

**FINAL-OMITTED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 215, 217, 230 AND 232]
U.S. Nuclear Regulatory Commission (NRC) Consistency Rule**

The Environmental Quality Board (Board) amends Chapters 215, 217, 230 and 232 to exclude specific provisions of Title 10, Section I (relating to Nuclear Regulatory Commission) of the Code of Federal Regulations (CFR) from incorporation-by-reference in these Chapters. These amendments are set forth in Annex A.

Notice of proposed rulemaking is omitted under section 204 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. § 1204), known as the Commonwealth Documents Law (CDL). Section 204(3) of the CDL provides that an agency may omit the notice of proposed rulemaking if “the agency for good cause finds...that the [public notice and comment] procedures specified in sections 201 and 202 are in the circumstances impracticable, unnecessary, or contrary to the public interest.” 45 P.S. § 1204(3). The amendments in this final-omitted rulemaking are necessary to exclude Federal provisions that purport to give the Department of Environmental Protection (Department) legal authority that it does not have. The specific provisions that this final-omitted rulemaking addresses have never been enforced by the Department because the enforcement authority resides with the Nuclear Regulatory Commission (NRC). Review and consideration of public comments on the amendments are unnecessary and contrary to the public interest because public comments would delay the required clarification of the Department’s proper authority under Federal law. Public comments could not alter the need to make these amendments and there is no need to alter the formatting of the amendments. Finalizing these amendments without public notice and comment is in the public interest to ensure that the Commonwealth’s regulations accurately reflect the Department’s authority in an expeditious manner. Likewise, finalizing these amendments without public notice and comment is in the interest of those holding radioactive material licenses in the Commonwealth because the amendments clarify the proper authority of the Department and the NRC under the agencies’ respective radioactive materials programs. No changes to any radioactive material license will result from this final-omitted rulemaking.

This final-omitted rulemaking was adopted by the Board at its meeting of _____.

A. Effective Date

This final-omitted rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact John Chipppo, Program Manager, Division of Radiation Control, P.O. Box 8469, Rachel Carson State Office Building, Harrisburg, PA 17105-8469, (717) 787-2480; or Keith Salador, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 783-8075. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988

(voice users). This final-omitted rulemaking is available on the Department's website at www.dep.pa.gov (Select "Public Participation," then "Environmental Quality Board (EQB)").

C. Statutory Authority

This final-omitted rulemaking is being made under the following statutory authority: Section 301 of the Radiation Protection Act (RPA), 35 P.S. § 7110.301, which designates the Department as the agency of the Commonwealth responsible for regulation and control of radiation; Section 302 of the RPA, 35 P.S. § 7110.302, which grants the Environmental Quality Board (Board) the authority to adopt rules and regulations to accomplish the purposes and carry out the provisions of the RPA; and Section 510-20(b) of the Administrative Code (P.L. 177, No. 175), as amended, 71 P.S. § 510-20, which grants the Board the authority to adopt rules and regulations for the proper performance of the work of the Department.

D. Background and Purpose

The Commonwealth and the NRC entered into an agreement in 2008 in which the Commonwealth agreed to oversee and regulate most types of radioactive materials used in the Commonwealth. This agreement gave the Commonwealth status as an "Agreement State." As part of that agreement, the Commonwealth's radioactive materials program must remain compatible with NRC's radioactive materials program, under 42 U.S.C. § 2021(d)(2) (relating to cooperation with states). The Commonwealth meets this requirement by incorporating the appropriate NRC regulations by reference in 25 Pa. Code Part I, Subpart D, Article V (relating to radiological health). The NRC recently identified provisions of 10 CFR that should be excluded from the Commonwealth's incorporation-by-reference in Chapters 215, 217, 230 and 232. These amendments are necessary for the Commonwealth's radioactive materials program to remain compatible with NRC's program because the citations to 10 CFR that the Board is excluding can only be implemented by the NRC.

The failure to exclude these sections from the Commonwealth's incorporation-by-reference of select Federal regulations was a mistake in the 2008 rulemaking (38 Pa.B. 2243, May 17, 2008) promulgated to support the 2008 agreement with the NRC. Examples of Federal provisions excluded by these amendments are: portions of the definitions of terms such as "construction" and "commencement of construction" dealing with national defense; provisions involving the sale and distribution of radioactive material in certain industrial devices across state lines; regulations concerning high concentration of radioactive source material or special nuclear material, such as uranium and plutonium; and provisions regarding the transportation and distribution of exempt consumer materials. The Department does not have the authority under 2008 agreement to implement these sections and has never enforced them. These amendments clarify the proper authority of the Department and the NRC under their respective regulations.

In addition, the amendments add an exception regarding notifications, reports and correspondence to be directed to the Department.

The Department presented this final-omitted rulemaking to the Radiation Protection Advisory Committee (RPAC) at its October 19, 2017 meeting. At that meeting, the RPAC recommended that DEP move forward with this final-omitted rulemaking.

E. Summary of the Final-Omitted Rulemaking

References to the provisions of Title 10 of the CFR that are now being eliminated from incorporation-by-reference in Chapters 215, 217, 230 and 232 in this final-omitted rulemaking are outlined, by section, in the table below:

25 Pa. Code Section Amended	10 CFR Provision Excluded from Incorporation-by-Reference
§§ 215.1(e)(3) and 217.131(b)	Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 30.4
§§ 215.1(e)(5) and 217.151(b)	§§ 32.1(c)(1), 32.30, 32.31, and 32.32
§ 215.1(e)(9) and § 232.2(b)	Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 36.2
§ 215.1(e)(12)	§§ 40.13(c)(5)(iv), 40.52, 40.53, Part 40 Appendix A Criterion—11 A-F and Criterion—12, and Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 40.4.
§ 215.1(e)(13)	§§ 70.74, Part 70 Appendix A, and Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 70.4
§ 215.1(e)(14)	The definitions of “certificate holder” and “certificate of compliance (CoC)” in Section 71.4. The term “applicant” when used in 10 CFR Part 71.
§ 217.171(b)	§§40.13(c)(5)(iv), 40.52, 40.53, and Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 40.4
§ 217.181(b)	§§ 70.74, Part 70 Appendix A, and Paragraph 2 of the definition of “commencement of construction” and Paragraph 9(ii) of the definition of “construction” in § 70.4
§ 230.3(b)	The definitions of “certificate holder” and “certificate of compliance (CoC)” in § 71.4. The term “applicant” when used in 10 CFR Part 71.

In addition, this final-omitted rulemaking amends Section 215.1(h)(5) to add an exception in 10 CFR § 71.17(c)(3) (relating to general license: NRC-approved package) regarding notifications, reports and correspondence that would otherwise be directed to the Department.

F. Benefits, Costs and Compliance

Benefits

The fundamental benefit of this final-omitted rulemaking is ensuring that the Commonwealth’s regulations meet the requirements of NRC’s Agreement State program, as required by Federal

law. *See* 42 U.S.C. § 2021(d)(2). If these amendments are not adopted, the Commonwealth will be at risk of losing the authority it assumed as an Agreement State under the 2008 agreement to regulate most types of radioactive materials used in the Commonwealth.

Compliance Costs

The amendments will create no compliance costs. No additional financial, economic or social impact will result from these amendments.

Compliance Assistance Plan

No compliance assistance is necessary for implementation of this final-omitted rulemaking because the regulated community remains subject to the requirements deleted from the Commonwealth's regulations at the Federal level.

Paperwork Requirements

This final-omitted rulemaking will not revise paperwork requirements.

G. Pollution Prevention

Pollution prevention is not applicable to this rulemaking.

H. Sunset Review

The Board is not establishing a sunset date for these amended regulations because the amendments are needed for the regulations to accurately reflect the Department's legal authority and for the Department to meet its obligations under Federal law.

I. Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on _____, the Department submitted a copy of this final-omitted rulemaking and a copy of the Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. On the same date, this final-omitted rulemaking was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101--732-506).

Under section 5.1(j.2) of the Regulatory Review Act, on _____, this final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved this final-omitted rulemaking.

J. Findings of the Board

The Board finds that:

(1) The amendments as set forth in Annex A are appropriate to remain compatible with the requirements of the NRC's Agreement State program.

(2) Use of the omission of notice of proposed rulemaking procedure is appropriate because the proposed rulemaking procedures specified in sections 201 and 202 of the CDL (45 P.S. §§1201 and 1202) are, in this instance, "impracticable, unnecessary, or contrary to the public interest."

(3) No radioactive licensees are affected by this final-omitted rulemaking.

(4) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order and are in the public interest.

K. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapters 215, 217, 230, and 232, are amended to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act (71 P.S. §§ 745.1—745.14).

(d) The Chairperson of the Board shall certify this order and Annex A, as approved to legality and form, and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

PATRICK McDONNELL,
Chairperson