

FINAL- OMITTED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
(25 Pa. Code Chapters 215, 217, 219, 220 and 230)

U.S. Nuclear Regulatory Commission Consistency Rule – Incorporation by Reference

The Environmental Quality Board (Board) amends Chapters 215, 217, 219, 220 and 230 to exclude specific provisions of the Code of Federal Regulations (CFR) in Title 10, Section I (relating to Nuclear Regulatory Commission) from incorporation by reference as set forth in Annex A. The amendments in this final-omitted rulemaking are necessary to exclude Federal provisions that the Department of Environmental Protection's (Department) radioactive materials regulations categorically incorporate by reference, but the Department does not have the legal authority to enforce. The specific provisions that this final-omitted rulemaking addresses have never been enforced by the Department because the enforcement authority resides with the United States Nuclear Regulatory Commission (NRC). The NRC has informed the Department that these amendments are necessary for the Commonwealth to retain its authority to regulate radioactive materials in this Commonwealth.

Omission of Proposed Rulemaking

Notice of proposed rulemaking is omitted under section 204 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1102—1208), referred to as the Commonwealth Documents Law (CDL) (45 P.S. §§ 1204). Under section 204(3) of the CDL (45 P.S. § 1204(3)), 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.”

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. It is in the public interest to ensure that the Commonwealth's regulations accurately reflect the Department's authority in an expeditious manner. This will allow radioactive material licensees in this Commonwealth to clearly identify which agency, the Department or the NRC, has enforcement authority for specific radioactive materials. Public comments could not alter the need for these amendments or the content of the amendments. No changes to radioactive material licenses 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 and Information

For further information contact John Chippo, Program Manager, Division of Radiation Control, Bureau of Radiation Protection, P.O. Box 8469, Rachel Carson State Office Building, Harrisburg, PA 17105-8469, (717) 787-2480, or Lindsay Williamson, Assistant Counsel, Bureau

of Regulatory Counsel, 400 Market Street, Rachel Carson State Office Building, Harrisburg, PA 17105, (717) 787-7196. Persons with a disability may use the Pennsylvania Hamilton 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 <https://www.pa.gov/agencies/dep.html> (select "Public Participation," then "Environmental Quality Board" and then navigate to the Board meeting of [REDACTED]).

C. Statutory Authority

This final-omitted rulemaking is authorized under 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 Board the authority to adopt rules and regulations to accomplish the purposes and carry out the provisions of the RPA; and section 1920-A of The Administrative Code of 1929 (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 this 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 the 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).

During its periodic review for Agreement States' program compatibility, the NRC identified provisions of 10 CFR that should be excluded from the Commonwealth's incorporation-by-reference in Chapters 215, 217, 219, 220 and 230. This procedure, titled "Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements, Interim State Agreement (SA) Procedure SA-200," informs Agreement States which NRC regulations are compatible with the Agreement State and which regulations are under exclusive NRC authority, meaning they are not compatible with Agreement State programs. The amendments in this final-omitted rulemaking 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 may only be implemented by the NRC.

The failure to exclude these sections from the Commonwealth's incorporation-by-reference of select Federal regulations was an oversight in the final-form rulemaking published at 38 Pa.B. 2243 (May 17, 2008), which was promulgated to support the 2008 agreement with the NRC. A few examples of these regulations whose implementation is exclusive to the NRC are 10 CFR 19.14 (relating to presence of representatives of licensees and regulated entities, and workers during inspections), 10 CFR 20.2203 (relating to reports of exposures, radiation levels, and concentrations of radioactive material exceeding the constraints or limits) and 10 CFR 70.82 (relating to suspension and operation in war or national emergency). Regulations under the

NRC's exclusive authority cannot be incorporated by the Commonwealth. The Department does not have the authority under the 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.

The Department presented the draft final-omitted regulation to the Radiation Protection Advisory Committee (RPAC) at its April 30, 2025, meeting. At that meeting, the RPAC supported the Department's recommendation to move forward with this final-omitted rulemaking.

E. Summary of the Final-Omitted Rulemaking

References to the sections of Title 10 of the CFR that are added to Chapters 215, 217, 219, 220 and 230 to clarify that those specific Federal requirements are not incorporated by reference in the Department's regulations are outlined, by section, in the table as follows:

25 Pa. Code Section Amended	10 CFR Provision Excluded from Incorporation-by-Reference
§§ 215.1(e)(15) and 217.201	The “foreign obligations” definition in § 150.3 is excluded from incorporation-by-reference as that is an exclusive NRC designation.
§§ 215.1(e)(1) and 220.9(b)	Sections 19.11(b) and (e) and 19.14(a) are excluded because they refer to Parts 50 and 52, which apply to nuclear power reactors that are regulated by the NRC.
§ 215.1(e)(2)	Sections 20.1406(b), 20.1905(g), and 20.2203(c) and (d) are excluded because they refer to Parts 50 and 52, which apply to nuclear power reactors that are regulated by the NRC.
§§ 215.1(e)(5) and 217.151(b)	Sections 32.11, 32.12 and 32.21a are excluded because they relate to exempt concentrations into products or materials and transfer of ownership or possession, which is category NRC designation.
§ 215.1(e)(8)	Sections 35.11(c) and 35.13(a)(1) are excluded because these provisions refer to a Federal government agency or Federally recognized Indian tribe.
§§ 215.1(e)(12) and 217.171(b)	Paragraphs (j), (l), and (m) of section 40.31 are added to the list of exceptions because they relate to uranium enrichment facilities, which is not part of the Agreement State program. Section 40.56 is added to the exceptions to incorporation by reference because it relates to restrictions on the use of Australian-obligated source materials, that is, “foreign obligations.” In addition, this final-omitted rulemaking amends §§ 215.1(e)(12) and 217.171(b) to delete the exception for subsection (i) of 10 CFR 40.31 (relating to application for specific licenses) from incorporation by reference because it is designated as “Category

	H&S" (health and safety), which is part of the Commonwealth's Agreement State program and must be enforceable by the Department.
§§ 215.1(e)(13) and 217.181(b)	Section 70.14 is excluded because it relates to foreign military aircraft. Section 70.50(d) is excluded because it relates to nuclear power reactors regulated by the NRC. Sections 70.60, 70.61, 70.64, 70.65, 70.66, 70.73, 70.76 and 70.82 are excluded because they relate to licensees authorized to possess greater than a critical mass of special nuclear material, which is not part of the Agreement State program.
§§ 215.1(e)(14) and 230.3(b)	Sections 71.11, 71.70, 71.85 and 71.91(b) are excluded because they regard packaging and transportation of radioactive materials, which is under exclusive NRC control.
§ 219.5(b)	Sections 20.1406(b), 20.1905(g), 20.2203(c) and (d) are excluded because they refer to Parts 50 and 52, which apply to nuclear power reactors that are regulated by the NRC.

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 under 42 U.S.C. § 2021(d)(2). If these amendments are not adopted, the Commonwealth risks losing the authority it assumed as an Agreement State under the 2008 agreement to regulate most types of radioactive materials used in this 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 excluded from the Commonwealth's regulations at the Federal level.

Paperwork requirements

This final-omitted rulemaking will not revise paperwork requirements.

G. Pollution Prevention

The Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101—13109, established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, or the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance.

Although this final-omitted rulemaking is administrative in nature, finalizing these amendments will allow those holding radioactive material licenses in the Commonwealth to clarify the proper authority of the Department and the NRC under the agencies' respective radioactive materials programs, which will result in greater operational efficiency.

H. Sunset Review

The Board is not establishing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

I. Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (RRA) (71 P.S. § 745.5a(c)), on [REDACTED], the Department submitted a copy of this final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the chairpersons of the Environmental Resources and Energy Committee of the Senate and the Environmental and Natural Resource Protection Committee of the House of Representatives. On the same date, the Department submitted a copy of the final-omitted rulemaking to the Office of Attorney General under section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732-204(b)). A copy of this material is available to the public upon request.

Under section 5.1(j.2) of the RRA, on [REDACTED], this final-omitted rulemaking was (deemed) approved by the House and Senate Committees. Under section 5.1(e) of the RRA, IRRC met on [REDACTED], 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 implement the requirements of the NRC's Agreement State program.
- (2) Use of the omission of notice of proposed rulemaking procedure is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) is, in this instance, "impracticable, unnecessary, or contrary to the public interest."

(3) The use of the notice of proposed rulemaking procedures is, in this instance, impracticable, unnecessary and contrary to the public interest because the amendments are required by the NRC for the Commonwealth to retain its Agreement State authority and 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 preamble and 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, 219, 220 and 230, are amended by amending §§ 215.1, 217.151, 217.171, 217.181, 217.201, 219.5, 220.9 and 230.3 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this final-omitted rulemaking 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 final-omitted rulemaking to IRRC, the Environmental Resources and Energy Committee of the Senate and the Environmental and Natural Resource Protection Committee of the House of Representatives, as required by the RRA (71 P.S. §§ 745.1—745.14).

(d) The Chairperson of the Board shall certify this final-omitted rulemaking and deposit it with the Legislative Reference Bureau, as required by law.

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

JESSICA SHIRLEY,
Chairperson