

POLICY ISSUE NOTATION VOTE

March 17, 2004

SECY-04-0045

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: FINAL CRITERIA FOR THE TREATMENT OF INDIVIDUAL REQUIREMENTS
IN A REGULATORY ANALYSIS

PURPOSE:

To obtain Commission approval of final criteria for the treatment of individual requirements in a regulatory analysis as stated in the attached *Federal Register* Notice (FRN) (Attachment 1), and to incorporate and publish these criteria in Revision 4 of NUREG/BR-0058, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission" (Guidelines).

To obtain Commission approval of conforming changes to Sections 4 and 6 of the revised Guidelines based on the Office of Management and Budget's (OMB's) recent Circular A-4, "Regulatory Analysis" (Attachment 2).

BACKGROUND:

On December 27, 2002, the staff submitted SECY-02-0225, "Proposed Criteria for the Treatment of Individual Requirements in a Regulatory Analysis," and sought Commission approval to publish the criteria for public comment. In a March 23, 2003, staff requirements memorandum, the Commission approved the staff's request. The criteria were subsequently published in the *Federal Register* on April 18, 2003 (68 FR 19162). Two sets of comments were submitted in response to the publication. The Nuclear Energy Institute (NEI) submitted one set, and the Nuclear Regulatory Services Group (NRSG) submitted the other. A full response to each of these comments is provided in the attached FRN.

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On July 10, 2003, the staff's proposed final criteria were presented to the Advisory Committee on Reactor Safeguards (ACRS). In a July 17, 2003, letter to the Chairman of the Nuclear Regulatory Commission (NRC), from the Chairman of the ACRS, the ACRS concluded that "the proposed criteria are responsive to the Commission's Staff Requirements Memorandum (SRM) dated December 31, 2001."

Subsequently, OMB issued Circular A-4 on September 17, 2003 (68 FR 54023). The OMB circular, which replaced Circular A-94 as OMB's regulatory analysis guidance document, provides guidance to Federal agencies on the development of regulatory analyses as required under Section 6(a)(3)(c) of Executive Order 12866, "Regulatory Planning and Review." As an independent agency, the NRC's analyses are not subject to OMB oversight and conformance with OMB guidance is not mandatory. However, because OMB's views constitute the latest thinking on this subject and OMB is responsible for providing guidance to all executive agencies in the Federal Government, the NRC has consistently attached importance to OMB's positions and has previously made selective conforming changes in response to OMB's updates. The staff has reviewed the document and made conforming changes to be included in the revised Guidelines.

Lastly, in COMSECY-02-0037, "Proposed NRC Information Quality Guidelines," dated July 7, 2002, the staff recommended minor revisions to the Guidelines to make NRC's regulatory analysis guidance conform more closely to the treatment of uncertainties as prescribed in OMB's Information Quality Guidelines. On July 31, 2002, the Commission approved the staff's general proposal, including a staff recommendation that these changes be implemented when the criteria for individual requirements were completed. For efficiency purposes, the staff decided to formally incorporate these changes into the Guidelines when other changes under development were completed.

DISCUSSION:

NEI submitted eight specific comments, most of which fall within two general areas of concern: issues with the criteria themselves and the use of subjective judgment in making bundling decisions. Further, NEI stated that the NRC's proposed criteria do not adequately incorporate the relevant Commission guidance on this issue and that industry comments made at an earlier public meeting were not taken into account by the NRC staff.

The second commenter, NRSG, called the proposed criteria "a positive step in providing detailed guidance in this area for the first time" and suggested some refinements to the criteria so that "all proposed new regulatory requirements receive a proper analysis of their costs and benefits." NRSG had three comments. The first was that separate analysis of individual requirements should be required to the extent practicable. The second was that the criteria must be consistent with the standards of the backfitting rule. The last comment concerned the criteria guidance on backfitting issues related to the American Society of Mechanical Engineers (ASME) Code.

The staff has concluded that no changes to the proposed criteria are necessary in response to NEI and NRSG comments. The staff notes that the proposed criteria are consistent with OMB's latest regulatory guidance (Circular A-4), and the specified criteria applicable to ASME code changes are consistent with previously documented Commission guidance. The staff's response also notes the positive comments received from the Committee to Review Generic Requirements (CRGR) and the ACRS. As a result, the final criteria contained in Section III of the attached FRN will be incorporated into Revision 4 of the Guidelines after they are approved by the Commission.

With respect to conforming changes to OMB Circular A-4, the NRC staff identified six areas where changes to the Guidelines are appropriate. These changes appear in Section 4 of the Guidelines. Five of the changes should not affect NRC value-impact calculations. The staff has made these changes because they clarify and amplify current NRC guidance and will improve the overall quality of the Guidelines. These changes involve openness and transparency, minimum quality standards, market failure and externalities, the baseline case, and threshold analysis.

The sixth change has subtle implications for the NRC's value impact calculations. Consistent with previous OMB guidance, the Guidelines currently prescribe the use of a 7-percent real discount rate for base case calculations and a 3-percent real rate for sensitivity analyses. OMB now recommends that the base case be expressed as a range of values using both a 3-percent and a 7-percent real discount rate. Further, for analyses with 'intergenerational' effects (i.e., long time-horizons), OMB supports continued use of the 3-percent – 7-percent range, but acknowledges that lower rates and supplemental information may be provided to account for ethical and technical considerations. In contrast, current NRC policy is that for intergenerational issues with long time-horizons, value-impact results should be displayed first, based on a 3-percent discount rate, and second, by depicting the consequences at the time they are incurred with no present worth conversion. With respect to the latter, the staff considers it a practical application of supplemental information.

The staff has reviewed OMB's basis for this change. Because there are sound technical arguments for both the 3-percent and the 7-percent rates, the staff finds this change reasonable. Further, the staff sees merit in maintaining consistency with OMB on this matter because consistency promotes risk harmonization, which in turn helps to ensure that decisions throughout the Federal Government result in an efficient and proper allocation of society's resources. It is for these reasons that current NRC policy, as discussed in the Guidelines, Revision 3, calls for NRC's conformance with OMB's latest recommended discount rate.¹

¹ Page 26 of the NRC Guidelines currently states: "Based on OMB guidance, present-worth calculations are to use the recommended discount rate specified in the latest version of OMB Circular A-94." (Circular A-4 has replaced Circular A-94 as OMB's regulatory analysis guidance document.)

The implications of this change are mostly minimal. In a typical regulatory analysis, value-impact results will continue to be displayed for both discount rates, with somewhat greater weight given to the 3-percent result because it is now deemed part of the base case. For most NRC scenarios, where the benefits tend to be more future-oriented than the costs, this will increase net benefits. It is difficult to quantify the difference because the temporal distribution of consequences is different for each regulatory action. However, because of inherent uncertainties in a value-impact assessment, the difference is not perceived as significant. For intergenerational analyses, the effects of including a 7-percent discount rate for a typical initiative would have the opposite effect, decreasing the present-worth benefits by a similar amount. However, because analysts can also consider a lower discount rate and supplemental analyses under the new policy, it seems reasonable to expect the decision maker to place more weight on the low end of the discount rate range, which will minimize the impact of this policy change on the NRC.

Circular A-4 contains additional issues that conflict with NRC's guidance. The staff reviewed these issues and determined that they should not be formally incorporated in the NRC's Guidelines. OMB's guidance is meant for "significant" regulatory initiatives that have a very high threshold for economic and policy import. Also, OMB meant for many of these additional issues to apply only to the most controversial and costly rules from among these initiatives. In fact, NRC initiatives rarely meet OMB's basic threshold standard of \$100 million. The staff has not included these additional issues in NRC's Guidelines because their inclusion would greatly expand the scope and complexity of a regulatory analysis when, in most cases, these issues would not be required by OMB because they would not be necessary nor justified due to the increased level of effort involved. For these reasons, rather than explicitly adding this material to the Guidelines, the staff proposes that the Guidelines simply acknowledge a possible benefit from more extensive and complex analyses and discussions, and refer the analyst to Circular A-4 when a specific rulemaking is deemed a highly controversial, significant initiative.

Attachment 2 contains the proposed changes to the Guidelines based on Circular A-4. The staff recommends that these changes be made without further public comment because the changes are relatively minor and fully conform to OMB's guidance. This guidance is based on sound scientific principles, is widely used throughout the Federal Government, and has already been subjected to public, interagency, and peer review. Further, the one change having the potential to alter NRC's value-impact results is not a policy change because, as noted above, the Guidelines currently specify that NRC analysts are to use OMB's latest recommended discount rate. For the reasons discussed above, neither the ACRS nor the CRGR have been asked to review the conforming changes.

Approval of these OMB-conforming changes, without further public review, will permit their inclusion in Revision 4 without significantly delaying its issuance. Under this approach, Revision 4 will address all outstanding regulatory analysis concerns in a timely and efficient manner.

COORDINATION:

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

The CRGR reviewed these criteria and concurred with them.

RECOMMENDATIONS:

That the Commission:

1. Approve, the recommended final criteria for publication in the *Federal Register* and the issuance of Revision 4 of NUREG/BR-0058, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission," to incorporate the recommended final criteria for the treatment of individual requirements in a regulatory analysis, and the conforming changes based on OMB's recent Circular A-4.
2. Note that, the staff's general approach for the treatment of uncertainties in a regulatory analysis, as approved by the Commission on July 31, 2002, will be incorporated into this revision of the Guidelines.

/RA/

William D. Travers
Executive Director
for Operations

Attachments:

1. *Federal Register* Notice
2. Conforming changes to
NUREG/BR-0058

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WITS Number: **W 200100143**

*See previous concurrence

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