



This document is scheduled to be published in the Federal Register on 04/25/2014 and available online at <http://federalregister.gov/a/2014-09442>, and on FDsys.gov

NUCLEAR REGULATORY COMMISSION

[NRC-2014-0081]

Standard Format and Content of Transportation Security Plans for Classified Matter Shipments

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a new draft regulatory guide (DG), DG-7005, “Standard Format and Content of Transportation Security Plans for Classified Matter Shipments.” This new guidance describes a method that NRC staff considers acceptable for use in the development of classified matter transportation security plans, which identify the correct measures to protect classified matter while in transport.

DATES: Submit comments by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: The document will be available for those who have established a “need-to-

know” and possess access permission to Official Use Only-Security Related Information (OUO-SRI). To review and provide comments on the document, contact: Al Tardiff, telephone: 301-287-3616 or e-mail: Al.Tardiff@nrc.gov

For additional direction on accessing information and submitting comments, see “Accessing Information and Submitting Comments” in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Mekonen Bayssie, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-251-7489; e-mail: Mekonen.bayssie@nrc.gov or Al Tardiff, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-001, telephone: 301-287-3616 or e-mail: Al.Tardiff@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments.

A. Accessing Information.

Please refer to Docket ID NRC-2014-0081 when contacting the NRC about the availability of information regarding this document. Draft regulatory guide, DG-7005, is withheld from public disclosure but is available to those affected licensees and cleared stakeholders who can or have demonstrated a need to know. The “Backfitting and Issue Finality” section describes previously issued guidance on this subject entitled, Interim Staff Guidance (ISG) DSP-ISG-01, *Staff Review Procedure for Transportation Security Plans for Classified Matter*

Shipments (July 7, 2006). This document also contains OUO-SRI information.

Those who have a need to know or believe they have a need to know should contact Al Tardiff to obtain information about accessing these documents.

B. Submitting Comments.

Please coordinate with Al Tardiff (telephone: 301-287-3616 or e-mail: Al.Tardiff@nrc.gov) regarding the drafting and transmission of comments in order to protect comments that contain OUO-SRI information. Please include Docket ID NRC-2014-0081 in the subject line of your comment submission to ensure that the NRC reviews any comment submission appropriately.

II. Additional Information.

The NRC is issuing for comment a draft guide in the NRC's "Regulatory Guide" series. This series was developed to describe such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The DG, entitled, "Standard Format and Content of Transportation Security Plans for Classified Matter Shipments," is temporarily identified by its task number, DG-7005. Draft regulatory guide, DG-7005, is a proposed new guide in the NRC's "Regulatory Guide" series. This is a new guide that contains the procedures and measures that the applicant or licensee can describe in a classified matter transportation security plan to comply with NRC requirements. The regulatory framework that the NRC has established for security plans for the transportation of classified matter is set forth in § 95.39(e) of Title 10 of the *Code of Federal*

Regulations (10 CFR).

III. Congressional Review Act.

This regulatory guide is a rule as defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting and Issue Finality.

Draft regulatory guide, DG-7005, provides guidance on development of transportation security plans to protect classified information while such information is in transport, in order to meet the requirements of 10 CFR part 95. The staff has previously issued guidance on this subject in DSP-ISG-01, *Staff Review Procedure for Transportation Security Plans for Classified Matter Shipments* (July 7, 2006). The staff will use the guidance in the review and approval of new and amended transportation security plans submitted to the NRC. Current licensees with NRC-approved transportation security plans may continue to use DSP-ISG-01, which the NRC has found acceptable for complying with 10 CFR part 95 regulations as long as the licensees do not change their NRC-approved transportation security plans. However, if a licensee makes changes to or proposes to amend such plans, then the staff will use the guidance in DG-7005 to evaluate the acceptability of the change or proposed amendment, unless the licensee provides sufficient basis and information that the licensee- proposed alternative to DG-7005 complies with applicable NRC regulations.

Issuance of the DG, if finalized, and NRC use of the DG as described above, would not

constitute backfitting under any of the backfitting provisions in 10 CFR Chapter I, nor would it be regarded as backfitting under Commission and Executive Director for Operations guidance. In addition, issuance of the DG, if finalized would not otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The staff's position is based upon the following considerations.

1. Part 95 applies to materials licensees and other entities transporting (or placing into transport) classified security information, and contains requirements governing such transport. Although some of these materials licensees are protected by backfitting or issue protection provisions in 10 CFR part 52, these backfitting and issue finality protections do not extend to the procedures governing transport of classified information. For example, under the definition of backfitting in 10 CFR 50.109(a)(1) protection is accorded to nuclear power plant licensees against changes in, or new requirements and guidance on, *inter alia*, "procedures or organization required to...operate a facility." Procedures governing the transportation of materials off of the facility site cannot reasonably be viewed as constituting such facility operating procedures. The backfitting and issue finality provisions applicable to other materials licensees are written in an analogous fashion. Therefore, changes to the guidance on compliance with 10 CFR part 95 – even if imposed on these materials licensees who are protected by backfitting or issue protection provisions in 10 CFR part 52 (see the discussion in item 2) – would not constitute backfitting or a violation of issue finality provisions under 10 CFR part 52.

2. Even if the NRC were to conclude that materials licensees are accorded backfitting protection with respect to procedures governing transportation of classified information, changes in guidance would not constitute backfitting as defined in the various NRC backfitting provisions unless imposed on materials licensees. As described earlier, the NRC staff does not intend to impose or apply the draft guidance in DG-7005, if finalized, to existing

licensees who already have NRC-approved transportation security plans (the exception is where a licensee makes changes to or proposes to amend such plans; the backfitting and issue finality implications are discussed in item 3 below). Given this current lack of staff intention to impose the guidance in DG-7005, the issuance of the draft regulatory guide in final form would not constitute backfitting or a violation of issue finality provisions under 10 CFR part 52. If, in the future, the staff seeks to impose a position in the draft regulatory guide (if finalized) on holders of already issued holders of licenses in a manner which constitutes backfitting or does not provide issue finality as described in the applicable issue finality provision, then the staff must make the showing as set forth in the applicable backfitting provision or address the criteria for avoiding issue finality as described applicable issue finality provision.

3. A licensing basis change voluntarily initiated by a licensee is not considered to be backfitting. In such cases, the policy considerations underlying the NRC's backfitting provisions, *viz.* regulatory stability and predictability concerning the terms of an NRC approval, are not applicable where the licensee itself voluntarily seeks a change to its licensing basis. This rationale is reflected in a July 14, 2010, Letter from the NRC General Counsel to NEI's General Counsel (ADAMS Accession No. ML101960180).

4. Even if the NRC were to conclude that materials licensees are accorded backfitting protection with respect to procedures governing transportation of classified information, applicants and potential/future applicants for such materials licenses are not, with certain exceptions not relevant here, protected under either the various NRC backfitting

provisions or the issue finality provisions under 10 CFR part 52. This is because neither the backfitting provisions nor the issue finality provisions under 10 CFR part 52 were intended for every NRC action which substantially changes the expectations of current and future applicants.

Dated at Rockville, Maryland, this 18th day of April, 2014.

For the Nuclear Regulatory Commission.

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[7590-01-P]

[FR Doc. 2014-09442 Filed 04/24/2014 at 8:45 am;
Publication Date: 04/25/2014]