

INITIAL STATEMENT OF REASONS

SUMMARY OF PROPOSED REGULATORY ACTION

This proposal updates funding requirements applicable to certain radioactive material licensees, in order to improve decommissioning planning, and to ensure that the licensees maintain adequate financial coverage for decommissioning activities. It seeks to address changes made by the U.S. Nuclear Regulatory Commission (NRC) regarding decommissioning planning, as contained in applicable sections of title 10, Code of Federal Regulations part 30, (10 CFR 30¹), part 40 (10 CFR 40), and part 70 (10 CFR 70). Nonsubstantial changes are also proposed to existing regulations.

POLICY STATEMENT OVERVIEW

Problem Statement: Existing California Department of Public Health (Department) regulations that address decommissioning planning and maintenance of adequate financial coverage of decommissioning planning are not compatible with those of the NRC, and contain provisions that are out-of-date, or that have unclear references, inconsistencies, and grammatical errors.

Anticipated Objectives and Benefits of the Proposed Regulation:

Objectives: The broad objectives of this regulatory action are to:

- Ensure compatibility between Department regulations and NRC regulations.
- Update existing regulations.
- Clarify existing regulations.

Benefits: Anticipated monetary (and nonmonetary) benefits of this proposed regulatory action are:

- Continued protection of the public health and safety, worker safety, and environmental concerns established by the California Legislature in H&S Code sections 114705, 114740, 114755, 114965, 114970, 115000, 115230 and 115235.
- Compatibility with the standards and regulatory programs of the NRC, as specified in H&S Code sections 114965(a), 115000(b), and 115235 (article V).
- Consistency with the regulatory programs of other states, as specified in H&S Code section 114965(c).
- Orderly regulatory pattern within the State, among the states and between the federal government and the State, as specified in H&S Code section 114965(b).
- Updating and clarification of existing regulations and deleting unnecessary regulations.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations:

The Department evaluated this proposal to determine whether the proposed regulations are inconsistent or incompatible with existing state regulations. This evaluation included a review of both the Department's existing general regulations, and those regulations specific to the regulatory control of radioactive material. Some inconsistencies in the

¹ This short format "10 CFR 30" for a given part of NRC regulations is used throughout the document for brevity. For example, "10 CFR 39.33" means title 10, Code of Federal Regulations, part 39 section 39.33.

specific regulations were found and are addressed in this proposal. An Internet search of other state agency regulations was also performed. It was determined that no other state regulations addressed the same subject matter, and that this proposal was not inconsistent or incompatible with other state regulations. Therefore, the Department has determined that this proposal, if adopted, would not be inconsistent or incompatible with existing state regulations.

AUTHORITY AND BACKGROUND

The Radiation Control Law (RCL) (H&S Code §§ 114960 through 115273) requires the Department to develop programs for licensing and regulating radioactive materials. (H&S Code § 115000(b).) The Department is the successor of the California Department of Health Services and, as such, has the authority to license and regulate radioactive material under the California Public Health Act of 2006 (Chapter 241, Statutes of 2006; SB 162, Ortiz.)

In 1962, the State of California ratified and approved an agreement with the United States Atomic Energy Commission, the predecessor of the NRC, by which the federal agency discontinued its regulatory authority over certain radioactive materials. (H&S Code § 115230.) By such action, California became an “Agreement State.”

A provision of the agreement between California and the NRC requires that the State “use its best efforts to maintain continuing compatibility between its program and the program of the [United States Atomic Energy] Commission for the regulation of like materials.” (H&S Code § 115235, article V). The NRC’s stated policy is “to evaluate Agreement State programs established pursuant to Section 274 of the Atomic Energy Act (AEA) of 1954, as amended, to ensure they are adequate to protect public health and safety and compatible with NRCs regulatory program.”²

To determine a state's compatibility, the NRC uses *Management Directive 5.9, Adequacy and Compatibility of Agreement State Programs, Handbook 5.9*.³ This handbook describes the specific criteria and process that are used to determine which NRC program elements should be adopted and implemented by an Agreement State for purposes of maintaining compatibility, and which NRC program elements have a particular health and safety significance. The NRC rates the elements according to the degree of compatibility required. Thus, the NRC requires that some elements be adopted by the States in a form identical to the NRC, while other elements need not be adopted in identical form, but are still required to meet the “essential objective” of the program element. The NRC’s overall determination of adequacy and compatibility for an Agreement State is made pursuant to Management Directive 5.6, *The Integrated Materials Performance Evaluation Program*

² *Adequacy and Compatibility of Agreement State Programs, Management Directive 5.9, page 1*. The document is available at the Nuclear Regulatory Commission, Office of State Programs website: <https://scp.nrc.gov/procedures/md0509.pdf> (Reference 1).

³ *Ibid.*

(*IMPEP*).⁴ The NRC evaluates Agreement States every four years to determine if a state's radiation safety program meets the adequacy and compatibility criteria. If California fails to meet those criteria, the NRC may revoke California's status as an Agreement State and assume direct regulation and control of byproduct, source, and special nuclear matter within the State.

In conjunction with the NRC's *IMPEP* review every four years, the NRC procedures (SA-200⁵) require that Agreement States, when adopting regulations required for meeting the adequacy and compatibility determinations, submit proposed regulations to the NRC for review. The NRC then reviews the proposal to ensure that the proposed regulations meet the applicable NRC compatibility category, defined as follows:

NRC Compatibility Categories⁶ (underlined words are defined below)

Category A: Basic radiation protection standard, or related definitions, signs, labels or terms that are necessary for a common understanding of radiation protection principles. The State program element should be essentially identical to that of NRC.

Category B: Program element with significant direct trans-boundary implications. The State program element should be essentially identical to that of NRC.

Category C: Program element, the essential objectives of which should be adopted by the State to avoid conflicts, duplications, or gaps. The manner in which the essential objectives are addressed need not be the same as the NRC provided the essential objectives are met.

Category D: Not required for purposes of compatibility.

Category NRC: Not required for purposes of compatibility. These are the NRC program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the AEA or provisions of title 10 of the Code of Federal Regulations. The State should not adopt these program elements.

Category Health & Safety (H&S): Program elements identified as H&S are not required for purposes of compatibility; however, they do have particular health and safety significance. The State should adopt the essential objectives of such program elements in order to maintain an adequate program.

[] = A bracket around a category (e.g., [B]) means that the section may have been adopted elsewhere and it is not necessary to adopt it again.

⁴ *Integrated Materials Performance Evaluation Program (IMPEP), Management Directive 5.6*. The document is available at the Nuclear Regulatory Commission, Office of State Programs website:

<https://scp.nrc.gov/procedures/md0506.pdf>. (Reference 2)

⁵ SA-200 is available at <https://scp.nrc.gov/procedures/sa200.pdf> (Reference 3)

⁶ Volume 5, Governmental Relations and Public Affairs, *Adequacy and Compatibility of Agreement State Programs*, February 27, 1998, Handbook 5.9, Part II, pp. 4-7, available at: <https://scp.nrc.gov/procedures/md0509.pdf> (Included within Reference 1).

Definitions⁷

Conflict means that the essential objectives of regulations or program elements are different and an undesirable consequence is likely to result in another jurisdiction or in the regulation of agreement material on a nationwide basis.

Duplication means that identical regulations or program elements apply to the same material at the same time. Note: this definition applies primarily to review of Agreement State regulations.

Essential objective of a regulation or program element means the action that is to be achieved, modified, or prevented by implementing and following the regulation or program element. In some instances, the essential objective may be a numerical value, (e.g., restriction of exposures to a maximum value) or it may be a more general goal (e.g., access control to a restricted area).

Essentially Identical means the interpretation of the text must be the same regardless of the version (NRC or Agreement State) that is read.

Gap means that the essential objectives of NRC regulations or program elements are absent from the Agreement State program and an undesirable consequence is likely to result in another jurisdiction or in the regulation of agreement materials on a nationwide basis.

The NRC amends its regulations continuously. The NRC's amendments directly impact the compatibility of State regulations with NRC regulations, and have the potential to impact California's status as an Agreement State. On January 22, 2008, the NRC published proposed amendments for decommissioning planning, applicable to certain radioactive materials licensees. (73 FR 3812 (Jan. 22, 2008).⁸) The NRC issued its final rules on June 17, 2011 (76 FR 35512 (June 17, 2011)). The objective of the final rule is to ensure that licensees maintain adequate financial surety, in order to ensure that decommissioning activities can be carried out following shutdown of normal operations at a licensed facility.

The financial surety regulations are part of an overall NRC strategy to ensure the safety and protection of the public and the environment during and after the decommissioning of licensed facilities. State legislation was also enacted (Chapter 635, Statutes of 1993) to ensure that licensees and applicants set aside adequate funds for decommissioning costs. Both the NRC's and State's financial surety regulations are intended to ensure that state and local governments, and/or the general public, would not have to bear the costs of a decommissioning, should a licensee not be able to do so. Additionally, these surety regulations encourage safe design and operation of a licensee's facility, thereby enhancing protection of the environment and the public. If a radioactive materials facility remains in a

⁷ *Ibid*, pg. 17.

⁸ This short format of 76 FR 35512 (June 17, 2011) for citations to Federal Register publications will be used throughout the remainder of this document for brevity. For example, 76 FR 35512 (June 17, 2011) references Volume 76, Federal Register, page 35512, published on June 17, 2011.

non-operational status without being decommissioned, public health and safety could be compromised by leakage, contamination, and/or loss of control of radioactive materials. Availability of adequate funding is necessary to ensure that timely decommissioning of facilities takes place following cessation of licensed operations.

In amending its financial surety regulations, the NRC repealed a number of financial instrument options and amended, adopted, or repealed other provisions. Financial instrument options repealed by the NRC and its reasons for doing so are referenced below. The number in parentheses (e.g., (24)) indicates the number of NRC licensees using the indicated option. (76 FR 35517 (June 17, 2011).)

- Prepayment Mechanisms
 - Trust Funds (6) – Maintained.
 - Escrow Accounts (24) – Repealed.
 - Certificates of Deposit (3) – Repealed.
 - Government Funds (0) – Repealed.
 - Deposits of Government Securities (0) – Repealed.

NRC’s reason for repealing four of the five prepayment mechanism options:

Because of their relative risk in bankruptcy and their non-use by licensees, the NRC eliminated four of these five options as alternatives for providing financial assurance for decommissioning. The NRC staff reviewed several studies of the situation of escrows in bankruptcy and concluded that the most accurate summary of the various assessments is as follows: The funds contained in escrows that are set up correctly before a licensee’s entry into bankruptcy will likely be secure from transfer into the bankruptcy estate as assets of the debtor, and they will not be reachable by the bankruptcy trustee using doctrines of fraudulent conveyance or voidable preference. However, correctly setting up an escrow is difficult. The NRC is also concerned that a determination of the legal status of an escrow may be subject to considerable delay. In addition to the time necessary to carry out a legal standing analysis, a bankruptcy trustee could attempt to use the automatic stay provisions of the bankruptcy code to stop payment by an escrow agent under the escrow, if that payment is occurring following the commencement of the bankruptcy action. While this attempt may fail, it could postpone the NRC’s access to the funds held in the escrow and thereby preclude the prompt commencement of decommissioning. (76 FR 35523 (June 17, 2011).)

- Guarantee Mechanisms
 - Letters of Credit (84) – Maintained.
 - Parent Company Guarantees (24) – Maintained.
 - Licensee Self-Guarantee (21) – Maintained.
 - Surety Bonds (24) – Maintained.
 - Insurance Policies (0) – Maintained.
 - Lines of Credit (0) – Repealed.

NRC's reason for repealing the lines of credit option: Although the line of credit was initially authorized for use to provide an alternative to licensees that elected not to use a surety or letter of credit, the NRC believed that it posed a greater risk than the other two surety methods, because it might be subject to underlying loan covenants that could make it more vulnerable to cancellation if the licensee experienced financial difficulties. However, since 1988, NRC licensees have not elected to use a line of credit to provide financial assurance for decommissioning. Because of its perceived greater risk of cancellation and its nonuse by NRC licensees, the NRC decided to eliminate the line of credit as an alternative for providing financial assurance for decommissioning. (76 FR 35526 (June 17, 2011).)

The regulations that implement, interpret, and make specific the provisions of the Radiation Control Law (H&S Code § 114960 et seq.) are found in title 17, California Code of Regulations (17 CCR), sections 30100 through 30395.⁹

AUTHORITY AND REFERENCE

The Department proposes to adopt, amend, or repeal, as applicable, the regulation sections identified in this document under the authority provided in sections 115000, 115091, and 131200 of the H&S Code¹⁰. This proposal implements, interprets, and makes specific sections 114965, 114970, 115060, 115091, 115092, 115230, 115235, 131050, 131051, and 131052 of the H&S Code.

DETAILED DISCUSSION OF EACH REGULATION

Section 30195.1, Special Requirements for Issuance of Specific Licenses-Financial Surety for Decommissioning. Currently, section 30195.1 incorporates by reference certain provisions in 10 CFR 30.35 and 40.36, as of January 1, 2007. Initially, the Department intended to re-incorporate by reference the NRC's recent changes.

However, a review of the number of Department licensees using financial instrument options repealed by the NRC indicated that a number of Department licensees would be financially impacted if the Department repealed acceptance of a certificate of deposit (CD) as a surety option. Although the NRC repealed use of CDs as a surety option, the Department is retaining the CD option because the CD instrument is in fact held by the Department, in its name, and the Department does not anticipate that a bankruptcy court would order it to turnover a CD to a bankruptcy trustee. In enforcing decommissioning requirements, the Department is in fact exercising its State police and regulatory powers in order to protect public health and safety and the environment, and debtors and trustees in bankruptcy would have a duty to comply with environmental laws and regulations, including financial surety provisions tied to environmental remediation obligations.

⁹ This short format "17 CCR 30190" for a given regulation found within title 17, California Code of Regulations will be used throughout this document for brevity.

¹⁰ This short format "H&S Code section 114705" for a given Health and Safety Code section will be used throughout this document for brevity. For example, "H&S Code section 114705" means California Health and Safety Code section 114705.

Thus, the Department proposes to:

- For Prepayment Mechanisms:
 - Maintain use of trust funds as did the NRC.
 - (One Department licensee uses this option.)
 - Repeal use of escrow accounts, government funds, and government securities as did the NRC.
 - (There are no Department licensees using these options.)
 - Maintain use of CDs, unlike the NRC.
 - (10 Department licensees use this option.)
- For Guarantee Mechanisms:
 - Maintain letters of credit, parent company guarantees, licensee self-guarantees, surety bonds, and insurance policies as did the NRC.
 - (70 Department licensees use these options.)
 - Repeal use of lines of credit as did the NRC.
 - (There are no Department licensees using this option.)
- Maintain Statement of Intent Mechanisms (government entities only) and External sinking funds, as did the NRC.

Section 30195.1 is amended to remove the incorporation by reference and present all requirements within 17 CCR, so that a licensee need only refer to 17 CCR. This proposal is intended to maintain certain existing financial instrument options, to provide clarity for licensees and Departmental staff, to be compatible and consistent with the NRC's changes, and to implement the Legislature's direction, as follows:

- Pursuant to H&S Code section 115091(a), Department regulations adopted for establishing financial sureties are to consider the appropriateness of the NRC's financial assurance regulations.
- Pursuant to H&S Code section 115235, article V, the State is to use its best efforts to maintain continuing compatibility between its program and the NRC's program for the regulation of like materials.

Existing regulations comply and are consistent with H&S Code section 115091(a), and meet the NRC's compatibility criteria. The NRC's compatibility categories for the 10 CFR provisions addressed in this proposal are as follows (76 FR 35561 (June 17, 2011)):

- Compatibility Category D
 - 30.35(c)(6), (d), (f), (h), and appendices A, C, D, and E;
 - 40.36(c)(5), (e), and (g); and
 - 70.25(c)(5), (d), (f), and (h).
- Compatibility Category H&S
 - 30.35(e)(1), and (2);
 - 40.36(d)(1), and (2); and
 - 70.25(e)(1), and (2).

Existing subsections (a) and (b) are deleted and addressed in proposed sections 30197 through 30197.7, respectively, as follows. See each section for discussion.

- Restructure 30195.1 as follows:

- Subsection (a) is placed in new section 30197, making it applicable to radioactive material except source material and special nuclear material (SNM). Corresponds to 10 CFR 30.35. SNM addressed in new section 30197.2.
 - Subsection (b) is placed in new section 30197.1, applicable only to source material. Corresponds to 10 CFR 40.36.
 - Subsection (c) is retained in 30195.1, and the section is restructured for clarity.
- Designate a section number to each 10 CFR part 30 appendix, and replace the appendix reference with a section number as referenced below. The provisions of 10 CFR 30.35, 40.36, and 70.25 cite to and use the financial tests found in the appendices of part 30.
 - Appendix A = 30197.3
 - Appendix B = 30197.7
 - Appendix C = 30197.4
 - Appendix D = 30197.5
 - Appendix E = 30197.6
 - Restructure 10 CFR provisions and appendices using California methodology.
 - Make grammatical and punctuation changes, section internal reference changes, federal law reference changes, phraseology changes, etc.
 - Revise section and appendix titles.

Proposed subsection (a) is necessary to clarify who must provide for financial surety and where the criteria can be found. The exception is needed to maintain clarity regarding who is exempt from the requirement to provide for financial surety.

Proposed subsection (a) also addresses the transition from current requirements to when, and if, this proposal becomes effective. This language is needed to clarify that this proposal would not require licensees, who already comply with existing requirements, to submit new financial surety documents, but that they would be subject to the new changes from the specified date, should changes triggering financial surety requirements occur.

Further, this assists in removing expired transition dates found in existing subsections (a) and (b). Because the effective date of this proposal cannot be determined, the Department proposes to authorize the Office of Administrative Law (OAL) to insert the date for clarity.

Existing subsection (c) is redesignated to subsection (b), resulting in no regulatory effect. No changes to the exemptions are made, except that because this proposal does not reincorporate by reference 10 CFR provisions, the reference to "Appendix B of Part 30" as found in proposed subsection (b)(1), as redesignated, is revised to refer to the equivalent table of material quantities used to determine if financial surety is needed. This reference change results in no regulatory effect. See section 30197.7 for discussion.

The authority and reference citation note is amended to more clearly reflect the reorganization of the Department of Health Services into the Department of Health Care Services and the California Department of Public Health, pursuant to SB 162 (Ortiz, Chapter 241, Statutes of 2006). These changes result in no regulatory effect.

Section 30197, Financial Surety for Decommissioning Except as provided for in Sections 30197.1 and 30197.2, is proposed to carry forward the existing provisions found in section 30195.1 that are specific to radioactive materials except source material and special nuclear material, which are addressed in proposed sections 30197.1 and 30197.2, respectively. Revisions are made as discussed further.

Source material is defined in H&S Code section 114985(e) as: “(1) uranium, thorium, or any other material which the department declares by rule to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such; or (2) ores containing one or more of the foregoing materials, in such concentration as the department declares by rule to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material in such concentration to be source material.”

Special nuclear material is defined in H&S Code section 114985(f) as: “(1) plutonium, uranium 233, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the department declares by rule to be special nuclear material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.”

This proposed section recodifies 10 CFR 30.35, formerly incorporated by reference in section 30195.1(a). The section is essentially identical to 10 CFR 30.35, to maintain consistency and uniformity with the NRC, since some California licensees may also hold an NRC license. The NRC’s compatibility categories for 10 CFR 30.35, including the changes made under 76 FR 35561 (June 17, 2011), are as follows:

- Compatibility Category B
 - Appendix B to part 30.
- Compatibility Category D
 - 30.35(c), (d), (f), (h), and appendices A, C, D, and E to part 30.
- Compatibility Category H&S
 - 30.35(a), (b), (e), and (g).

Existing section 30195.1, and 10 CFR 30.35 as incorporated by that section (2007 version) and as found in the current version of 10 CFR 30.35, contains a number of provisions with specific dates used for transitioning from when there were no requirements to the financial surety requirements, originally adopted in 1996. The Department amended section 30195.1 again in 2009, including additional transition dates for that adoption. Because these transition dates have expired, they are not carried forward into this proposed section; broad language is proposed in section 30195.1(a) to address transition from existing

requirements to this proposal. See section 30195.1(a) for discussion.

Proposed subsection (a), equivalent to 10 CFR 30.35(a), is recodified from existing section 30195.1(a) and modified as specified in section 30195.1(a)(4) and (a)(9). The exception phrase is added for consistency with section 30195.1(a)(2) regarding source material. Both the recodification and modification result in no regulatory effect. The NRC made no changes to 10 CFR 30.35(a) under 76 FR 35561 (June 17, 2011). This proposal cites sections proposed to be adopted regarding the structural changes, as discussed in section 30195.1 for clarity.

Subsection (b), equivalent to 10 CFR 30.35(b), is recodified from existing section 30195.1(a) and modified for structural clarity with this proposal. The exception phrase is added for consistency with section 30195.1(a)(2) regarding source material. Both the recodification and modification result in no regulatory effect. The NRC made no changes to 10 CFR 30.35(b) under 76 FR 35561 (June 17, 2011). The proposal cites provisions proposed to be adopted regarding the structural changes, as discussed in section 30195.1 for clarity.

Subsection (c), equivalent to 10 CFR 30.35(c), is recodified from existing section 30195.1(a) and modified as specified in the exceptions to section 30195.1(a). The exception phrase is added for consistency with section 30195.1(a)(2) regarding source material. Both the recodification and modification result in no regulatory effect, except as discussed further.

Currently, the second sentence of 10 CFR 30.35(c)(5) (2007 version) as incorporated by reference in section 30195.1(a) requires waste collectors and processors, as part of the decommissioning funding plan (DFP), to include certain cost estimates in addition to those items specified in 30.35(e). This proposal (subsection (c)(4)) revises that sentence by removing reference to remediation costs, because those costs are now addressed in 30.35(e), as amended by the NRC. Thus, this removes duplication and improves clarity.

Proposed subsection (c)(5) addresses the NRC's addition of 10 CFR 30.35(c)(6) under 76 FR 35561 (June 17, 2011). Though 10 CFR 30.35(c)(6) is not required for compatibility, the provision is proposed to be adopted to meet the essential objective of the provision and to maintain consistency with the NRC's provisions, since some State licensees also hold NRC licenses. The Department agrees with the NRC's reasons (76 FR 35526 (June 17, 2011): section II.N.9) for adoption of the provision; namely, licensees that qualify to use the certification amounts have not been subject to a regulatory requirement that they increase the amount of financial assurance to cover remediation costs in the event subsurface contamination occurs at a site. This proposal would require these licensees to cover the full cost, not just the certification amount, of remediation costs, thus helping to ensure that State and local governments and/or the general public would not have to bear the costs of a decommissioning, should a licensee not be able to do so.

However, 10 CFR 30.35(c)(6) triggers submittal of the DFP by use of criteria specified in 10 CFR 20.1402. This proposal (subsection (c)(5)) does not adopt those criteria, in order

to ensure consistency with the trial court order issued May 16, 2002, in *Committee to Bridge the Gap, et al. v. Diana M. Bonta, Director, California Department of Health Services*, Sacramento County Superior Court No. 01CS01445. The purpose of the proposal is not to exempt a licensee from 17 CCR section 30256, to authorize the performance of actual decommissioning activities, or to set radiological criteria for termination of a specific license. The purpose of the proposal is to establish a reasonable financial estimate of remediation costs and to ensure the availability of those funds to help ensure that State and local governments and/or the general public would not have to bear the costs of a decommissioning, should a licensee not be able to do so. Therefore, instead of using the 10 CFR 20.1402 criteria, proposed subsection (c)(5) uses the criteria established on a case-by-case basis for the particular licensee, since that site-specific criteria will provide a more accurate cost estimate for establishing financial surety.

Subsection (d), equivalent to 10 CFR 30.35(d), is recodified from existing section 30195.1(a) and modified as discussed regarding transition dates and for structural clarity with this proposal. Both the recodification and modification result in no regulatory effect. The NRC made no changes to 10 CFR 30.35(d) under 76 FR 35561 (June 17, 2011), except that the NRC changed the compatibility category designation from H&S to D. The proposal cites provisions proposed to be adopted for purposes of the structural changes as discussed in section 30195.1 for clarity.

Subsections (e) and (f), equivalent to 10 CFR 30.35(e)(1) and (e)(2), respectively, are recodified from existing section 30195.1(a) and modified to address the NRC's changes to 10 CFR 30.35(e) under 76 FR 35561 (June 17, 2011). The NRC amended 10 CFR 30.35(e) by specifying more clearly the content of a DFP and providing examples of events that are likely to impact estimated costs. The NRC has designated those changes as compatibility category H&S, requiring Agreement States to adopt regulations meeting the essential objective of the regulation. Those changes are proposed to be adopted in an essentially identical manner, except as discussed below, since some State licensees also hold NRC licenses, and adopting identical regulations reduces confusion for licensees of both California and the NRC.

Proposed subsections (e) and (f), as compared to the NRC's amendment of 10 CFR 30.35(e), contain differences as follows:

- Subsections (e)(1)(B) and (e)(1)(C) (equivalent to 10 CFR 30.35(e)(1)(i)(B), and (C)) base the cost on the criteria identified in the license application material or the licensee's specific license, for the reasons stated regarding proposed subsection (c)(5).
- Subsection (e)(1)(D) (equivalent to 10 CFR 30.35(e)(1)(i)(D)) specifies a contingency factor of at least 25 percent, whereas 10 CFR 30.35(e)(1)(D) merely states that the factor must be adequate. The 25 percent value is based on the NRC guidance document NUREG-1757, Volume 3, Revision 1, Appendix A, section A.3.1.2.3 (page A-25; Reference 5), indicating that a 25% contingency factor should

be used.¹¹ Though this value is only recommended, the Department believes that value should be used, due to its use throughout the United States and territories, and because many State licensees also hold NRC licenses that are subject to the NRC's financial assurance requirements. This carries out State policy specified in H&S Code section 114965 and the mandate specified in H&S Code section 115091(d).

- Subsections (e)(3) and (e)(5) (equivalent to 10 CFR 30.35(e)(1)(iii) and (v)) exclude internal section references (e.g., "of this section"), resulting in no regulatory effect.
- Subsection (f) (equivalent to 10 CFR 30.35(e)(2)) is reworded to more clearly state who must do what, resulting in no regulatory effect. Other grammatical changes are made, resulting in no regulatory effect.

Subsection (g), equivalent to 10 CFR 30.35(f), is recodified from existing section 30195.1(a) and modified to address the NRC's changes to 10 CFR 30.35(f) under 76 FR 35561 (June 17, 2011). This proposal is essentially identical to 10 CFR 30.35(f), except as follows:

- Reverses the sentence order to ensure the provision clearly states the subsection's purpose; namely, to specify the methods to establish financial surety for decommissioning. What information must be identified in the financial instrument is subservient to the subsection's purpose.
- Revises what information must be included in the financial instrument. The phrase "docket number" is excluded, since it is unclear what it refers to. Information added, as compared to 30.35(f), includes the licensee's address, the instrument's dollar amount, and the account or bond number issued by the instrument's issuer. Though existing section 30195.1 does not clearly state what information must be identified on the instrument, the information is provided by licensees. Thus, this proposal carries forward current practice, resulting in no impact.
- Excludes the exception language regarding signed original duplicates of the financial instrument because it is unclear to what the exception is addressing, when the exception is applicable, and by whom it is permitted. The Department has always received the signed original; thus, the exception language is also unnecessary.
- Subsection (g)(1): Acceptance of CDs is retained as discussed regarding section 30195.1.
- Subsection (g)(2): Proposed to be essentially identical to 10 CFR 30.35(f)(2), except references to part 30 appendices are revised, as discussed regarding the restructuring of section 30195.1.
 - Subsection (g)(2)(B): Reference is made to the Financial Surety Account (FSA) within the Radiation Control Fund, administered by the Department pursuant to H&S Code section 115092, to inform licensees of the alternative to establishing a standby trust. The Legislature created the FSA under Chapter 635, Statutes of 1993, to ensure that funds were available to the

¹¹ NUREG-1757 is available at: <https://www.nrc.gov/docs/ML1204/ML12048A683.pdf>.

Department should the Department need to cover costs of decommissioning activities should a licensee be unable to.

- Subsection (g)(3): Only nonsubstantial changes are made for consistency with NRC's changes under 76 FR 35512 (June 17, 2011).
- Subsection (g)(4): Nonsubstantial insertion of the word "table" before the phrase "in subsection (d)" for clarity.
- Subsection (g)(5): Redesignated from section 30195.1(a), equivalent to 10 CFR 30.35(f)(5), without change.

Proposed subsection (g) also requires the licensee, within 30 days of any change in instrument information, to submit financial instruments reflecting such changes. Though this provision is not required to be adopted for purposes of compatibility with the NRC's provision, the provision is proposed to be adopted to ensure the Department has current information on file regarding the financial instrument. Failure to have the current information could result in a delay of funds for performing decommissioning activities by the Department should the licensee be unable to.

Subsection (h), equivalent to 10 CFR 30.35(g), is necessary to clarify where the recordkeeping requirements are found. As specified in existing section 30195.1(a)(1), 10 CFR 30.35(g) is not incorporated by reference because those requirements were adopted under section 30256(a). The federal provision was placed in section 30256 since those requirements relate to records needed to guide actions addressed in section 30256. Thus, this proposal clarifies where those equivalent requirements are located and prevents duplication.

The NRC's provision in 10 CFR 30.35(h) is designated compatibility category D, meaning its adoption by Agreement States is not required for compatibility or health and safety reasons. The provision requires licensees to monitor funds and to inform the NRC if the fund value drops below estimated decommissioning costs. Pursuant to H&S Code section 115091(d), the Department considered this provision and determined that it is not necessary to adopt this provision for the following reasons:

- Currently, no licensees use government securities and government funds and those surety options are proposed to be repealed; and
- The value of funds is re-evaluated every three years.

Subsection (i) is necessary to clarify that this section does not apply to the specified material, since the cited sections address the particular material. This clarification is found in existing section 30195.1(a)(2), except that the existing clarification does not address special nuclear material as addressed in 10 CFR 70.25. See section 30197.2 for further discussion. The term "radioactive material" is defined in existing section 30100(q) as any material, which emits radiation spontaneously. Both source material and special nuclear material emit radiation spontaneously and thus are radioactive material as defined. However, each type of material is addressed separately, to maintain uniformity with federal provisions.

Section 30197.1, Financial Surety for Decommissioning – Source material, is proposed to carry forward the existing provisions found in section 30195.1(b) that are specific to source material, with revisions.

This proposed section recodifies 10 CFR 40.36, formerly incorporated by reference in section 30195.1(b). The section is structured nearly identical to 10 CFR 40.36 to maintain consistency and uniformity with the NRC, since some California licensees may also hold an NRC license. The NRC's compatibility categories for 10 CFR 40.36, including the changes made under 76 FR 35561 (June 17, 2011), are as follows:

- Compatibility Category D
 - 40.36(c), (e), and (g).
- Compatibility Category H&S
 - 40.36(a), (b), (d), and (f).

Existing section 30195.1, and 10 CFR 40.36 as incorporated by that section (2007 version) and as found in the current version of 10 CFR 40.36, contains a number of provisions with specific dates used for transitioning from no requirements to the financial surety requirements originally adopted in 1996. The Department amended section 30195.1 again in 2009, including additional transition dates for that adoption. Because these transition dates have expired, they are not carried forward into this proposed section, so broad language is proposed in section 30195.1(a). See section 30195.1(a) for discussion.

Proposed subsections (a) and (b), equivalent to 10 CFR 40.36(a) and (b), are recodified from existing section 30195.1(b), and modified as specified in existing section 30195.1(b)(1) through (b)(8). Both the recodification and modification result in no regulatory effect. The NRC made no changes to 10 CFR 40.36(a) or (b) under 76 FR 35561 (June 17, 2011). This proposal cites sections proposed to be adopted regarding the structural changes as discussed in section 30195.1, for clarity and to reduce duplication. Further, the term "source material" is clarified by citing the specific law where the term is defined. As specified in existing section 30195.1(b)(8), appendix A of 10 CFR 40 is not proposed to be adopted.

Proposed subsection (c), equivalent to 10 CFR 40.36(c) is proposed to be adopted in the same manner and for the same reasons as discussed regarding proposed section 30197(c), except as follows:

- 10 CFR 40.36(c)(4), (Jan. 1, 2007), currently incorporated by reference in existing section 30195.1(b) as modified by section 30195.1(b)(2), is deleted because the provision's applicability has expired.
- Proposed subsection (c)(4), equivalent to 10 CFR 40.36(c)(5), is added for the reasons discussed regarding proposed section 30197(c)(5).

The NRC provisions found in 10 CFR 40.36(d) and (e), both of which are compatibility category H&S, are duplicative of 10 CFR 30.35(e) and (f), respectively. To reduce duplication, this proposed section cites to the applicable provision and also includes

clarifying language as to what provisions apply when an applicant becomes a licensee. An applicant becomes a licensee when the license is granted.

Subsection (d), equivalent to 10 CFR 40.36(f), is necessary for the reasons stated regarding proposed section 30197(h).

The NRC provisions in 10 CFR 40.36(g) are not required for compatibility and are not proposed to be adopted, for the reasons discussed in proposed section 30197 regarding 10 CFR 30.35(h).

Section 30197.2, Financial Surety for Decommissioning – Unsealed Special Nuclear Material, is proposed to be specific to special nuclear material (SNM) licensees and structured nearly identical to 10 CFR 70.25 in order to maintain consistency and uniformity with the NRC, since some California licensees may also hold an NRC license. The NRC's financial assurance provisions in 10 CFR 30.35, 40.36, and 70.25 are nearly identically structured.

The NRC's compatibility categories for 10 CFR 70.25, including changes made under 76 FR 35561 (June 17, 2011), are as follows:

- Compatibility Category NRC
 - 70.25(a)(1).
- Compatibility Category D
 - 70.25(c), (d), (f), and (h).
- Compatibility Category H&S
 - 70.25(a)(2), (b), (e), and (g).

Currently, regarding SNM applicants and licensees, existing section 30195.1(a) applies as indicated in section 30195.1(a)(2), since that provision encompasses all radioactive material, except source material, including SNM, a material that emits radiation spontaneously. However, it is unclear how to apply the provisions of 10 CFR 30.35, due to differing criteria such as quantity and half-life of the material. Thus, this proposed section is needed to address and clarify 10 CFR 70.25.

Existing section 30195.1(a) currently applies to SNM and contains a number of provisions with specific dates used for transitioning from no requirements to the financial surety requirements originally adopted in 1996. The Department amended section 30195.1 again in 2009, including additional transition dates for that adoption. Because these transition dates expired, they are not carried forward into this proposed section, so broad language is proposed in section 30195.1(a). See section 30195.1(a) for discussion.

Additionally, this proposed section follows the NRC's provision and uses the terminology exceptions, as found in existing section 30195.1(a)(1) through (a)(11), to maintain clarity and consistency.

To reduce duplication, this proposed section cites to equivalent provisions proposed and discussed regarding sections 30195.1, 30197, and 30197.1, as follows. See the cited section for additional discussion.

- Appendix B of part 30 cited in 70.25(a)(2) = Proposed section 30197.7;
- 70.25(e)(1) = Proposed section 30197(e);
- 70.25(e)(2) = Proposed section 30197(f);
- 70.25(f) = Proposed section 30197(g);
- 70.25(g) = Existing section 30256(a). No changes to section 30256 are proposed; and
- 70.25(h) is not adopted for the same reasons discussed in proposed section 30197 regarding 10 CFR 30.35(h).

Subsection (a), equivalent to 10 CFR 70.25(a) and (a)(2), is necessary to maintain compatibility with the NRC and to state when financial surety is required. The term “special nuclear material” is clarified by citing where the term is defined. The provision in 10 CFR 70.25(a)(1) is not proposed to be adopted because it is reserved to the NRC and agreement states may not adopt it.

Subsection (b), equivalent to 10 CFR 70.25(b), is necessary to maintain compatibility with the NRC and to address H&S Code section 115091. This subsection cites to provisions for the same reasons as discussed regarding subsection (a).

Subsection (c), equivalent to 10 CFR 70.25(c), is proposed to be adopted in the same manner and for the same reasons as discussed regarding proposed section 30197(c), except that 10 CFR 70.25(c)(4) (Jan. 1, 2007 version), currently addressed in existing section 30195.1(a) as modified by section 30195.1(a)(2), is deleted because the provision’s applicability has expired. The NRC did not amend the dates found in 10 CFR 70.25 during its recent changes. (76 FR 35512 (June 17, 2011).)

Proposed subsection (c)(4) is needed for the same reasons stated regarding proposed section 30197(c)(5).

Subsection (d), equivalent to 10 CFR 70.25(d), is not required for compatibility with the NRC. However, it is proposed to be adopted in an essentially identical manner to maintain consistency and uniformity with the NRC, since some California licensees may also hold an NRC license. This implements H&S Code sections 115000(b) and 115091. [The Department believes the specific dollar amounts are appropriate given the NRC’s evaluation of decommissioning costs and activities and experience gained nationally.]

Subsection (e), equivalent to 10 CFR 70.25(g), is necessary for the reasons stated regarding proposed section 30197(h).

Section 30197.3, Criteria Relating to Use of Financial Tests and Parent Company Guarantees for Providing Reasonable Surety of Funds for Decommissioning, is proposed to carry forward the provisions incorporated by reference in existing section 30195.1(a), corresponding to appendix A of 10 CFR 30.

This proposed section is based on the 2007 version of appendix A, as currently incorporated by reference in existing section 30195.1(a), and revised to address the NRC's changes in 76 FR 35512 (June 17, 2011).

Though the NRC has designated appendix A, C, D and E of 10 CFR 30 as compatibility category D, meaning Agreement States need not adopt it for purposes of compatibility and adequacy, the Department initially adopted those provisions because it deemed the provisions to be appropriate financial tests for purposes of implementing H&S Code section 115091. The NRC's tests, as specified in appendix A, C, D, and E of 10 CFR 30, are used nationally. Many licensees within Agreement States, including California, also hold an NRC license. Thus, maintaining consistent financial tests across jurisdictions reduces regulatory burden, and carries out the State's policy of maintaining compatible standards with the federal government and consistency, when possible, with other states. (H&S Code section 114965.)

Therefore, this proposed section, and proposed sections 30197.4, 30197.5, and 30197.6, are essentially identical to appendix A, C, D and E of 10 CFR 30, respectively, except that the structure is revised for consistency with California's structural methodology, and grammatical and punctuation changes are made to maintain consistency and clarity and to achieve a coherent structure. The reference to the Financial Surety Account found in proposed subsections (e)(4) and (6)(A) and (f)(1) is made for the reasons specified regarding proposed section 30197(g)(2)(B).

Section 30197.4, Criteria Relating to Use of Financial Tests and Self Guarantees for Providing Reasonable Surety of Funds for Decommissioning, is proposed to carry forward the provisions incorporated by reference in existing section 30195.1(a), corresponding to appendix C of 10 CFR 30.

This proposed section is based on the 2007 version of appendix C, as currently incorporated by reference in existing section 30195.1(a), and revised to address the NRC's changes in 76 FR 35512 (June 17, 2011) as discussed regarding proposed section 30197.3. The reference to the Financial Surety Account found in proposed subsections (e)(6) through (e)(9) is made for the reasons specified regarding proposed section 30197(g)(2)(B).

Section 30197.5, Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Surety of Funds for Decommissioning by Commercial Companies That Have No Outstanding Rated Bonds, is proposed to carry forward the provisions incorporated by reference in existing section 30195.1(a), corresponding to appendix D of 10 CFR 30.

This proposed section is based on the 2007 version of appendix D, as currently incorporated by reference in existing section 30195.1(a), and revised to address the NRC's changes in 76 FR 35512 (June 17, 2011), as discussed regarding proposed section 30197.3. The reference to the Financial Surety Account found in this proposal is made for the reasons specified regarding proposed section 30197(g)(2)(B).

Section 30197.6, Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Surety of Funds for Decommissioning by Nonprofit Colleges, Universities, and Hospitals, is proposed to carry forward the provisions incorporated by reference in existing section 30195.1(a), corresponding to appendix E of 10 CFR 30.

This proposed section is based on the 2007 version of appendix E, currently incorporated by reference in existing section 30195.1(a), and revised to address the NRC's changes in 76 FR 35512 (June 17, 2011), as discussed regarding proposed section 30197.3. The reference to the Financial Surety Account found in this proposal is made for the reasons specified regarding proposed section 30197(g)(2)(B).

Section 30197.7, Schedule of Material Quantities for Use in Determining Financial Surety Amounts, is proposed to carry forward the provisions incorporated by reference in existing section 30195.1(a), corresponding to appendix B of 10 CFR 30 (January 1, 2007), resulting in no regulatory effect. The NRC has designated appendix B of 10 CFR 30 as compatibility category B, meaning Agreement States must adopt equivalent regulations that are essentially identical to the NRC's provision. Therefore, appendix B of 10 CFR 30 is proposed to be adopted in an essentially identical manner, except as discussed further.

With regard to the "Note" at the end of the appendix B table addressing cases involving a combination of isotopes; this proposal deletes the phrase "For purposes of section 20.303." The phrase is deleted because it is a carryover phrase from the Table's original purpose, as identified in the federal register adoption history of 10 CFR 30.35 and appendix B of part 30. It no longer applies for purposes of establishing when financial surety must be provided. The NRC has made no changes to appendix B since 1993.

The current appendix B of part 30 was formerly appendix C of part 20 and the "Note" was necessary to clarify what material quantities could be disposed of in sanitary sewers, as specified in the 1993 version of 10 CFR 20. As indicated in 58 FR 67659 (December 22, 1993), the NRC redesignated appendix C to part 20 as appendix B to part 30 without change. The "Note," including the title and federal register history citations, was carried from part 20 over to part 30 without change. The note, including the title, is now no longer applicable to the former subject - when disposal can occur - but is now applicable to when financial surety must be provided. Therefore, this proposal clarifies the title and deletes the reference to 10 CFR 20.303, since appendix B to part 30 is specific to establishing financial sureties.

DOCUMENTS RELIED UPON

1. *Adequacy and Compatibility of Agreement State Programs, Management Directive 5.9* as published in Volume 5: Governmental Relations and Public Affairs. Available at: <https://scp.nrc.gov/procedures/md0509.pdf>. Accessed April 8, 2016.
2. *Integrated Materials Performance Evaluation Program (IMPEP), Management Directive 5.6* as published in Volume 5: Governmental Relations and Public Affairs. Available at: <https://scp.nrc.gov/procedures/md0506.pdf>. Accessed April 8, 2016.

3. NRC Procedure SA-200, *Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements – SA – 200*. Available at: <https://scp.nrc.gov/procedures/sa200.pdf>. Accessed April 8, 2016.
- 3a. NRC Procedure SA-201, *Review of State Regulatory Requirements – SA – 201*. Available at: <https://scp.nrc.gov/procedures/sa201.pdf>. Accessed April 8, 2016.
4. NRC Review Summary Sheets, *Domestic Licensing of Special Nuclear Material*, available at: <https://scp.nrc.gov/regulationtoolbox/10cfr70.pdf>. Accessed April 8, 2016.
5. *NUREG-1757, Vol. 3, Rev. 1, Consolidated Decommissioning Guidance: Financial Assurance, Recordkeeping, and Timeliness*, NRC, February 2012, available at: <https://www.nrc.gov/docs/ML1204/ML12048A683.pdf>. Accessed April 8, 2016.
6. Comparison of title 10 CFR 30.35, 2007 and 2014 versions.
7. Comparison of title 10 CFR 40.36, 2007 and 2014 versions.

CONSIDERATION OF REASONABLE ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Alternatives have been considered in those areas not subject to or specifically limited by the adequacy and compatibility criteria made applicable under the State of California agreement with the United States Atomic Energy Commission, the predecessor to the United States Nuclear Regulatory Commission. (H&S Code § 115230.) The NRC categories A and B require that the State be “essentially identical” to the NRC; category C requires that the “essential objectives” are met; category D is not required for purposes of compatibility; and category H&S is not required for purposes of compatibility, but does have health and safety significance and requires adoption of regulations meeting the essential objectives for an adequate program. According to the agreement, the state is to use its “best efforts to maintain continuing compatibility between its program and the program of the [United States Atomic Energy] Commission for the regulation of like materials...” (H&S Code §115235, art. V.) No reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed; would be as effective and less burdensome to affected private persons than the proposed action; or, would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations or during the written comment period.

Local Mandate: The Department has determined that this regulatory action would not impose a mandate on local agencies or school districts, nor are there any costs that require state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Mandated by Federal Law or Regulations: See Authority and Background on Pg. 3.

Other Statutory Requirements: None.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Mandate on local agencies and school districts: Not applicable.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Cost impacts on a representative private person or business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. This proposal comports with NRC's adoption except that CDPH is retaining use of certificates of deposits (CD) for purposes of establishing required financial surety. By retaining use of CD's, licensees using CDs will not be required to establish a new financial instrument resulting in a savings annually from \$181 to \$16,475, if the licensee used letters of credit or surety bonds for the new financial surety instrument.

Statewide adverse economic impact directly affecting businesses and individuals:

There is no impact because the proposal clarifies activities currently performed by licensees or applicants and it would not require a licensee to establish a new financial instrument.

Significant effect on housing costs: The Department has determined that the proposed regulations will not have an impact on housing costs.

Business Reporting Requirement: No report required.

Small Business Determination: There would be an affect on small business because they will be legally required to comply with the regulations, and may incur a detriment from the enforcement of the regulation.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The Department analyzed whether and to what extent this proposal affects the following:

1. **The creation or elimination of jobs within the State of California.** This proposal is not likely to create new jobs because it clarifies activities currently performed by licensees or applicants.
2. **The creation of new businesses or the elimination of existing businesses within the State of California.** This proposal is unlikely to create new businesses because it clarifies activities currently performed by licensees or applicants.
3. **The expansion of businesses currently doing business within the State of California.** This proposal is unlikely to result in the expansion of businesses currently doing business in California because it clarifies activities currently performed by licensees or applicants.
4. **The benefits of the regulation to the health and welfare of California residents, worker safety, and the State's environment.** This proposal increases the benefits to the health and welfare of California residents and worker safety because it increases the likelihood that licensees will improve decommissioning planning, and have adequate funds for effective decommissioning. This proposal would benefit the State's environment because it reduces the likelihood that an operating facility will become a legacy site. The above benefits specifically demonstrate:
 - Continued protection of the public health and safety, worker safety, and the environment, as established by the Legislature in the following provisions:
 - H&S Code sections 114705, 114740, 114755, 114965, 114970, 115000, 115230, and 115235.
 - Compatibility with the standards and regulatory programs of the NRC, as specified in H&S Code sections 114965(a), 115000(b), and 115235 (article V).
 - Consistency with the regulatory programs of other states, as specified in H&S Code section 114965(c).
 - Evidence of orderly regulatory pattern within the State, among the states, and between the federal government and the State, as specified in H&S Code section 114965(b).
 - Initiation and administration of programs of surveillance and control of those activities that could lead to the introduction of radioactive materials into the environment, as specified in H&S Code section 114705.