



POLICY ISSUE **(Information)**

February 10, 2019

SECY-19-0018

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: CHANGES TO THE PETITION REVIEW PROCESS UNDER
SECTION 2.206 OF TITLE 10 OF THE *CODE OF FEDERAL
REGULATIONS*

PURPOSE:

This paper informs the Commission of the results of the U.S. Nuclear Regulatory Commission (NRC) staff's efforts to revise Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions" (MD 8.11). This paper also presents the results of the NRC staff's consideration of the five items identified in Staff Requirements Memorandum (SRM)-M180208, dated February 20, 2018.¹ This paper does not address any new commitments or resource implications.

SUMMARY:

The staff has completed its comprehensive reassessment of the review process for petitions for enforcement-related actions filed under Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR) (the 2.206 petition process) as described in its briefing to the Commission on February 8, 2018. As part of this effort, the staff considered the five items identified in SRM-M180208 (the SRM), and made corresponding changes to the 2.206 petition process and the associated guidance. Enclosure 1 shows the redline/strikeout document comparing the current version of MD 8.11 (last revised October 25, 2000) to the revised MD 8.11. The revised

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¹ SRMM180208, is available in the Agencywide Documents Access and Management System (ADAMS) at Accession No. ML18051A998.

MD 8.11 is provided for information in Enclosure 2,² and will be issued pending EDO approval.

Like the current version of MD 8.11, the revised MD 8.11 includes Directive Handbook 8.11, "Review Process for 10 CFR 2.206 Petitions" (DH 8.11), which contains procedural details for reviewing 2.206 petitions. The staff has also issued a publicly available companion guidance document that captures lower level staff procedures for implementing the 2.206 petition process, "Desktop Guide: Review Process for 10 CFR 2.206 Petitions" (Desktop Guide). The Desktop Guide will become effective upon issuance of MD 8.11.³

In the SRM, the Commission directed the staff to evaluate, consider, or clarify five items (SRM Items) when preparing the final revised MD 8.11. The staff revised MD 8.11 to address each of the items in the SRM. The revisions clarify how petitioners and licensees may communicate during meetings, implement an informal EDO review process for proposed director's decisions, clarify when a streamlined director's decision is appropriate, and clarify the initial screening criteria. The revised MD 8.11 also provides greater emphasis on promptly filing director's decisions with the Office of the Secretary of the Commission (SECY) immediately following signature by the Office Director. Additional staff procedural guidance in each of these areas has been provided in the Desktop Guide.

BACKGROUND:

It is NRC policy to provide any person with the means to request that the agency institute a proceeding pursuant to 10 CFR 2.202, "Orders," to modify, suspend, or revoke a license, or to take such other action as may be proper (hereinafter referred to as to take enforcement-related action). This policy is documented in MD 8.11 and codified in 10 CFR 2.206.

The NRC staff has proposed numerous changes to the 2.206 petition process since the current version of MD 8.11 was published in 1999 and later revised in 2000. In 2009, the staff began an effort to update MD 8.11 and solicited comments from NRC internal stakeholders. The staff informed members of the public about its plan to revise MD 8.11 and requested public comment in a *Federal Register* (FR) notice dated July 30, 2010 (75 FR 44992). However, the staff deferred its efforts to update MD 8.11 because of higher priority work resulting from the events at Fukushima in 2011, which included addressing numerous Fukushima-related petitions submitted under 10 CFR 2.206. Subsequently, as part of the agency's re-baselining initiative for Project Aim, the staff proposed changes related to the 2.206 process that would reduce the resources needed for 2.206 petition reviews. The proposed changes included clarifying the evaluation criteria for acceptance of petitions and allowing the Petition Review Board (PRB) to make an initial decision to accept a petition without a petitioner presentation.⁴ In 2017, the Office of the Inspector General (OIG) conducted an audit of the 2.206 process and issued recommendations in "Audit of NRC's 10 CFR 2.206 Petition Review Process," OIG-17-A-23, dated August 22, 2017.⁵ In its report, the OIG recommended that the staff clarify the criteria for evaluating 2.206 petitions and implement a formal assessment of the process. The proposed revised MD 8.11 addresses previous input from past revision efforts, the OIG audit recommendations, and Project Aim re-baselining Item 94.

² Enclosure 2, "Final Draft MD 8.11," will become publicly available upon final approval by the EDO.

³ "Desktop Guide: Review Process for 2.206 Petitions" is available in ADAMS at Accession No. ML18176A147.

⁴ See Item 94 from Enclosure 1, "Re-baselining Recommendations," of SECY-16-0009, "Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities," dated January 31, 2016 (ADAMS Accession No. ML16028A189 (package)).

⁵ OIG-17-A-23 is available in ADAMS at Accession No. ML17234A561.

Given the span of time since the initial efforts to update MD 8.11, the staff sought to make further revisions in 2017 to improve the 2.206 process and to obtain updated external stakeholder feedback. The staff proposed a shorter version of MD 8.11 by relocating lower level staff procedures to a companion implementing guidance document, the Desktop Guide, as noted above. The Desktop Guide aims to facilitate consistent implementation of the 2.206 petition process. On December 7, 2017, the staff held a public meeting with external stakeholders and collected additional feedback on improvements to increase clarity, effectiveness, and efficiency and ensure openness and transparency in implementing petition reviews. The staff sought feedback on the proposed changes to the 2.206 petition process, which include introducing initial screening criteria, allowing the PRB to make an initial assessment before meeting with a petitioner, adding criteria for holding petitions in abeyance, and clarifying the criteria for petition acceptance. On February 8, 2018, external stakeholders and the staff briefed the Commission on potential changes to the 2.206 petition process.

As documented in the resulting SRM-M18028, the Commission asked the staff to consider the following five items when preparing the final MD:

- (1) Evaluate whether the petitioner should have an opportunity to pose clarifying questions of the licensee during the initial meeting, facilitated by the PRB Chairman.
- (2) Consider whether to provide a mechanism for the petitioner to request an informal EDO review of a director's decision.
- (3) Further clarify when a streamlined director's decision is appropriate.
- (4) Clarify the language for the initial screening process for determining whether a request for action is within the scope of 10 CFR 2.206.
- (5) Ensure that the MD clearly articulates the responsibility of the staff to promptly file director's decisions with SECY.

The staff's consideration of each SRM item is included in the discussion section below. The Commission also directed the staff to make a redline/strikeout version of the proposed changes to MD 8.11 available to the Commission and external stakeholders. Enclosure 1 of this paper provides the redline/strikeout version showing the differences between the updated version of MD 8.11 and the current MD 8.11. Enclosure 1 is publicly available and a copy will be posted to the NRC public Web page. Changes corresponding to each SRM Item and a complete list of significant revisions is included in the "Executive Summary," of the revised MD, which will remain non-public until EDO approval (see Enclosure 2).

In addition to the revised MD 8.11, the staff is separately documenting a process for petitions to modify the terms and conditions of a combined license filed under Section 103(f) of 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," that will reflect SECY-17-0007,⁶ "Petitions to Modify a Combined License and Petitions to Modify, Suspend, or Revoke an Early Site Permit," dated January 17, 2017, and the corresponding

⁶ SECY-17-0007 is available in ADAMS at Accession No. ML16159A251.

SRM.⁷ This documented process will build on the 10 CFR 2.206 petition process discussed in the revised MD 8.11.

DISCUSSION:

SRM Item 1: Evaluate whether the petitioner should have an opportunity to pose clarifying questions of the licensee during the initial meeting, facilitated by the PRB Chairman.

External stakeholders provided feedback that the NRC treats petitioners differently than licensees when moderating questions during PRB meetings with petitioners. In the current version of MD 8.11, licensees are permitted to ask clarifying questions of a petitioner to ensure the licensee fully understands and can promptly address safety or compliance concerns identified by a petitioner. However, a petitioner is not given an opportunity to ask questions of a licensee. The staff considered whether the current practice, as described in the current version of MD 8.11, is sufficient to meet the objectives of the initial meeting, the need for licensees to understand the petition, and the agency's policy for conducting public meetings.

The primary purpose of the meeting with the petitioner is to obtain clarification on the issues raised in the petition. The staff determined that this objective, and the need for licensees to be aware of safety concerns at their facilities, can still be achieved if the process is altered consistent with stakeholder feedback. The revised process removes the opportunity for licensees to ask questions of petitioners, and instead, offers petitioners and licensees the opportunity to ask questions of the PRB while allowing both the petitioner and licensee to voluntarily respond to such questions. This approach maintains consistency with the public meeting policy of MD 3.5.

The staff has revised DH 8.11 Section III.F, "Meeting with the Petitioner," and the accompanying Desktop Guide to state that after the petitioner's presentation, the licensee will be given an opportunity to ask the PRB members questions related to the issues raised in the petition, and both the petitioner and licensee will be given an opportunity to ask the PRB members questions regarding the process for evaluating and reviewing 2.206 petitions. Although the intent is that the PRB members would respond to such questions, the licensee or petitioner may also voluntarily respond.

SRM Item 2: Consider whether to provide a mechanism for the petitioner to request an informal EDO review of a director's decision.

At the February 8, 2018, Commission meeting, external stakeholders pointed out that there is no appeals process for director's decisions similar to those in place for backfitting and enforcement actions.

⁷ As described in SECY-17-0007, 10 CFR 52.103(f) petitions are part of the NRC's process for determining whether to allow operation and may be submitted from combined license issuance to the making of the finding under 10 CFR 52.103(g) that the acceptance criteria in the inspections, tests, analyses, and acceptance criteria are met.

In considering options to address SRM Item 2, the staff noted the following mechanisms for petitioners to provide information for review by the PRB, the assigned Office Director, the EDO, or the Commission:

- Petitioners may address an initial PRB recommendation during the meeting with the PRB.
- Petitioners are provided an opportunity to comment on the proposed director's decision. The comments and staff's responses are included as an attachment to the director's decision.
- Petitioners may supplement their petitions at any time prior to the NRC's issuance of the final director's decision.
- Outside of the 2.206 process, petitioners may provide feedback to Office Directors, who review and approve all PRB recommendations; to the EDO, who has supervisory authority over Office Directors who sign director's decisions; and to the Commission during its 25-day review period for director's decisions.
- Petitioners may resubmit a petition with new information that addresses the reason(s) for a denial.
- Petitioners may also provide feedback on technical or process issues to the NRC staff after a decision is documented in a director's decision or closure letter.

The staff considered three options in response to SRM Item 2:

- (1) Implement an EDO review initiated by the petitioner.
- (2) Implement a discretionary EDO review process.
- (3) Retain the review mechanisms of the current process.

The staff chose to implement Option 3. The considerations for each of the options considered are presented below.

SRM Item 2, Option 1: EDO Review Initiated by the Petitioner

The staff considered providing a mechanism for the petitioner to directly request an EDO review of a director's decision. Option 1 would be implemented by offering the petitioner an opportunity to request an EDO review of a decision to deny a petition, in whole or in part, in the letter requesting comments on the proposed director's decision. The staff would establish criteria for acceptance of a request for EDO review, and the petitioner would be required to demonstrate that the request meets those review criteria. This would increase the formality of the process.

Considerations: The 2.206 petition process is intended to provide an informal process, accessible to the public, to provide a timely response to a request for enforcement-related action. Well-defined review criteria would need to be established for Option 1 to allow a determination whether an additional review is warranted, to avoid expending additional resources and delaying the schedule without a corresponding benefit. Based on experience with petitioners who comment on proposed director's decisions, the staff expects that most petitioners whose requests are denied would

request an additional EDO review. Each request would require additional time and resources to evaluate, even when the review criteria were not met. Adding an additional EDO review initiated by the petitioner places the burden of meeting the review criteria on the petitioner, and petitioners may be dissatisfied if their petition is not selected.

Option 1 was not implemented.

SRM Item 2, Option 2: Implement a Discretionary EDO Review Process

The staff considered establishing a defined process for the EDO to initiate a discretionary review of a proposed director's decision for any petition the staff intends to deny in whole or in part prior to final issuance. The EDO, as supervisor of the staff, inherently has the authority to review a proposed director's decision when the EDO believes it appropriate. Under Option 2, the staff would forward a proposed director's decision and any comments received to the EDO. The EDO, at his or her discretion, could choose to initiate an informal review of the proposed director's decision before the Office Director provides the final director's decision to the petitioner and to SECY. The staff would inform a petitioner when the EDO initiates this review, and would inform the petitioner of the results. The metric for issuing the final director's decision would be adjusted to enable responsible staff to address the results of the EDO review.

This approach would be analogous to, and in addition to, the current opportunity provided to the Commission to review final director's decisions. The regulations in 10 CFR 2.206(c)(1) and (2) state that the Commission will not entertain a petition or other request for review of a director's decision, but that the Commission may, on its own motion, decide to review any director's decision that denies a 10 CFR 2.206 petition in whole or in part.

Considerations: As an informal process, this option avoids an administrative barrier of adding a formal appeals process with prescriptive entry criteria and provides guidance and transparency for the EDO to exercise his or her supervisory authority, when deemed appropriate, to review a proposed director's decision. The staff expects that an EDO discretionary review would be initiated infrequently, and the resource implications of this option would be modest. However, a threshold EDO staff review of each proposed director's decision and petitioner's comments will be necessary to determine whether to undertake a discretionary review. Further, guidance on the role of the EDO in the director's decision process would have to be developed to ensure that it is consistent with 10 CFR 2.206(b), which states that the decision to grant or deny the petition is made by the Office Director. Finally, because this option does not provide petitioners a means to initiate a review, petitioners may be dissatisfied if their petition is not selected for additional review.

Option 2 was not implemented.

SRM Item 2, Option 3: Retain the Review Mechanisms of the Current Process

The staff considered the current mechanisms within the 2.206 review process for petitioners to provide opposing views on decisions under review, as discussed above, and whether there is a need to provide petitioners an additional opportunity to raise such concerns to the PRB, the assigned Office Director, the EDO, or the Commission.

The 2.206 petition process gives members of the public an opportunity to identify safety or security concerns and request that the NRC take enforcement-related action to address them. A 2.206 petitioner contributes to the regulatory process and NRC decision-making. The process for requesting and considering comments on a proposed director's decision ensures that the Office Director will review and consider any opposing views prior to making a decision on the petition. As noted above, multiple opportunities already exist in the 2.206 process for petitioners to provide opposing views for consideration in NRC decision-making.

Considerations: Petitioners may not be aware that they can provide information directly to an Office Director, the EDO, or the Commission because such informal avenues are not explicitly described in MD 8.11. Option 3 would make no additional change to the current process since the proposed revisions to MD 8.11 already provide for enhanced communications with petitioners and emphasize the need for the staff to appropriately document the basis for NRC decisions. As noted above, the director's decision, along with any comments received and their resolution, is provided to SECY. If the Commission chooses to take *sua sponte* review of a director's decision, the Commission may, at its discretion, assign action to the EDO to support the Commission's review, as appropriate. The staff concluded that the addition of a formal or informal EDO review to the process would lengthen the process with some increase in expended staff time without a commensurate improvement to the clarity, openness, or quality of the outcomes. The staff expects that the enhancements to communication and documentation in the revised MD 8.11 will minimize a petitioner's need to use other communication avenues. The expected resource implications of this option are minimal.

The staff is implementing Option 3.

SRM Item 3: Further clarify when a streamlined director's decision is appropriate.

The current MD 8.11 describes the option for a streamlined process where the director's decision is issued at the same time the staff accepts a petition with an acknowledgement letter. In response to feedback received, the staff revised MD 8.11 and the Desktop Guide to clarify when it would be appropriate to use the streamlined director's decision process.

The staff provided additional clarification to address SRM Item 3 in the revised DH 8.11 Section III.D, "PRB Initial Assessment," and Section III.G.4(f), "Streamlined Director's Decisions." In certain cases, the PRB may be able to issue a streamlined director's decision for a petition that meets the acceptance criteria in DH 8.11 Section III.C.1 but raises issues that the staff has evaluated and is prepared to immediately issue a decision on. For example, this may occur if a petition's supporting information consists almost entirely of NRC-generated information (e.g., inspection reports, generic letters) or information well known to the NRC (e.g., news reports, licensee event reports). In such cases where the NRC staff is already prepared to issue a decision on the issue or to take an action, the NRC would not issue a proposed director's decision but would issue a final director's decision with the acknowledgment letter. Issuing a streamlined director's decision in these situations would allow the NRC to move forward with an imminent decision or action that considers the information in the petition and avoids unnecessary duplication of NRC resources that would result from the PRB addressing the same concern.

SRM Item 4: Clarify the language for the initial screening process for determining whether a request for action is within the scope of 10 CFR 2.206.

The proposed 2.206 review process presented at the 2018 Commission meeting included initial screening criteria to ensure that requests submitted as 2.206 petitions are appropriately within the scope of the 2.206 petition process. Requests that are more appropriately handled in other processes would be screened out. At the meeting, the staff received questions on whether or not requests for actions other than proceedings to issue orders under 10 CFR 2.202 (e.g., a demand for information or a civil penalty) would screen out of the 2.206 process. In response, the staff indicated that this was not the intent.

In response to the SRM, the staff has revised and clarified the screening criterion in Section II.A.2(d)(v) of revised DH 8.11. This criterion, entitled "Requests that Would Not Reasonably Lead to an Enforcement Action," states that a petition should be screened out if it does not request a specific enforcement-related action and does not identify a specific safety or security concern. It also states that a petition must provide information that could reasonably lead the NRC to take an enforcement action, even if the ultimate action taken is not the action originally requested. This criterion reflects language in 10 CFR 2.206(a) that states "[t]he request must specify the action requested and set forth the facts that constitute the basis for the request." The intent is to ensure that, regardless of the type of action requested, an adequately supported request for enforcement-related action that identifies a specific safety or security concern will be evaluated under the 2.206 petition process and will not be screened out solely because the action requested is inappropriate for the circumstances.

SRM Item 5: Ensure that the MD clearly articulates the responsibility of the staff to promptly file director's decisions with SECY.

The staff added guidance to MD 8.11 to ensure SECY can promptly provide director's decisions to the Commission to begin its 25-day *sua sponte* review period. The revised MD 8.11 specifies that the agency 2.206 petition coordinator is responsible for coordinating with SECY to obtain director's decision numbers (e.g., DD-YY-XX) prior to issuance and to inform SECY promptly when a director's decision is issued. The staff addressed SRM Item 5 in revised DH 8.11 Section V.H, "Issuing the Director's Decision," which specifies that the petition manager immediately inform the agency 2.206 petition coordinator when the director's decision is signed. Section V.I, "Coordination with SECY," of the revised DH 8.11 also clarifies that the agency 2.206 petition coordinator is responsible for ensuring that SECY is promptly notified when a director's decision is signed. The Desktop Guide includes additional procedural details, instructions and tools⁸ to ensure the staff consistently coordinates director's decisions with SECY.

CONCLUSION:

The EDO intends to sign and issue the revised version of MD 8.11 on March 1, 2019. The revised MD 8.11 implements the staff's disposition of the five items listed in SRM-M180208 and other improvements to the 2.206 petition process. The revised MD 8.11 and the Desktop Guide enhance the clarity and consistency of the 2.206 petition process, foster more effective

⁸ See Exhibit 1, "Simplified 2.206 Process Flow Chart," Exhibit 2, "Petition Manager Checklist," and Exhibit 8, "2.206 Petition Review Checklist for Proposed and Final Director's Decision," in Appendix B of the Desktop Guide (ADAMS Accession No. ML18176A147).

communications between the staff and petitioners, provide clearer expectations for staff and petitioners participating in the process, and emphasize timely responses to petitioners and notification of the Commission (through SECY) when director's decisions are issued.

COORDINATION:

The Office of the General Counsel reviewed this paper and has no legal objection.

A handwritten signature in black ink, reading "Margaret M. Doane". The signature is written in a cursive, flowing style.

Margaret M. Doane
Executive Director
for Operations

Enclosures:

1. Redline/Strikeout of Revised MD 8.11
Compared to October 25, 2000 Revision
2. Final Draft MD 8.11