

RULEMAKING ISSUE (Affirmation)

July 21, 2014

SECY-14-0072

FOR: The Commissioners

FROM: Mark A. Satorius
Executive Director for Operations

SUBJECT: FINAL RULE: CONTINUED STORAGE OF SPENT NUCLEAR
FUEL (RIN 3150-AJ20)

PURPOSE:

To request Commission approval to publish two documents: (1) a final rule in the *Federal Register* that amends Part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR), “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,” and (2) the generic environmental impact statement (GEIS) that provides a regulatory basis for the final rule (NUREG-2157, “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel”). The amendments revise 10 CFR 51.23, “Temporary storage of spent nuclear fuel after cessation of reactor operation-generic determination of no significant environmental impact,” which contains the generic determination on the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor (continued storage). In addition to revising the generic determination, the final rule clarifies that the generic determination applies to license renewals for independent spent fuel storage installations (ISFSI) and to reactor construction permits and early site permits. The final rule also makes clarifying changes to improve readability and to indicate how the generic determination will be used in future National Environmental Policy Act (NEPA) reviews. The final rule makes conforming changes to other sections in 10 CFR Part 51.

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SUMMARY:

The U.S. Nuclear Regulatory Commission (NRC) staff is recommending that the Commission approve a final rule that revises the generic determination on the environmental impacts of continued storage of spent nuclear fuel. The NRC staff also requests approval to publish the final GEIS. The rule concludes that the analysis provided in the GEIS generically and conclusively determines the environmental impacts of continued storage of spent nuclear fuel. The rule language does not address repository availability or the safety of continued storage. In addition to revising the generic determination, the rule clarifies that the generic determination applies to license renewals for ISFSIs as well as to reactor construction permits and early site permits. The final rule contains clarifying changes to improve readability and to indicate how the generic determination will be used in future NRC NEPA reviews. The NRC staff is evaluating how the environmental impacts of continued storage from the GEIS will be addressed in site-specific environmental reviews to reflect this rulemaking. Most of the clarifying changes were not part of the proposed rule; however, the NRC staff believes the normal notice and comment requirements have either been satisfied or do not apply to these additional changes.

BACKGROUND:

The Commission approved publication of the proposed rule in a staff requirements memorandum (SRM) dated August 5, 2013 (Agencywide Documents Access and Management System Accession (ADAMS) Accession No. ML13217A358). In the SRM, the Commission directed the NRC staff to invite comment on four issues. On September 13, 2013 (78 FR 56776), the NRC published the proposed rule and draft GEIS for a 75-day public comment period. In response to the October 2013 government shutdown, which caused the agency to reschedule several public meetings, the NRC extended the comment period to December 20, 2013 (78 FR 66858; November 7, 2013). The NRC received 33,099 items of correspondence that contained comments on the proposed rule and draft GEIS; however, over 32,000 of these submittals were considered form letters. In addition, the 13 public meetings resulted in more than 1,600 pages of transcribed comments. Commenters included Tribal governments, State governments, industry groups, advocacy groups, licensees, and individuals. The U.S. Environmental Protection Agency (EPA) also provided comments under its authority to review environmental impact statements (EIS).

In SECY-14-0025, "Waste Confidence—Continued Storage of Spent Nuclear Fuel Proposed Rule: Public Feedback on Specific Issues" (ADAMS Accession No. ML14027A528), the NRC staff provided a brief summary of the comments received in response to the four issues on which the Commission specifically sought comment in conjunction with the proposed rule. The paper also identified the common themes raised in the comments.

DISCUSSION:

The NRC staff has prepared a draft *Federal Register* notice (Enclosure 1) that contains the final rule. The rule is supported by the draft final GEIS, NUREG-2157, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Enclosure 2). The GEIS will be published in two volumes. Volume 1 will contain the main body of the GEIS and all appendices, except Appendix D. Volume 2 will contain Appendix D. The four issues on which the NRC sought public comment, the key aspects of the rule, and the major changes in the

GEIS are discussed in the following paragraphs and in more detail in the *Federal Register* notice and GEIS.

Issues

As noted in SECY-14-0025, the NRC requested comments on four issues: (1) whether a timeline on repository availability should be included in the rule language; (2) whether the statements regarding continued safe storage should be included in the rule language; (3) whether it would improve clarity to streamline the statements of consideration; and (4) whether the title of the rule should be changed. SECY-14-0025 summarizes the public comment that the NRC received on these four issues and this Commission paper does not present the summaries again. These four issues are discussed in more detail in Section D.2.1 of Appendix D of the GEIS, as well as in the *Federal Register* notice.

In regard to Issue 1, whether a timeline on repository availability should be included in the rule language, the NRC staff recommends that the timeline not be retained. With the development of the GEIS, the relationship between repository availability and the consideration of environmental impacts from continued storage has changed from previous proceedings. In this rule, there is no end point to the temporal scope of the NRC's analysis of the environmental impacts of continued storage. Further, there is no legal requirement to include a timeline in the rule. Although future repository availability remains an important consideration because it provides an eventual disposition path for spent fuel, it is no longer needed to provide a time limit for the environmental impacts analysis because the GEIS evaluates the environmental impacts of indefinite storage. Repository feasibility is discussed in Appendix B of the GEIS and briefly in the *Federal Register* notice.

In regard to Issue 2, whether the statements regarding continued safe storage should be included in the rule language, the NRC staff recommends that the rule language not address safety. The generic conclusion that spent fuel can be stored safely beyond the operating life of a power reactor has been a component of all past Waste Confidence proceedings and remains part of this proceeding. There is not, however, any legal requirement for the NRC to codify this generic safety conclusion in the rule text. The NRC staff has retained the discussion of the technical feasibility and regulatory framework that supports continued safe storage in Appendix B of the GEIS and a brief discussion on the safety of continued storage is included in the *Federal Register* notice.

In regard to Issue 3, whether it would improve clarity to streamline the statements of consideration, the NRC staff has streamlined the statements of consideration for the final rule. The *Federal Register* notice must contain enough information to explain the matters in the rule; however, it does not need to include the specificity discussed in the GEIS. The *Federal Register* notice now includes focused discussion on the basis for the rule and directs the reader to appropriate sections in the GEIS for more detailed information. Some redundancy between the rule and GEIS remains to ensure adequate information is present in the *Federal Register* notice to explain the nature and intent of the rule and to meet the required content and format of a rule.

In regard to Issue 4, whether the title of the rule should be changed, the NRC staff recommends that the title of the *Federal Register* notice and the GEIS be changed. This rule represents a

change to the format from past Waste Confidence proceedings. The GEIS, which provides an analysis of the environmental impacts associated with continued storage for three timeframes, provides a regulatory basis for the rule and eliminates the need for a separate Waste Confidence Decision. The rule primarily codifies the environmental impacts of continued storage determined in the GEIS. A title that more accurately reflects the content of the *Federal Register* notice is more appropriate. Therefore, the NRC staff recommends changing the title of the *Federal Register* notice for the rulemaking to "Continued Storage of Spent Nuclear Fuel." The NRC staff also recommends changing the title of the GEIS to conform to the revised title for the notice.

Rule Changes

The heading of 10 CFR 51.23 is being revised to "Environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor." Paragraph 51.23(a) is updated to state that the Commission has generically and conclusively determined the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG-2157.

Paragraph (b) of 10 CFR 51.23 is being revised to clarify that license renewals for ISFSIs are included in the generic determination. Conforming changes are made to 10 CFR 51.61, 51.80(b)(1), and 51.97(a).

In addition, the NRC staff is recommending a number of changes that were not included in the proposed rule to address early site permits and construction permits, clarify how the generic determination will be used in ongoing and future NRC NEPA reviews, and improve readability. Paragraph (b) of 10 CFR 51.23 is being revised to clarify that reactor construction and early site permits are subject to the generic determination in 10 CFR 51.23. In practice, NRC staff has applied the generic determination in early site permit proceedings. This change makes the regulatory requirements consistent with actual practice. Conforming changes are made to 10 CFR 51.50(a), 51.50(b), 51.75(a), and 51.75(b).

Paragraph (b) of 10 CFR 51.23 is also being revised to clarify how the NRC staff will use the generic determination in future NEPA proceedings. Currently, 10 CFR 51.23(b) provides that no discussion in any environmental assessment or EIS is required. Because the NRC has analyzed the environmental impacts of continued storage of spent fuel in the GEIS instead of an environmental assessment (EA) with a Finding of No Significant Impact, the manner in which NRC's NEPA documents account for the generic determination is changing. Applicants will not be required to address continued storage in environmental reports, consistent with the current rule. For EISs, the rule states that the generic impact determinations in NUREG-2157 regarding continued storage are deemed incorporated into EISs prepared to support issuance, renewal, or amendment of an ISFSI, operating licenses or construction permit for an operating reactor, or early site permit or combined license for a nuclear power reactor. The impact determinations in NUREG-2157 regarding continued storage will be considered in EAs, if the impact determinations of continued storage of spent fuel are relevant to the proposed action that the EA is prepared to support. Additionally, paragraph (b) of 10 CFR 51.23 is revised for readability by restructuring the paragraph and separating the requirements that apply to environmental reports prepared by the applicant and the EISs and EAs prepared by the NRC. Conforming changes are made to 10 CFR 51.30(b), 51.50(c), 51.53(b), 51.53(c), 51.53(d), 51.61, 51.75(a),

51.75(b), 51.75(b), 51.80(b), 51.95(b), 51.95(c), 51.95(d), and 51.97(a) to improve readability and to provide consistent wording for the requirements related to the generic determination in 10 CFR 51.23.

As discussed in Section III, "Rulemaking Procedure," of the *Federal Register* notice, the NRC staff believes that the normal notice and comment requirements have either been satisfied or do not apply to these additional changes. Notice and comment is not necessary because the changes are exempt from the notice and comment requirements. Additionally, notice and comment is not necessary because the changes are a logical outgrowth of the proposed rule, so the public had adequate notice of the changes that are being made in the final rule. The *Federal Register* notice provides additional detail on why notice and comment is not necessary.

When the Commission approved the final rule on the environmental effects of license renewal (SECY-12-0063, "Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses" (ADAMS Accession No. ML110760033)), the SRM (ADAMS Accession No. ML12341A134) directed the NRC staff to make any necessary conforming changes to the license renewal rule upon issuance of the GEIS and revised Waste Confidence rule. This rule revises two finding column entries in 10 CFR Part 51, Appendix B to Subpart A, Table B-1, "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants," to address the changes to 10 CFR 51.23. The issue listed in the table as, "Offsite radiological impacts of spent nuclear fuel and high-level waste disposal," is reclassified as a Category 1¹ issue with no impact level assigned and the finding column entry is revised to address existing radiation standards. For the issue, "Onsite storage of spent nuclear fuel," the finding column entry is revised to address the impacts of onsite storage during the license renewal term and during the continued storage period.

Implementation

The revised rule will affect both applications for which the EIS or EA has been published but the action has not yet been taken, and applications for which the final EIS or EA has not yet been published. As stated in 10 CFR 51.23(b), the generic environmental impact determinations of NUREG-2157 are deemed incorporated into each EIS and will inform the NRC's recommendation in each proceeding. For applications where the final EIS has been published but the action has not yet been taken, the staff will determine whether it must supplement the site-specific EIS. For applications where an EA is prepared, the staff will consider the generic environmental impact determinations of NUREG-2157 to inform the NRC's recommendation on the proposed action. For applications where the EA has been completed but the action has not yet been taken, the NRC staff will determine whether it must supplement the site-specific EA.

GEIS Changes

The NRC staff made changes to the GEIS in response to public comments. Major changes included adding more information on institutional controls, restructuring and clarifying the purpose and need and alternatives sections, expanding Appendix B to add information to the

¹ For purposes of Table B-1, a designation as Category 1 means that the generic analysis of the issue may be adopted in each site-specific review.

discussions on international experience and regulatory framework, adding a new Appendix I on high-burnup fuel, and adding a glossary. In addition, Appendix D includes the response to comments on the proposed rule and draft GEIS. The NRC staff made no changes to the environmental impact levels in the final GEIS.

AGREEMENT STATE ISSUES:

The amendments to 10 CFR Part 51 are not a matter of compatibility between the NRC and the Agreement States. The final rule provisions are classified as Compatibility Category NRC. The NRC staff will provide a copy of the final rule *Federal Register* notice and the final GEIS to all the States. The NRC received comments on the proposed rule and draft GEIS from Arkansas, California, Connecticut, Massachusetts, New Jersey, New York, South Carolina, Utah, and Vermont.

COMMITMENTS:

1. The final rule does not impose any requirements on industry nor is industry guidance necessary; therefore, the cumulative effects of regulation does not need to be considered for this rulemaking.
2. Because the NRC will now be relying on the GEIS for the generic determination instead of a finding of no significant impact, the NRC staff needs to revise the manner in which the generic determinations are used in ongoing and future NEPA documents. The NRC staff is evaluating how to appropriately address implementation. If implementation will result in delays in completing any ongoing licensing reviews, the NRC staff will promptly notify the Commission.
3. After Commission approval of the final rule and GEIS, the NRC staff will distribute the GEIS and file it with the EPA.
4. The NRC staff plans to publish the final rule concurrent with EPA's publication of the notice of receipt for the GEIS. The rule will be effective 30 days after publication in the *Federal Register*.
5. After publication, the NRC staff will provide a copy of the rule and GEIS to approximately 70 Tribes.
6. The NRC staff does not have a schedule for revisiting the GEIS and rule after this update. The NRC staff will review the GEIS and rule for possible revision when warranted by significant events that may call into question the appropriateness of the rule.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the notice of final rulemaking (Enclosure 1).
2. To satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed *Federal Register* notice.
3. Approve for publication the final GEIS (Enclosure 2).
4. Note:
 - a. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b);
 - b. That a regulatory analysis has not been prepared for this rulemaking;
 - c. The staff has determined that this action is not a “major rule” as defined in the Congressional Review Act of 1996 [5 U.S.C 804(2)] and has verified this determination with the Office of Management and Budget. The appropriate Congressional and Government Accountability Office contacts will be informed;
 - d. The appropriate Congressional committees will be informed;
 - e. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register; and
 - f. The final rule does not contain any information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.).

RESOURCES:

No additional resources to complete the rule and GEIS are needed. Any significant additional resources that may be needed for implementation of the rule will be addressed through the budget implementation plan for fiscal year (FY) 2015, and through the FY 2016 Current Estimate update in the FY 2017 Planning, Budget, and Performance Management process.

The Commissioners

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COORDINATION:

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

/RA/

Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Final GEIS

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Enclosures:

1. *Federal Register* Notice
2. Final GEIS

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