second change would clarify that radium on operational firing ranges would not be subject to the NRC's jurisdiction, but the MOU would apply to the remediation of radium on closed ranges. See further discussion of firing ranges and this change in Enclosure 3. The final RIS would also include the staff's responses to all the public comments received on the draft RIS, including the DoD comments. The final RIS would be noticed in the *Federal Register*.

- Potential Schedule

The staff recommends the following implementation schedule, but notes that this schedule is dependent on the Commission's decision and DoD participation that is supportive and timely.

- Complete MOU by early Fiscal Year (FY) 2015.
- Complete RIS by early FY 2015.
- Complete initial DoD site inventory and planning discussions in FY 2015.
- Begin monitoring and training at pilot sites during early FY 2016.
- Full monitoring during FY 2017.

6. Resolution of Issues

In the Naturally Occurring and Accelerator Produced Radioactive Material Rule Statement of Considerations, the Commission directed the staff to interact with DoD and resolve issues related to military radium. As a result of the staff's site visits to Air Force and Navy sites since 2007, and the more recent meetings with DoD regarding the draft RIS, the following key issues would be resolved by completing the MOU and final RIS. Enclosure 7 gives a description of each issue and its resolution.

- Confusion over what radium in military possession is subject to NRC regulatory authority.
- Potential for dual regulation from the overlap of AEA and CERCLA jurisdiction for DoD's remediation of AEA radioactive material.
- The DoD remediation of unlicensed AEA material subject to the NRC's authority.
- Potential for reopening of completed military remediation and impacts on redevelopment.
- Independent Federal oversight to ensure protection of public health and safety.

RECOMMENDATIONS:

The staff recommends that the Commission approve:

- 1) Completing the MOU for the NRC's involvement with DoD remediation of confirmed radiological contamination consistent with the key provisions;
- 2) Using a graded approach described in Enclosure 6 to implement NRC's involvement under the MOU;
- 3) Establishment of a new fee relief category for the monitoring of DoD unlicensed sites; and
- 4) Completing the RIS as described above and publishing it in a *Federal Register* notice.

AGREEMENT STATE COORDINATION:

The Agreement States were initially involved with this issue during the development of SECY-11-0023, and subsequently, in July 2011 the Agreement States were notified that the draft RIS was available for public comment. Two State of California agencies provided comments. On April 25, 2013, the staff provided a status briefing in a monthly call with the Organization of Agreement States and Conference of Radiation Control Program Directors. This briefing summarized the NRC/DoD discussions of DoD's comments, the option for a comprehensive remediation MOU instead of licensing, and the general schedule for completing the MOU and RIS at the time of the briefing. A few States asked about the scope of the MOU and NRC monitoring. One State raised concerns about NRC's lack of authority under an MOU with DoD based on its experience with DoD's remediation.

RESOURCES:

The resource implications associated with NRC's involvement at military radium sites are addressed within Enclosure 8, which is non-public.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this paper for both the fee relief issue and resource implications and has no objections.

/RA by Roy P. Zimmerman for/

Mark A. Satorius
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Enclosures:

1. DoD's August 1, 2013, Letter Supporting an MOU for NRC Involvement with DoD Remediation
2. Summary of Public Comments on the Draft RIS for Military Radium
3. NRC Staff Views on Resolution of Major DoD Comment Areas and New Concerns Identified in Discussions with DoD
4. Key provisions of a MOU between the NRC and the DoD for Remediation of DoD sites with Radioactive Material Subject to NRC Regulatory Authority
5. Options for NRC Involvement with DoD Remediation
6. Description of NRC Involvement under an MOU with DoD
7. Resolution of Issues Regarding NRC's Involvement with DoD Remediation of Radium and other Radioactive Material Subject to NRC Regulatory Authority
8. Resource Implications for NRC's Involvement at Military Radium Sites

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Monday August 18, 2014

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT August 11, 2014, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

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**U.S. Department of Defense's August 1, 2013, Letter
Supporting a Memorandum of Understanding for
U.S. Nuclear Regulatory Commission Involvement with
U.S. Department of Defense Remediation
ML13277A566**