



POLICY ISSUE **(Notation Vote)**

October 1, 2019

SECY-19-0095

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: DISCONTINUATION OF RULEMAKING—ENHANCED SECURITY OF
SPECIAL NUCLEAR MATERIAL

PURPOSE:

The purpose of this paper is to provide the Commission with options for implementing the Commission's direction in the staff requirements memorandum (SRM) for COMKLS-18-0003, "Fiscal Year 2020 Budget to the Commission," dated August 22, 2018 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18234A238, non-public), on the rulemaking activity, "Enhanced Security of Special Nuclear Material." The U.S. Nuclear Regulatory Commission (NRC) staff requests Commission approval to discontinue the proposed rulemaking activity.

BACKGROUND:

Following the events of September 11, 2001, the NRC issued security orders to licensees that possessed Category I or Category III quantities of special nuclear material (SNM). In 2006, the Commission approved in SRM-COMSECY-05-0058, "Schedules and Resources for Security Rulemakings," (ADAMS Accession No. ML060390527, non-public), the staff's schedules and resources for the initial rulemaking on enhancing security for SNM. The scope of the rulemaking included incorporating the physical protection requirements contained in the post-9/11 security orders into generically applicable regulations to increase regulatory predictability and stability. In 2010, the Commission approved the staff's request to amend the scope of the rulemaking to pursue a revised categorization scheme for SNM, which included a material attractiveness approach. In April 2016, the Commission directed the staff to suspend all activities on the proposed SNM rulemaking (SRM-M160330, ADAMS Accession No. ML16098A444 (limited access)).

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In SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated October 19, 2015 (ADAMS Accession No. ML15267A759 (Package)), the staff recommended an approach that would require Commission approval to discontinue rulemakings previously authorized by the Commission. The Commission approved the staff's recommendation in the SRM for SECY-15-0129, dated February 3, 2016 (ADAMS Accession No. ML16034A441). Consistent with Commission direction in SRM-SECY-15-0129 to explore ways to minimize the resources necessary to discontinue rulemaking, the staff is suspending work on the "Enhanced Security of Special Nuclear Material," rulemaking activity pending the Commission's response to this request to discontinue rulemaking. Should the Commission approve the discontinuation of this rulemaking, enclosed is a draft *Federal Register* notice that would inform the public of the Commission's decision (Enclosure 1).

DISCUSSION:

In SRM-COMKLS-18-0003, the Commission directed the staff to proceed with rulemaking with the exclusive scope of codifying the requirements of the post-9/11 security orders into the NRC's regulations. Consistent with this direction, the staff developed a draft revised regulatory basis (ADAMS Accession No. ML18332A053) and noticed it in the *Federal Register* for public comment (84 FR 6980; March 1, 2019). A subsequent notice was published to extend the public comment period (84 FR 10269; March 20, 2019), and the comment period closed on April 19, 2019. The NRC received 13 comment submissions, including 1 non-publicly available comment due to the inclusion of classified information. A summary of the comments and the staff's consideration of those comments was developed (ADAMS Accession No. ML19157A086).

Several commenters suggested alternate approaches to the limited-scope rulemaking directed in SRM-COMKLS-18-0003. Several commenters supported the take no action alternative (not proceeding with the rulemaking). One commenter suggested proceeding with a direct final rule to simply reference the previously issued security orders in the regulations. Another commenter expressed "strong opposition" to the reduction in scope proposed by the draft revised regulatory basis and urged the Commission to discard it and move forward with a rulemaking consistent with the 2015 final regulatory basis. Enclosure 2 discusses the views of some NRC technical staff supporting this commenter's alternate approach. The alternate views were considered in the development of the staff's options and the recommendation to discontinue the SNM security requirements rulemaking. The staff notes that these alternate approaches are not consistent with the August 2018 Commission direction and therefore are beyond the scope of this rulemaking.

In addition to written comments received, the staff engaged stakeholders at public meetings. During the April 2019 Fuel Cycle Cumulative Effects of Regulation public meeting, the staff presented the status of the rulemaking based on the August 2018 Commission direction. Several stakeholders expressed concerns on resuming the rulemaking with the limited scope. One concern expressed was that codifying parts of the post-9/11 orders and not others could create a patchwork of regulations and potentially result in confusing the regulated community. (As discussed in the November 2018 Commissioners' Assistant (CA) Note, not all order requirements could be codified into the regulations because of the sensitive nature of those requirements.)

Subsequently, the NRC staff determined that all requirements of the security orders issued to licensees possessing Category III quantities of SNM could be incorporated into the regulations

and those orders withdrawn.¹ However, some requirements of the classified security orders issued to licensees possessing Category I quantities of SNM could not be included in the regulations because of their sensitive nature. Thus, portions of those orders would need to remain in effect. To mitigate having the same or similar requirements in both the regulations and security orders, the NRC could remove from the orders those requirements incorporated into the NRC's regulations. While this addresses some of the stakeholder concerns, it does not resolve the concerns of licensees with Category I quantities of SNM having requirements in both orders and the NRC's regulations.

The staff conducted a preliminary cost and benefit analysis in which it has identified that the rulemaking is not cost justified. If the rulemaking proceeds, both NRC and industry would incur cost without any increase in public health and safety or the common defense and security. Thus, qualitative benefits for the rulemaking would only relate to regulatory openness, clarity, and reliability. Based on insights gained from the cost analysis and the input from the stakeholders, the staff considered these factors and developed three options discussed below.

Evaluation of Options

(1) **Option 1:** Discontinue the SNM security requirements rulemaking.

This option would have licensees maintain the post-9/11 security orders, which provide adequate protection of public health and safety and common defense and security. The NRC would continue to address the appropriate security requirements for new license applicants on a case-by-case basis as described in the November 2018 CA Note.

This option would not provide benefits such as openness, clarity, and reliability. In addition, discontinuation of the rulemaking would eliminate the opportunity for public comment on the SNM security requirements. However, the enclosed *Federal Register* notice provides general information regarding the issuance and scope of post-9/11 security orders.

This option would result in no new direct costs to the NRC or the industry. This option would also allow resources for this rulemaking to be reallocated.

(2) **Option 2:** Discontinue the SNM security requirements rulemaking and issue a communication to clarify the SNM security requirements imposed by the post-9/11 orders.

Under this option, licensees would continue to maintain the post-9/11 security orders, which provide adequate protection of public health and safety and the common defense and security.

The staff would issue a communication with publicly available summary information of post-9/11 orders, similar to what was published in the *Federal Register* in the 2015 regulatory basis for the SNM rulemaking (ADAMS Accession No. ML14321A007). This would enhance openness and transparency. This reissued information may be of some use for future SNM licensees, but overall staff would not expect it to significantly

¹ The NRC's practice is to withdraw applicable security orders if all of the requirements of the security orders are incorporated in regulations once the final rule becomes effective.

increase awareness since the information is already publicly available, as would be noted in the enclosed *Federal Register*.

This option would involve some costs to develop and issue the communication. However, overall it would result in some remaining resources to be reallocated to other high priority activities.

- (3) **Option 3:** Proceed with the SNM security requirements rulemaking with the exclusive scope of codifying the requirements of the post-9/11 orders.

This option would provide some benefits such as openness, clarity, and reliability. In addition, proceeding with a rulemaking on the SNM security requirements would provide an opportunity for public comment.

Licensees have already implemented the post-9/11 security orders, which provide adequate protection of public health and safety, therefore, this option would not further improve public health and safety or further promote common defense and security. In addition, due to the sensitive nature of some of the security requirements, some aspects of the orders would still need to be maintained.

The staff also determined the net cost (the combined costs and benefits of all NRC and licensee implementation and operational activities) of this rulemaking option to be approximately (\$770,000). The staff did not identify any quantitative benefits to offset these costs.

RECOMMENDATION:

The staff has been implementing the Commission's direction to engage in a limited-scope rulemaking and has budgeted resources accordingly. However, based on the input from the stakeholders and the preliminary cost and benefit analysis, the staff has now determined that a rulemaking to solely codify the post-9/11 security orders (Option 3) would not improve public health and safety or the common defense and security, and is not cost justified. In addition, the staff has determined that there would be minimal additional value to reissue information on the post-9/11 orders (Option 2), which was previously published in the *Federal Register*. Thus, the staff recommends discontinuation of this rulemaking, including efforts to finalize the revised regulatory basis (Option 1).

In summary, staff recommends that the Commission approve the following:

- (1) Discontinue the SNM security requirements rulemaking (Option 1).
- (2) Publish the enclosed *Federal Register* notice informing the public that the NRC is discontinuing the rulemaking.

If the Commission approves the staff's recommendation to discontinue the SNM security requirements rulemaking, the staff will inform the appropriate congressional committees of these actions and ensure orderly closure of the rulemaking activity in the NRC's portion of the Unified Agenda of Regulatory and Deregulatory Actions.

RESOURCES:

If the Commission approves the staff's recommendation to discontinue this rulemaking, the resources included in the fiscal year 2020 budget of one full-time equivalent will be reallocated to other approved rulemaking projects through the Planning, Budgeting, and Performance Management Process.

COORDINATION:

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

A handwritten signature in black ink, appearing to read "M. Doane", followed by the word "for" in a cursive script.

Margaret M. Doane
Executive Director
for Operations

Enclosures:

1. Draft *Federal Register* notice
2. Summary of Views of Some Technical Staff on the Alternate Approach to Conduct a Rulemaking Consistent with the 2015 Final Regulatory Basis

SUBJECT: DISCONTINUATION OF RULEMAKING—ENHANCED SECURITY OF SPECIAL NUCLEAR MATERIAL DATED:

Package: ML19157A082

SECY Tickets: SRM-CMSY05-0058-16-NSIR

*Via E-Mail

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| DATE | 6/18/2018 | 9/6/2019 | 9/6/2019 | 8/27/2019 |
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