[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 8

RIN 3150–AJ02

[NRC-2011-0180]

Interpretations; Removal of Part 8

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is amending its regulations to remove its published General Counsel interpretations of various regulatory provisions. These interpretations are largely obsolete, having been superseded by subsequent statutory and regulatory changes, and this part of the Commission's regulations is no longer necessary.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Please refer to Docket ID NRC-2011-0180 when contacting the NRC about the availability of information for this final rule. You may access information related to this final rulemaking, which the NRC possesses and is publicly available, by the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2011-0180.

- **NRC's Public Document Room (PDR):** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Sean Croston, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Mail Stop O15-D21, Washington, DC 20555-0001, telephone: 301-415-2585, e-mail: Sean.Croston@nrc.gov.

SUPPLEMENTARY INFORMATION:

Various NRC regulations provide the NRC General Counsel with authority to issue binding written interpretations of the NRC's regulations. Between 1956 and 1977, the General Counsel of the NRC and its precursor, the Atomic Energy Commission (AEC), occasionally published such interpretations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 8. These interpretations have not been updated, and contained various provisions that have since been superseded by statutory and regulatory changes.

To resolve these problems and prevent any confusion resulting from mistaken reliance upon outdated interpretations, the NRC is now removing and reserving 10 CFR Part 8. This action is consistent with Section 2 of Executive Order 13579 (76 FR 41587; July 14, 2011), which calls upon independent regulatory agencies to repeal outmoded and unnecessary rules.

I. Background

Less than one year after the Atomic Energy Act of 1946 authorized the creation of the NRC's predecessor, the AEC issued 10 CFR 40.50, "Valid Interpretations" (12 FR 1855; March 20, 1947). Section 40.50 was the first AEC regulation authorizing the agency's General Counsel to issue written "interpretations" of other AEC regulations, which would be valid and binding upon the Commission. The current 10 CFR 40.6 is almost identical to the original 10 CFR 40.50.

Following the enactment of 10 CFR 40.50, the AEC and then the NRC added very similar regulations to most of its parts in Title 10 of the CFR. Like the current rules authorizing General Counsel interpretations, these rules did not specify where the General Counsel would publish written interpretations.

In 1956, AEC General Counsel William Mitchell issued the first formal General Counsel interpretation, 10 CFR 8.1, regarding inventions under Section 152 of the Atomic Energy Act (21 FR 1414; March 3, 1956).

Four years later, General Counsel L.K. Olson issued the next formal interpretation, published at 10 CFR 8.2, which construed the Price-Anderson Act, a provision that had been recently added to the Atomic Energy Act in 1957 (25 FR 4075; May 7, 1960).

The AEC General Counsel Joseph Hennessey then issued 10 CFR 8.3, which related to the computation of time when regulatory deadlines fell on Saturdays, Sundays, or holidays (32 FR 11379; August 5, 1967). "Based upon comments and further consideration," the Commission revoked that interpretation in 1978 (43 FR 17999; April 26, 1978).

General Counsel Hennessey also published 10 CFR 8.4, which addressed whether states could regulate materials covered under the Atomic Energy Act on the basis of radiological

health and safety (34 FR 7273; May 3, 1969). When faced with a later industry petition for rulemaking, the Commission defended this rule, asserting that the interpretation remained "correct as it stands" (67 FR 66075; October 30, 2002).

Lastly, the NRC General Counsel Peter Strauss issued 10 CFR 8.5, which interpreted contemporary illumination and physical search requirements under 10 CFR 73.55 (42 FR 33265; June 30, 1977). Since the publication of 10 CFR 8.5 and revocation of 10 CFR 8.3 one year later, the interpretations in 10 CFR Part 8 have remained unchanged for approximately thirty-three years.

II. Status of 10 CFR Part 8 Interpretations

The Administrator of the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs, recently issued a Memorandum to the Independent Regulatory Agencies regarding "Executive Order 13579, 'Regulation and Independent Regulatory Agencies'" (July 22, 2011). This Memorandum encouraged independent agencies to identify "rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counter-productive," and to modify or repeal them. Moreover, the Memorandum advised that agencies "should focus on the elimination of rules that are no longer justified or necessary." This is consistent with the longstanding policy of the Administrative Committee of the Federal Register, which maintains that each agency should "amend its regulations whenever the regulations are rendered ineffective in whole or in part" (54 FR 9670; March 7, 1989).

i. 10 CFR 8.1

When the AEC issued its first General Counsel interpretation, regarding the status of licensee inventions with respect to Section 152 of the Atomic Energy Act, that statute was

unclear. It referred to inventions "made or conceived under any contract, subcontract, arrangement, or other relationship with the Commission." Thus, General Counsel Mitchell felt it necessary to announce whether agency licensees had a "relationship with the Commission" under that section.

But five years later, Congress amended Section 152 to its current form, eliminating the "other relationship" language. The legislative history makes it clear that the purpose of this amendment was to "more clearly define the applicability of Section 152" by eliminating its former "unclear" language. See 107 Cong. Rec. 15514 (Aug. 22, 1961) (statement of Rep. Aspinall); S. Rep. No. 87-746 at 8 (Aug. 16, 1961). Therefore, § 8.1 is "no longer justified or necessary," as it interprets a statutory provision that no longer exists.

ii. 10 CFR 8.2

The next General Counsel interpretation, 10 CFR 8.2, has remained unchanged since 1960. It comments on the international application of the Price-Anderson Act. The interpretation relied on "Section 11o." of the Atomic Energy Act, which was the original definition of "nuclear incident." That definition included occurrences causing "damage" without specifying the location of that damage. But since the issuance of § 8.2, that definition, subsequently retitled as Section 11q., has been significantly amended to explicitly cover damages "within or outside the United States." The interpretation also relied on "Section 11u." of the Atomic Energy Act, the original definition of "public liability," which has since been amended and retitled as Section 11w.

Moreover, §§ 8.2(h)-(i) pointed to a "confusing" and "ambiguous" legislative history, "since the language of the Act [at that time] draws no distinction between damage received in the United States and that received abroad." The interpretation concluded that Price-Anderson insurance should cover damage to Canada or Mexico caused by a nuclear incident in the United States.

However, as noted above, the crucial definition of "nuclear incident" has been updated since 1960. In its amendments, Congress made it absolutely clear that "nuclear incidents" under Price-Anderson would include incidents in America causing damage "outside the United States." There is no longer any ambiguity, and thus no need for the interpretation.

Section 8.2 is also confusing, because it hinted at a potential controversy involving "ambiguous" legislation where there is none. The NRC understands that some stakeholders still rely on § 8.2 as valid guidance on the scope of the Price-Anderson Act. The NRC is attempting to end any such confusion by removing this rule, which has been rendered obsolete and is thus "no longer justified or necessary."

iii. 10 CFR 8.3

As indicated previously, the Commission revoked the former General Counsel interpretation at 10 CFR 8.3 in 1978.

iv. 10 CFR 8.4

Nine years ago, in response to a petition for rulemaking, the Commission reaffirmed the position set forth in 10 CFR 8.4, which discussed state regulation of materials covered under the Atomic Energy Act on the basis of radiological health and safety (67 FR 66075; October 30, 2002). Although this interpretation was never updated to incorporate subsequent court decisions and other events, the NRC continues to adhere to the substance of the interpretation in § 8.4. The removal of 10 CFR Part 8 should not be read to imply a change in the NRC's substantive position on this or any other issue.

v. 10 CFR 8.5

The last General Counsel interpretation, 10 CFR 8.5, referred to the illumination and physical search requirements contained in a previous version of 10 CFR 73.55. However, § 73.55 has been amended at least 18 times since this interpretation was issued in June 1977. The latest version of § 73.55 bears little resemblance to the version interpreted in § 8.5.

For example, the interpretation relied on provisions in §§ 73.55(c)(4), (c)(5), and (d)(1) that no longer exist. Moreover, it cited forthcoming revisions to a guidance document that was itself superseded thirty years ago. Unsurprisingly, the NRC staff recently concluded that § 8.5 is no longer needed from a technical perspective, and recommended removing that provision. Thus, it is clear that the interpretation at § 8.5 has also been "rendered ineffective" and should be removed.

III. Publication of Part 8 Interpretations

Under the Administrative Procedure Act, 5 U.S.C. 552(a)(1)(D), all "interpretations of general applicability formulated and adopted by the agency" must be "state[d] and currently publish[ed] in the Federal Register for the guidance of the public."[1] All of the General Counsel's formal interpretations in 10 CFR Part 8 were properly published in the *Federal Register*. Other agencies also continue to publish their legal interpretations in the *Federal Register*. See, e.g., Department of Veterans Affairs, "Summary of Precedent Opinions of the General Counsel" (76 FR 4430; January 25, 2011); Department of Energy, "Office of the General Counsel Ruling 1995-1 Concerning 10 CFR Parts 830 and 835" (61 FR 4209; February 5, 1996).

[1] On the other hand, everyday interpretations of particular applicability regarding specific factual circumstances are not and need not be published in the *Federal Register*. See U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act at 22-23 (1947) ("An advisory interpretation relating to a specific set of facts is not subject to [the publication requirement]. For example, a reply from the agency's general counsel to an inquiry from a member of the public as to the applicability of a statute to a specific set of facts need not be published.").

However, publication in the CFR is another matter. Beginning with an opinion by then-Judge Scalia, the Court of Appeals for the D.C. Circuit has repeatedly held that under a provision of the Federal Register Act, 44 U.S.C. 1510, "the Code of Federal Regulations [may] contain only documents having general applicability and legal effect." Wilderness Society v. Norton, 434 F.3d 584, 596 (D.C. Cir. 2006), quoting Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986). See also American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("44 U.S.C. 1510 limits publication in [the] [C]ode to rules 'having general applicability and legal effect.'").

Moreover, the administrative regulations implementing 44 U.S.C. 1510 confirm that the CFR should "contain . . . Federal regulation[s] of general applicability and legal effect." 1 CFR 8.1. The key to this limitation on publication in the CFR is "legal effect."

The D.C. Circuit long-ago established that documents with "legal effect" are those that "ha[ve] the force and effect of statute." Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 282, 287 (D.C. Cir. 1949). The interpretations in 10 CFR Part 8 do not have the binding force and effect of statute (67 FR 66076; October 30, 2002) (agreeing that the NRC's 10 CFR Part 8 interpretations "presumably would not be binding on a court"). Likewise, regulations define the term "Document having general applicability and legal effect" to mean "any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation." 1 CFR 1.1. Interpretive rules like those in 10 CFR Part 8 do not meet this definition, as the General Counsel's interpretations do not have "legal effect" like the substantive regulations published elsewhere in 10 CFR Chapter I.

Therefore, the NRC has concluded that it would be more prudent to remove the obsolete interpretations in 10 CFR Part 8 than to attempt to update these provisions. Any future formal General Counsel interpretations will be published only in the *Federal Register*.

IV. Rulemaking Procedure

Because this rulemaking concerns interpretive rules, the notice and comment provisions of the Administrative Procedure Act do not apply under 5 U.S.C. 553(b)(A), and this rule is immediately effective under 5 U.S.C. 553(d)(2). Additionally, the NRC has determined that a post-promulgation comment period would serve no public interest under 10 CFR 2.804(e)(2) because the interpretations have been superseded by subsequent statutory and regulatory changes.

V. Environmental Impact: Categorical Exclusion

This final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, the NRC has not prepared an environmental impact statement or an environmental assessment for this rule.

VI. Paperwork Reduction Act Statement

This final rule does not contain information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

VII. Regulatory Analysis

A regulatory analysis has not been prepared for this final rule because the NRC is eliminating regulations that have been superseded by subsequent statutory and regulatory actions, and this rule has no impact on health, safety, or the environment. There is no cost to licensees, the NRC, or other Federal agencies.

VIII. Backfit Analysis

The NRC has determined that the backfit rule does not apply to this final rule because removal of these interpretations does not involve any backfits as defined in 10 CFR 50.109(a)(1). Therefore, a backfit analysis is not required for this rule.

IX. Congressional Review Act (CRA)

In accordance with the CRA, the NRC has determined that this action is not a major rule and has verified this determination with OMB's Office of Information and Regulatory Affairs.

List of Subjects in 10 CFR Part 8

Intergovernmental relations, Inventions and patents, Nuclear power plants and reactors.

PART 8—INTERPRETATIONS [REMOVED AND RESERVED]

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is removing and reserving 10 CFR Part 8.

1. 10 CFR Part 8 is hereby removed and reserved.

Dated at Rockville, Maryland this 3rd day of April, 2012.

For the Nuclear Regulatory Commission.

Michael F. Weber,
Acting Executive Director for Operations.

[FR Doc. 2012-8673 Filed 04/10/2012 at 8:45 am; Publication Date: 04/11/2012]