



POLICY ISSUE **(Notation Vote)**

October 9, 2019

SECY-19-0100

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: DISCONTINUATION OF RULEMAKING—INDEPENDENT SPENT FUEL
STORAGE INSTALLATION SECURITY REQUIREMENTS

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, "Independent Spent Fuel Storage Installation Security Requirements." The U.S. Nuclear Regulatory Commission (NRC) staff requests Commission approval to discontinue the proposed rulemaking, and to deny a petition for rulemaking associated with this rulemaking.

SUMMARY:

In SRM-COMKLS-18-0003, the Commission directed the staff to proceed with the Independent Spent Fuel Storage Installation (ISFSI) Security Requirements rulemaking with the exclusive scope of codifying the requirements of the security orders issued by the NRC following the terrorist attacks of September 11, 2001 (post-9/11 security orders). During implementation of this direction, the staff performed a preliminary cost and benefit analysis and sought public input on the revised rulemaking scope. The staff identified that continuing with this rulemaking would not further improve public health and safety or the common defense and security and would not be cost justified. Therefore, the staff recommends that the Commission approve the discontinuation of the rulemaking to codify ISFSI security requirements. The staff also recommends that the Commission deny a petition for rulemaking associated with this rulemaking.

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BACKGROUND:

In SECY-07-0148, "Independent Spent Fuel Storage Installation Security Requirements for Radiological Sabotage," dated August 28, 2007 (ADAMS Accession No. ML062860177), the staff proposed to develop a rulemaking to establish a risk-informed and performance-based approach to ISFSI security using scenarios and dose calculations that considered site-specific information. In SRM-SECY-07-0148, dated December 18, 2007 (ADAMS Accession No. ML073530119), the Commission approved the staff's recommendation. On December 16, 2009, the staff published the draft regulatory basis for the proposed rulemaking (ADAMS Accession No. ML093280743) and noticed it in the *Federal Register* for public comment (74 FR 66589). The draft regulatory basis stated that one of the objectives for the rulemaking would be to make generically applicable requirements similar to those imposed on ISFSI licensees by the post-9/11 security orders.

To help address stakeholder comments on the draft regulatory basis (ADAMS Accession No. ML13085A150), particularly regarding the proposed dose-based approach, the staff contracted with the U.S. Department of Energy's Sandia National Laboratories (Sandia) to conduct an internal review of existing studies, reports, and data on spent nuclear fuel cask vulnerabilities and potential releases. Sandia researchers documented the results of this review in SAND2013-0533, "Analysis of Dose Consequences Arising from the Release of Spent Nuclear Fuel from Dry Storage Casks," issued in January 2013 (ADAMS Accession No. ML13297A320).

On September 11, 2015, based on stakeholder feedback and the staff's confirmation under the NRC's Project Aim 2020 rebaselining effort that the rulemaking did not present an immediate security need, the staff recommended in COMSECY-15-0024, "Proposed Rulemaking on Security Requirements for Facilities Storing Spent Nuclear Fuel and High-Level Radioactive Waste" (ADAMS Accession No. ML15229A231), that the agency postpone the proposed ISFSI security rulemaking for five years. During this five-year period, the staff contracted with Sandia to finalize its studies of ISFSI casks and develop a usable dose-based approach. Sandia completed this work and provided the results in the January 2018 report, "Quantification of the Release of Spent Nuclear Fuel from Dry Casks during Security Related Scenarios" (non-public, safeguards information (SGI)). On August 22, 2018, before the staff resumed work on the ISFSI rulemaking, the Commission directed the staff in SRM-COMKLS-18-0003 to proceed with the rulemaking with the exclusive scope of codifying the requirements of the post-9/11 security orders into the NRC's regulations.

Petition for Rulemaking (PRM-72-6)

The NRC received a petition for rulemaking (PRM), dated November 24, 2008, filed by Ms. Sandra Gavutis (the petitioner), Executive Director of C-10 Research and Education Foundation, Inc. (ADAMS Accession No. ML083470148). The petitioner requested that the NRC amend its regulations concerning dry cask safety, security, transferability, and longevity.

The petitioner made 12 specific requests in the petition. The NRC docketed the petition as PRM-72-6 and noticed it in the *Federal Register* for public comment on March 3, 2009 (74 FR 9178). In a *Federal Register* notice dated October 16, 2012 (77 FR 63254), the NRC denied nine of the petitioner's 12 specific requests (Requests 1-3, 5-8, 10, and 12), reserved two requests for future rulemaking determination (Requests 4 and 9), and accepted one request

(Request 11) for consideration as part of the ISFSI security requirements rulemaking effort. Subsequently, in a *Federal Register* notice dated June 24, 2016 (81 FR 41258), the NRC announced its final decision to deny Requests 4 and 9. Request 11 of PRM-72-6 asked that the NRC amend its regulations to do the following:

"Require 'Hardened On-Site Storage' (HOSS) at all nuclear power plants as well as away-from-reactor dry casks storage sites: that all nuclear industry interim on-site or off-site dry cask storage installations or ISFSIs be fortified against terrorist attack. In addition, all sites should be safeguarded against accident and age-related leakage."

Process for Discontinuing Rulemaking Activities

In SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated October 19, 2015 (ADAMS Accession No. ML15267A716 (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-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 "Independent Spent Fuel Storage Installation Security Requirements" 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.

DISCUSSION:

In SRM-COMKLS-18-0003, the Commission directed the staff to proceed with the rulemaking with the exclusive scope of codifying the requirements of the post-9/11 security orders into the NRC's regulations. The basis for codifying orders is to make the provisions of the orders generically applicable and increase agency transparency.

However, some of the detailed requirements in the ISFSI security orders are designated as SGI, making these provisions not appropriate for public disclosure. These details include threat and adversary characteristics related to the design basis threat and information regarding response times for designated armed responders required to implement the site-specific protective strategy. In the past, when codifying requirements of security orders issued to power reactors, the agency has chosen to maintain some of the SGI requirements in orders and codified only a portion of the provisions into the regulations.

During the development of the revised regulatory basis for the rulemaking, the staff conducted a preliminary cost and benefit analysis related to continuing this rule with the revised scope directed by the Commission. Based on insights gained from the cost and benefit analysis, the staff has developed three options discussed below.

Evaluation of Options(1) **Option 1:** Discontinue the ISFSI 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 the common defense and security. The NRC would continue to address the appropriate security requirements for new license applicants on a case-by-case basis.

This option would result in no new direct costs to the NRC or the industry. This option would not provide qualitative benefits such as openness. In addition, discontinuation of the rulemaking would eliminate the opportunity for public comment on the ISFSI security requirements. However, the enclosed *Federal Register* notice provides general information regarding the issuance of post-9/11 security orders.

(2) **Option 2:** Discontinue the ISFSI security requirements rulemaking but issue regulatory guidance to clarify the ISFSI security requirements imposed by ISFSI security orders and current regulations.

Like option 1, 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 develop guidance specifically for decommissioning power reactor licensees that would increase agency transparency and provide a clearer understanding of ISFSI security requirements for transitioning to a standalone ISFSI (wet or dry). This guidance could also help in making the licensing process more efficient, and would be considered as part of guidance development associated with the ongoing rulemaking in SECY-18-0055, "Proposed Rule: Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning," dated May 7, 2018 (ADAMS Accession No. ML18012A021). The guidance would be public to the extent possible but would likely include a non-public enclosure or separate document to address the SGI requirements in the orders.

This option would result in some direct costs. During the development of the revised regulatory basis, the staff determined that the net cost (the combined costs and benefits of all NRC and licensee implementation and operational activities) to develop and issue guidance to be approximately \$0.3 million.

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

Proceeding with a rulemaking on the ISFSI security requirements would continue to provide adequate protection of public health and safety and the common defense and security. This option would also provide an opportunity for public comment and engagement and would provide some qualitative benefits such as openness and transparency for future applicants and the public.

Licensees have already implemented the post-9/11 security orders, which provide adequate protection of public health and safety and the common defense and security.

Therefore, this option is not necessary for adequate protection and would not further improve public health and safety or 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. Because not all of the requirements of the orders could be codified in public regulations, the requirements would instead be divided between the regulations and the orders.

During the development of the revised regulatory basis, the staff determined the net cost (the combined costs and benefits of all NRC and licensee implementation and operational activities) of this rulemaking option would be approximately \$1.1 million¹. The staff did not identify any quantitative benefits to offset this cost (i.e., cost savings resulting from activities and actions implemented under the post-9/11 security orders that would no longer be required if the ISFSI security requirements are codified).

Consideration of Public Input

On July 10, 2019, the staff held a public meeting to discuss the status of the proposed rulemaking on ISFSI security requirements and the potential options discussed above. During the public meeting, the staff provided opportunity for public input on the option of discontinuing the ISFSI security requirements rulemaking activity with the exclusive scope of codifying the post-9/11 ISFSI security orders. The NRC staff also solicited stakeholder input on whether the NRC should issue guidance relating to ISFSI security requirements. The NRC received two comments during the meeting. One commenter questioned the reason why the NRC was not continuing the rulemaking as presented in the 2009 draft regulatory basis. Another commenter agreed with the option to discontinue this rulemaking activity based on the costs involved for both the industry and NRC. This commenter also indicated that, for efficiency, guidance on ISFSI security requirements could be considered as part of guidance development associated with the ongoing rulemaking, "Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning," rather than as a standalone document. This commenter also stated that standalone guidance for ISFSI security requirements is not necessary or beneficial at this time.

The NRC issued a summary of the public meeting on August 2, 2019 (ADAMS Accession No. ML19198A014).

Denial of PRM-72-6 Final Issue

Under each of the options, the staff recommends that the Commission approve denial of the final issue (Request 11) raised by PRM-72-6, as this request is not consistent with the Commission's direction in SRM-COMKLS-18-0003 and beyond the scope of this rulemaking. If the Commission approves the denial of the petition request, then in accordance with § 2.803(i)(2), "Petition for rulemaking—NRC action," the staff will notify the petitioner in writing of this decision (Enclosure 2) and publish the enclosed *Federal Register* notice.

¹ This estimate includes the one NRC full-time equivalent (FTE) that was budgeted for this rulemaking effort in fiscal year (FY) 2020.

RECOMMENDATIONS:

The staff acknowledges the Commission's direction to engage in a limited-scope rulemaking and has budgeted resources accordingly. Based on the preliminary cost and benefit analysis and input from stakeholders, the staff has now determined that a limited-scope rulemaking solely to codify the post-9/11 security orders (Option 3) is not necessary for adequate protection of public health and safety and the common defense and security, would not further improve public health and safety or further promote common defense and security, and would not be cost justified.

The staff does not recommend Option 2 (discontinue the ISFSI security requirements rulemaking but issue regulatory guidance) because the staff has determined that the development of new guidance would not be cost justified. Industry guidance regarding the post-9/11 security orders is currently available,² and accordingly there is not an immediate need for additional guidance.

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

- (1) Discontinue the ISFSI security requirements rulemaking (Option 1).
- (2) Deny the remaining issue (Request 11) raised by PRM-72-6.
- (3) Publish the enclosed *Federal Register* notice informing the public that the NRC is discontinuing the rulemaking on ISFSI security and denying PRM-72-6 for the reasons set forth in this paper.

Upon Commission approval, 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 FY 2020 budget of 1 FTE will be reallocated to other approved rulemaking projects through the Planning, Budgeting, and Performance Management Process.

² In 2002, the NRC staff determined that the industry guidance provides an acceptable method for ISFSI licensees to implement the interim compensatory measures in the post-9/11 security orders (ADAMS Accession No. ML022980277).

COORDINATION:

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

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. Draft *Federal Register* notice
2. Letter to Petitioner

**SUBJECT: DISCONTINUATION OF RULEMAKING—INDEPENDENT SPENT FUEL
STORAGE INSTALLATION SECURITY REQUIREMENTS DATED: OCTOBER 9, 2019**

Package: ML19172A301; SECY Paper: ML19172A305; FRN: ML19172A304; Letter to
Petitioner: ML19231A257

SECY Tickets:

*Via E-Mail

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