



October 13, 2017

**POLICY ISSUE**  
**(Notation Vote)**

SECY-17-0103

FOR: The Commissioners

FROM: Margaret M. Doane  
General Counsel

SUBJECT: DENIAL OF PETITION FOR RULEMAKING ON AGENCY PROCEDURE  
FOR RESPONDING TO ADVERSE COURT DECISIONS AND  
ADDRESSING FUNDING SHORTFALLS (PRM-2-15; NRC-2015-0264)

PURPOSE:

To obtain Commission approval to deny the petition for rulemaking (PRM) submitted by Mr. Jeffrey M. Skov. This paper does not address any new commitments.

BACKGROUND:

On October 22, 2015, the U.S. Nuclear Regulatory Commission (NRC) received a PRM from Jeffrey M. Skov requesting that the NRC modify its regulations in Part 2 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates. The NRC docketed the PRM on November 10, 2015, under Docket No. PRM-2-15, and the NRC published a notice of docketing in the *Federal Register* on February 17, 2016 (81 FR 8021). The petitioner provided supplemental information to the NRC on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017.

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DISCUSSION:The Petition

In the PRM and associated supplements, the petitioner proposes two rules to address his concerns about NRC independence, mission-related functions, and commitment to transparency after the adverse decision *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013). The petitioner's first proposed rule would require the NRC to take certain actions following the receipt of a court decision (and the expiration of rehearing and appeal rights) involving a violation of applicable law by the agency. Specifically, the rule would require (1) an identification and determination of the causes of each violation; (2) an "extent of condition" evaluation to determine whether the NRC's implementation of other statutes and regulations is similarly affected by the violation; (3) implementation of immediate corrective actions based on the evaluation performed; (4) implementation of corrective actions to prevent recurrence; and (5) preparation of a public report documenting the agency's work. The rule would also require the NRC to seek investigation by the U.S. Department of Justice (DOJ) as to whether the agency has adequate oversight mechanisms in place to prevent the violation of applicable laws and whether any violations of federal criminal laws have occurred (particularly statutes prohibiting obstruction of federal proceedings and conspiracies to commit offense or to defraud the United States). In addition, the rule would require the NRC to decide whether to appeal or seek rehearing in accordance with the American Bar Association's Model Rules of Professional Conduct.

The petitioner's second proposed rule would require the NRC to disclose annually "each instance where [the NRC] does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates." In these instances, the petitioner's proposed rule would have the NRC publicly disclose whether it was directed not to request funds, requested funds but did not receive them, or determined on its own not to request funds. Further, the rule would require the agency to produce a publicly available "discussion of the consequences of each instance with respect to (1) public safety and health; (2) environmental protection; (3) the common defense and security; (4) the reputation/credibility of the agency as a 'trusted, independent, transparent, and effective nuclear regulator;' and (5) collateral fiscal impacts."

NRC Evaluation of the PRM

The staff recommends that the Commission deny further consideration of the petitioner's first proposed rule because it does not present a practical process for agency accountability, and the NRC already has the tools in place to provide for independent evaluation of agency actions. As an initial matter, a finding by a court of competent jurisdiction that the NRC violated applicable law is not an appropriate indicator of agency misconduct. The Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions and the need for any responsive action ensure compliance with the holding. In addition, OGC will provide advice on the impact, if any, of that decision on any current and future NRC decisionmaking. With respect to a requirement to make appeals and rehearing decisions in accordance with the Model Rules of Professional Conduct, each NRC attorney is already subject to the disciplinary rules of the bar in which he or she is admitted as well as the courts in which he or she appears. Similarly, the proposal to seek DOJ review of an adverse decision is not necessary because the DOJ is a party to, or has some involvement in, virtually all of the program-related cases in which the agency is named as a defendant. Further, the

NRC's Office of the Inspector General provides an independent process to review agency decisionmaking that includes many of the requested elements of the petitioner's proposed rule. The Inspector General has the authority to investigate significant agency problems or deficiencies and to recommend corrective action to address concerns. Based on the aforementioned processes already in place, the staff concludes that the first proposed rule would impose additional processes duplicative of existing agency practice.

The staff recommends that the Commission deny further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance. OMB Circular A-11 directs agencies to withhold pre-decisional materials underlying budget deliberations. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions, as well as the Executive Branch communications underlying those decisions. On the basis of the NRC's practice of compliance with OMB guidance, the staff recommends denial of the second proposed rule.

A petition review board has reviewed the issues raised in the PRM and determined that it is appropriate to deny the PRM based on the NRC's current policies and practice, consistent with the staff recommendations and the considerations in 10 CFR 2.803(h)(1), particularly 10 CFR 2.803(h)(1)(vi).

RECOMMENDATION:

The staff recommends that the Commission deny PRM-2-15 based on current policies in accordance with the considerations in 10 CFR 2.803(h)(1), specifically 10 CFR 2.803(h)(1)(vi).

The enclosed *Federal Register* notice (FRN) provides a detailed response to the issues raised in the PRM. The staff requests the Commission's approval to publish the FRN denying the PRM (Enclosure 1). The enclosed letter for signature by the Secretary of the Commission (Enclosure 2) informs the petitioner of the Commission's decision to deny the PRM. The staff will inform the appropriate congressional committees.

RESOURCES:

Denial of this PRM will not affect budgeted resource needs.

COORDINATION:

The Office of Administration has reviewed and concurred on this paper.

  
Margaret M. Doane  
General Counsel

Enclosures:

1. *Federal Register* notice
2. Letter to the petitioner

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Tuesday, October 31, 2017.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Tuesday, October 24, 2017, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

**DISTRIBUTION:**

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