

July 10, 2001

COMMISSION VOTING RECORD

DECISION ITEM:      SECY-01-0035

TITLE:                      PROPOSED RULE FOR REVISING 10 CFR  
PART 71 FOR COMPATIBILITY WITH IAEA  
TRANSPORTATION SAFETY STANDARDS  
[TS-R-1], AND FOR MAKING OTHER  
NRC-INITIATED CHANGES

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of July 10, 2001.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

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Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc:      Chairman Meserve  
         Commissioner Dicus  
         Commissioner McGaffigan  
         Commissioner Merrifield  
         OGC  
         EDO  
         PDR

VOTING SUMMARY - SECY-01-0035

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	6/6/01
COMR. DICUS	X				X	4/16/01
COMR. McGAFFIGAN	X				X	5/30/01
COMR. MERRIFIELD	X				X	5/2/01

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on July 10, 2001.

## Commissioner Comments on SECY-01-0035

### Chairman Meserve

SECY-01-0035 concerns a proposed rule that would amend 10 CFR Part 71 to be compatible with the International Atomic Energy Agency (IAEA) transportation safety standards (TS-R-1). The staff's proposal was the subject of a Commission meeting with staff and various stakeholders on April 9, 2001.

I approve the staff recommendations to 1) publish the proposed rule in the Federal Register and 2) to continue to use an enhanced-public-participation process (web-site and public meetings) in the 10 CFR Part 71 rulemaking, subject to the following comments:

1. In proposing to adopt the radionuclide exemption values in TS-R-1 (Issue 2), the staff would include provisions that would allow 10 times the applicable exemption level for natural materials and ores in certain circumstances. As a result, staff is proposing to provide different exemption levels for materials that pose equivalent risks. Such action may be justified by consideration of the balance of the costs and benefits of including in the NRC regulatory system certain materials and businesses not currently covered by our transportation requirements (e.g., phosphate mining, waste products from the oil and gas industry). Staff should pursue this issue further as the rulemaking proceeds.
2. In the Commission meeting on April 9, 2000, it appeared that the Agreement States had not participated very fully in the development of the rule. The staff should ensure that the views of the Agreement States are solicited on the proposed rule.
3. The Federal Register notice should be revised to reflect the attached edits.

### Commissioner Dicus

I commend the staff for doing an excellent job in their formulation and analysis efforts on both the previously submitted Issues Paper and on the 10 CFR Part 71 Proposed Rule revisions. I also commend the staff for their public outreach efforts, in putting forth the type and quality of information that will allow the public and stakeholders to meaningfully provide input and participate in the Part 71 revision process, which will ultimately allow for making more informed decisions.

Throughout the information contained in the Draft Regulatory Analysis and the Proposed Rule, and as discussed at the April 9 Commission Briefing, there is little data available which addresses potential costs and benefits of implementing the TS-R-1 and/or the NRC's proposed changes. Fully recognizing the importance, from an international commerce standpoint, of having packaging and transportation regulations that are compatible with the IAEA's TS-R-1, I believe that our existing Part 71 regulations and those of the Department of Transportation, would still provide adequate protection of the public and the environment, even if the 11 TS-R-1 Issues were not adopted. For this very reason, I believe that it is essential to publish the Proposed Part 71 so that the solicited cost-benefit and exposure information can be provided. Having this information available for both TS-R-1 and NRC proposed changes will allow for a more informed decision making process now, and in future revisions.

## Commissioner McGaffigan

I approve the staff recommendation to publish, for a 90-day comment period, the proposed amendments to 10 CFR Part 71 transportation requirements to be compatible with the International Atomic Energy Agency's (IAEA) June 2000 version of ST-1 (now referred to as TS-R-1), and to continue using an enhanced public participation process during the public comment period. I also approve the staff proposal to publish the proposed and final Part 71 amendments concurrent with the Department of Transportation's (DOT) parallel rulemaking provided that the DOT schedule does not result in an unacceptable delay in finalizing Part 71. The staff should inform the Commission if such a delay occurs and provide periodic updates on this rulemaking to Commission office points of contact consistent with the direction in the staff requirements memorandum on SECY-00-0117. I also offer the following comments for the staff's consideration.

I agree with Commissioners Dicus and Merrifield that this is a complex rulemaking which will require significant resources to arrive at final, and potentially controversial, amendments to Part 71. I also share their concern, as recognized by the staff, that final decisions on certain proposed amendments can not be made in the absence of additional data and information from the industry to evaluate fully any potential impacts to domestic and international transportation of regulated material. It should also be recognized that while the staff paper and briefing focused on a few "high interest" issues, such as the radionuclide exemption values, there are others that could prove controversial during the formal comment period, e.g., fissile material shipments, uranium hexafluoride package requirements, and grandfathering of previously approved packages. The staff should be prepared to discuss fully the bases for the proposed requirements and solicit input when needed to ensure a more informed decision.

Consistent with my vote on SECY-00-0117, I note that this rulemaking has the potential to impact industries that are currently not regulated by NRC, such as the zircon sand and other mineral extraction industries and certain wastes routinely disposed of at facilities permitted under the Resource Conservation and Recovery Act. For example, these industries' activities could be captured by the proposed radionuclide exemption values, which are based on TS-R-1, if codified in Part 71 as proposed. In my opinion, such a result could not be justified on a health and safety or cost-benefit basis, and would be an unintended and misguided outcome of this rulemaking. I also understand that the zircon sand industry is concerned with at least two other matters. First, that the classes of materials, to be regulated by DOT and NRC as "radioactive" for transportation purposes based on TS-R-1, might fail to exclude natural materials and ores that incidentally contain radionuclides and are not exploited for their radionuclide content, provided a certain activity is not exceeded. If this exclusion is not provided, increased costs, and transportation burdens and liabilities would result despite the absence of a health and safety issue. Second, the ambiguity created by Table 1 in TS-R-1 and IAEA's ST-2 explanatory materials, regarding how to determine compliance with the Table 1 radionuclide exemption values, should be clarified to reflect IAEA's intent, i.e., the specific activity of the parent radionuclide should be used when determining whether a material is exempt from the scope of TS-R-1 and not the total specific activity of the sum of all nuclides in the decay sequence. For these reasons, I strongly encourage the staff to continue to identify and solicit input from industries that possess, use, or transport materials currently exempt from regulatory control (e.g., unimportant quantities of source material under 10 CFR 40.13) to ensure that the potential impacts from this rulemaking are clearly identified and considered in any future regulatory decisions on Part 71.

I would also note that, unlike the IAEA, NRC is bound to involve stakeholders in its rulemaking process and to consider costs and benefits in its regulatory analyses. I encourage the staff to continue to identify opportunities to persuade IAEA to make its processes more transparent and to include cost-benefit analyses. For example, IAEA needs to make fundamental background documents (such as Draft ST-2) publicly available in a timely manner to provide for a transparent and fully informed standards-setting process in member countries. DOT has made Draft ST-2 available on its website at <http://www.hazmat.dot.gov/hazhome.htm> under the "International Standards" placard. While it is highly unsatisfactory that IAEA has not made Draft ST-2 publicly available to date, it is my understanding from the staff<sup>1</sup> that IAEA intends to include its draft and final documents on the IAEA website by the end of this year.

Because of the differences between IAEA's and NRC's rulemaking processes, I am prepared to differ from the TS-R-1 standards, at least for domestic purposes, to the extent the standards can not be justified. In that regard, in light of public comments I am reluctantly reconciled not to attempt to change the 4 Becquerel per square centimeter beta and gamma package surface contamination standard applied to high-level waste and spent fuel casks in this round of transportation rulemakings. But I continue to believe that this standard makes no sense from a health and safety or risk-based perspective. Therefore, I fully support the staff's intent to participate in the IAEA's effort to establish a Coordinated Research Project to review current surface contamination models, approaches and standards and, hopefully, promptly propose modifications to the TS-R-1 standards based on risks, costs and practical experience.

I appreciate the staff's efforts to date on this complex rulemaking and look forward to the next periodic update from the staff. The next update should be provided no later than after the public workshops on the proposed rule are conducted. This time line will provide the Commission an opportunity to provide feedback to the staff on how to resolve the comments received and finalize the rule language, before the staff reaches tentative final agreements with DOT staff on the proposed final rule. In other words, the Commission should not find itself in the position of reviewing final rule language, for the first time, which has already received final DOT approval, since DOT is the lead U.S. agency on transportation and NRC would have little or no flexibility at that point to make changes to the draft final rule.

#### Commissioner Merrifield

I approve the staff proposal in SECY-01-0035 to publish a proposed rule amending 10 CFR Part 71 transportation requirements and to continue using an enhanced public-participation process during the proposed rule public comment period to solicit maximum public input. However, for the reasons outlined in the following paragraph, the *Federal Register* notice announcing the rule should have a separate section which clearly lists in one location all of the areas where the Commission is specifically requesting comments/input from the public. A similar action was done in the rule making for 10 CFR Part 35 and I believe it was effective in focusing public comments.

This is a complex rule making involving 19 separate issues. The staff has devoted significant

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<sup>1</sup> Memorandum from M.Federline to M.Virgilio, NMSS dated May 8, 2001 entitled "Participation in IAEA Advisory Group Meeting on Education and Training in Radiation Protection and Waste Management, April 23-26, 2001, Vienna, Austria."

resources in arriving at its current recommendations. However, the staff admits in many areas that it requires more input from the public, and in particular from the industry, before the staff can better understand the impacts on the industry. Although I have some concerns about the current staff recommendations and in particular the draft Regulatory Analysis, those concerns do not raise to the level where I would prefer changes be made before the draft rule is issued for public comment. But I also believe it is important for the *Federal Register* notice to clearly focus the public on areas where the staff needs additional information before making a final recommendation to the Commission.