Rules and Regulations

Federal Register
Vol. 64, No. 140
Thursday, July 22, 1999

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150–AB94

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Notice of intent to implement currently effective rule; response to comments.

SUMMARY: The Nuclear Regulatory Commission, having considered the comments received on the May 10, 1999, document declaring its intent to begin implementing a final rule published and made effective in 1985, has decided to proceed with implementation of the rule, 30 days from the date of publication of this document.

DATES: The May 21, 1985, interim rule became effective May 21, 1985. The Commission will begin holding non-Sunshine Act discussions no sooner than August 23, 1999.

FOR FURTHER INFORMATION CONTACT: Peter Crane, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415–1622.

SUPPLEMENTARY INFORMATION: On May 10, 1999 (64 FR 24936), the Nuclear Regulatory Commission noticed in the **Federal Register** of its intention to begin implementing its regulations, promulgated in 1985, applying the Government in the Sunshine Act. The Commission provided a period for public comment, ending June 9, 1999, and stated that no non-Sunshine Act discussions would be held before July 1, 1999, to give the Commission an opportunity to consider the comments. The Commission stated that non-Sunshine Act discussions could begin on July 1, unless it took further action. Finding that the comments do in fact warrant discussion, the Commission provides this additional document that responds to the issues raised by the commenters. During the period of its review of the comments, the Commission has not held any non-Sunshine Act discussions and has decided not to hold any such discussions until, at the earliest, 30 days from the date of publication of this document.

Nine comments were received on the May 10 notice, all but one of which expressed disapproval of the NRC's action. (The lone exception was a comment from a nuclear industry group, the Nuclear Energy Institute, which said that it endorsed the NRC's action for the reasons stated in the May 10, 1999, document.) Of the critical comments received, the most detailed came from a Member of the United States House of Representatives, Edward J. Markey, and from two public interest organizations, the Natural Resources Defense Council and Public Citizen. The negative comments were mostly (but as will be seen, not exclusively) along the lines that the Commission had tried to anticipate in its detailed document of May 10.

The comments were both on legal and policy grounds. The primarily legal arguments included the following:

(a) The legislative history of the Sunshine Act makes clear Congress's intent that there should be openness to the maximum extent practicable;

(b) The Commission's action is thus antithetical to the letter and spirit of the Act;

(c) The Supreme Court's decision in *FCC* v. *ITT World Communications,* 466 U.S. 463 (1984), involved unique circumstances and is not relevant to the issue before the NRC;

(d) The Commission disregarded such court decisions as that of the U.S. Court of Appeals for the D.C. Circuit in *Philadelphia Newspapers* v. *NRC,* 727 F.2d 1195 (1984);

(e) The criteria adopted by the Commission are too vague to be workable, inasmuch as they require the Commission to predict the course that discussions will take; and

(f) The Commission's action, by providing for minimal recordkeeping, possibly to be discontinued after six months, will preclude meaningful judicial review.

Policy arguments included these:

(a) Even if the rule can be justified legally, it represents a retreat from openness and will diminish public confidence in the Commission;

(b) The NRC has failed to show that collegiality has been impaired by the Sunshine Act;

(c) The examples of topics that the Commission has cited as examples of possible non-Sunshine Act discussions are too trivial to warrant changing a rule that has served well for 20 years;

(d) The Commission failed to follow the recommendations of the American Bar Association with respect to record keeping;

(e) No harm could come to the Commission's processes if general background briefings were held in open session;

(f) The NRC's role as regulator of a technically complex industry calls for maximum openness; and

(g) Nothing in the rule prevents the Commission from holding off-the-record discussions with representatives of the regulated industry.

In the interest of clarity, we will address the comments in a comment-and-response format. Some comments were dealt with in sufficient detail in the May 10, 1999, document that it would serve no useful purpose to repeat here the Commission's position with regard to them.

A. *Comment:* One of the critical commenters quoted at length from the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Philadelphia Newspapers* v. *NRC,* 727 F.2d 1195 (1984), in which the court declared that ''Government should conduct the public's business in public.'' The commenter opined that Congress undoubtedly intended that the Government in the Sunshine Act ''would guarantee public accountability'' on the safety of nuclear power.

Response: Undeniably, the *Philadelphia Newspapers* decision represented an expansive view of the Sunshine Act on the part of that panel of the D.C. Circuit. Only a few months later, however, the Supreme Court provided sharply different guidance in the first (and to date only) Government in the Sunshine Act case to reach the Court: *FCC* v. *ITT World*

Communications, 466 U.S. 463 (1984). *ITT World Communications* resembled *Philadelphia Newspapers* in that it also involved an expansive interpretation of the Sunshine Act by the D.C. Circuit. Resoundingly, in a unanimous decision, the Supreme Court overturned the D.C. Circuit's ruling, and it used the opportunity to give guidance on the proper interpretation of the Sunshine Act. It said, among other things:

> Congress in drafting the Act's definition of ''meeting'' recognized that the administrative process cannot be conducted entirely in the public eye. ''(I)nformal background discussions (that) clarify issues and expose varying views'' are a necessary part of an agency's work. (Citation omitted.) The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit. Section 552b(a)(2) therefore limits the Act's application. * * *

Id. at 469–70.

The Commission's rulemaking has been grounded from the start in this definitive Supreme Court guidance. The rule itself includes a definition of ''meeting'' taken verbatim from the Court's opinion. The American Bar Association confirmed that the NRC's approach was consistent with Congressional intent and the Supreme Court's interpretation. To the extent that the commenter was urging the NRC to follow the approach of the Court of Appeals and disregard the contrary guidance of the Supreme Court, the NRC cannot agree. Even if the Commission believed as a matter of policy that such a course was desirable, the NRC is not at liberty to ignore Supreme Court decisions interpreting the statutes that govern its operations.[1]

B. *Comment:* The NRC's action, even if some legal arguments could be made for it, is contrary to the Congress's intent, documented in the legislative history, that Federal agencies were intended to practice openness to the maximum extent possible.

Response: Congress made a deliberate decision to limit the applicability of the Sunshine Act to ''meetings.'' As the Supreme Court explained in detail, the definition of ''meeting'' was an issue to which Congress paid extremely close attention, with changes introduced late in the process. The bill in its final form therefore differed significantly from what some of its supporters (including its chief sponsor, the late Senator Lawton Chiles) desired. As a result, Committee reports describing earlier, more expansive versions of the legislation bills are of slight significance compared to the Supreme Court's parsing of the statute that Congress actually passed. Some commenters are in effect asking the NRC to join in rewriting history so that the narrowing of the scope of ''meetings''—proposed by then-Representative Pete McCloskey, enacted over the opposition of Senator Chiles and others, and elucidated by the Supreme Court—is made to disappear from the record. The reality, contrary to the views of some commenters, is that the Sunshine Act did not decree openness to the maximum extent practicable. Instead, it struck a balance between the public's right to know and the agencies' need to function efficiently in order to get the public's business done.

C. *Comment:* A commenter asserted that the NRC had failed to offer examples of the types of ''non-Sunshine Act discussions'' that it contemplated holding.

Response: The commenter is in error, as may be seen from the section of the NRC's May 10, 1999, document on page 24942 that begins, ''Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include. * * *'' Nor was this the first time that the NRC had offered such examples. It has done so repeatedly, beginning in 1985. Indeed, the American Bar Association task force that studied the Sunshine Act quoted, with approval and at considerable length, the examples of possible non-Sunshine Act discussions included in a memorandum to the Commission from the NRC General Counsel.

D. *Comment:* A commenter asserted that ''no detailed analysis or specific example has been provided of problems with the current rule or of the need for changes.''

Response: The Commission disagrees with this comment. As long ago as 1984, the Administrative Conference of the United States, in Recommendation 84–3, was commenting that the Sunshine Act had had the unintended effect of diminishing collegiality at multi-member agencies and shifting power from the collegium to the Chairman and staff. Analyses by the NRC, the American Bar Association, and the Administrative Conference all provide factual support for the proposition that there are problems associated with the Act. Again, this topic was covered in detail in the Commission's May 10, 1999, document.

E. *Comment:* One commenter observed that ''[t]here is no apparent requirement to keep any tape or transcript of non-Sunshine Act discussions.''

Response: This comment is correct, for that is the way that Congress enacted the statute. (The May 10, 1999, document quoted the legal judgment reflected in the ABA report that if a discussion ''is not a 'meeting,' no announcement or procedures are required because the Act has no application.'') As a matter of policy discretion, however, the NRC has decided to maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend, for *at least* the initial six-month period of implementing the rule. This will assist the Commission in determining whether thereafter, recordkeeping should be maintained, increased, or eliminated. No final decision has been made at this time. The Commission will not discontinue its practice of keeping such records without advance notice to the public.

F. *Comment:* The NRC should make clear whether or not it intends that discussions now held as ''meetings'' can henceforth be held as non-Sunshine Act discussions. The Commissioners whose proposal initiated the Commission's action seem to have contemplated transforming current ''meetings'' into non-Sunshine Act discussions, but the Commission's May 10, 1999, document denies this intent.

Response: The May 10, 1999, document made clear that the objective is not to turn discussions now held as ''meetings'' into non-Sunshine Act discussions, but rather to enable the Commission to hold, as non-Sunshine Act discussions, the kind of informal, preliminary, and ''big picture'' discussions that currently are not held at all. As is sometimes the case, the final Commission action differed in this

---

[1] It is worth noting that on the precise legal point in dispute here—the definition of a ''meeting'' under the Sunshine Act—one D.C. Circuit decision held that an agency is legally prohibited from interpreting the law more restrictively than Congress provided. In *WATCH* v. *FCC,* 665 F.2d 1264 (D.C. Cir. 1981), the court sharply chastised an agency which had adopted a definition of ''meeting'' that included types of discussions that Congress had not included within the statutory scope. The court declared that the agency was ''supposed to track'' the statutory definition when it defined a ''meeting'' in its regulations. Because it had failed to do so, and instead included types of discussions not intended by Congress to fall within the statutory scope, the agency had written an ''impermissibly broad'' definition which could not legally be sustained. The court said:

> Indeed, we are unable to discern any reason for the breadth of the agency's definition of ''meeting''—apart from shoddy draftsmanship, perhaps. While we recognize that an agency generally is free to shoulder burdens more onerous than those specifically imposed by statute, the regulation at issue here is in excess of the Commission's rulemaking discretion under 47 U.S.C. 154(1) (1976). Consequently, we set it aside to the extent that its definition of ''meeting'' is more inclusive than the one contained in the Sunshine Act. 665 F.2d 1264, 1272.

instance from the proposal that set the action in motion.

G. *Comment:* The memorandum from two Commissioners that initiated the Commission's action said that one reason to act was that the primary opponent of the Commission's 1985 action was no longer in Congress. This suggests that the Commission's action was motivated by political considerations, rather than actual need.

Response: The cited memorandum did indeed include an allusion to a former Representative. Read fairly and in its totality, it makes clear that the two Commissioners' proposal was motivated by concerns of good government and legal correctness, not politics. At the same time, they offered their candid view that concern about the proposal might be less intense than it had been in 1985. There was nothing inappropriate about making this observation. The Commission's decision to take action with regard to the Sunshine Act was a reflection of its longstanding efforts to increase the collegiality of the Commission process, to ensure that its procedures and practices are in conformity with current law, and to reach closure on outstanding items.

H. *Comment:* The May 10, 1999, document is not clear as to whether there is anything in the rule that would prevent the full Commission from meeting off-the-record with representatives of a licensee or the Nuclear Energy Institute in non-Sunshine Act discussions.

Response: The commenter's point is well taken; the notice did not address this question. The Commission's intent is that non-Sunshine Act discussions would be limited to NRC or other federal agency personnel, with limited exceptions for persons (e.g. representatives of the regulatory body of a foreign nation, or a state regulator) who would not be regulated entities or who could not be considered interested parties to Commission adjudicatory or rulemaking proceedings. The Commission is committed to implementing this intent; the non-Sunshine Act discussions will not include discussions with representatives of licensees or of organizations who could be considered interested parties to NRC adjudications, rulemakings, or development of guidance.

I. *Comment:* The NRC's standards for determining when a discussion can be held as a non-Sunshine Act discussion is impermissibly vague, requiring ''divination'' on the part of the participants.

Response: The standards for determining what is a non-Sunshine Act discussion were taken verbatim from the decision of a unanimous Supreme Court. Moreover, it is not correct to say that the standard requires ''divination'' of what will happen in a discussion. Rather, what the rule envisions is that if a discussion begins to evolve from the preliminary exchange of views that the Commission contemplated into something so particularized that it may ''effectively predetermine'' agency action if it continues, the Commission will cease the discussion.[2]

J. *Comment:* Because of the special sensitivity and public interest in issues of nuclear safety, the NRC should continue to apply the law more stringently than is required.

Response: That argument may have some force, but it cuts both ways. By the same token, it can be argued that the special sensitivity and public interest in issues of nuclear safety make it essential that the Commission remove barriers to efficiency and collegiality, so as to maximize the quality of Commission decision-making, and that the Congressional balance between openness and efficiency should therefore be adhered to strictly. The NRC believes that the latter interest should predominate.

K. *Comment:* Whether or not legally justifiable, the NRC's action will diminish public confidence in the Commission.

Response: The Commission was aware of this possibility at the time it issued the May 10, 1999, document, but it believes that the legal and policy reasons for its action—compliance with the Supreme Court's guidance, and the expected benefits in collegiality and efficiency, make this a desirable course of action, even if—despite the Commission's best efforts to explain its reasoning—some persons misunderstand or disapprove of the Commission's action. It is also possible that the potential enhancement of collegiality and the potential improvement in Commission decision-making that may result from non-Sunshine Act discussions will ultimately increase the public's confidence in the Commission's actions.

[2] Every Commissioner who meets one-on-one with an interested party to a matter before the Commission has to be prepared to cut off discussions that threaten to stray into impermissible areas, as provided, for example, by the NRC's *ex parte* rules. There seems no reason why Commissioners could not equally well halt discussions among themselves that seem likely to cross the line separating non-Sunshine Act discussions from ''meetings.''

L. *Comment:* The NRC did not follow the recordkeeping recommendations of the American Bar Association.

Response: It is true that the Commission did not follow the American Bar Association's recommendations with respect to recordkeeping. However, those recommendations were prudential, not based on legal requirements. The ABA recognized that as a legal matter, if a discussion is not a ''meeting,'' no procedural requirements apply at all. The Commission's May 10, 1999, document reflected a judgment that Congress would not have given agencies latitude to hold this type of discussion free of elaborate and burdensome procedures if it had not viewed such procedures as undesirable. Nonetheless, as described in the response to Comment E above, the Commission has decided to maintain a record of the date, participants in, and subject matter of all non-Sunshine Act discussions for at least the first six months in which the rule is implemented, and it will not discontinue the practice thereafter without advance notice to the public.

M. *Comment:* No harm could result from holding briefings in public session, and doing so would benefit public understanding.

Response: On this point, arguments can go either way. At the time that the Commission first put its Sunshine Act rules into place, it acknowledged that briefings might be exempt from the Sunshine Act's scope, but said that the Commission did so much of its important work in briefings that as a policy matter, it believed these should be open to the public. This argument is not insubstantial. In part for that reason, the Commission affirms once again what it said in its May 10, 1999, document and earlier in this present document, namely, that its objective is not to turn discussions now held as ''meetings'' into non-Sunshine Act discussions. Rather, the intent is to ensure that the Commission is not categorically required to apply the Sunshine Act's procedural requirements to *every* briefing, including such things as routine status updates, where the benefit to the public would be small compared to the administrative burden and loss of efficiency in doing day-to-day business.

In sum, the NRC believes, based on its review of the comments received on the May 10, 1999, document, that the general approach taken by the Commission in that notice remains a desirable course of action. Accordingly, the NRC intends to implement its 1985 Sunshine Act rules and to begin holding non-Sunshine Act discussions, subject

to the conditions outlined in the May 10, 1999, document, and as further clarified in the present document, 30 days from the date of this notice.

Dated at Rockville, Md., this 16th day of July, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99–18724 Filed 7–21–99; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–350–AD; Amendment 39–11232; AD 99–15–12]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes. This action requires repetitive detailed inspections to detect looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs, and eventual replacement of the bushings with new, staked bushings. Accomplishment of such replacement terminates the repetitive inspections. This action also provides for an optional temporary preventive action, which, if accomplished, would terminate the repetitive inspections until the terminating action is accomplished. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent looseness or gap of the bushings. In the event of failure of the redundant trim tab actuator, such looseness or gap of the bushings could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

DATES: Effective August 6, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of August 6, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 23, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–350–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Luftfartsverket (LFV), which is the airworthiness authority for Sweden, notified the FAA that an unsafe condition may exist on certain Saab Model SAAB 2000 series airplanes. The LFV advises that a failure of a bushing of the flap support fitting occurred during a fatigue test. The bushing installation of the flap support fitting is similar to the bushing installation of the actuator fittings of the aileron trim tabs. In the event of failure of the redundant trim tab actuator, such a failure of the bushing could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

Explanation of Relevant Service Information

Saab has issued Service Bulletin 2000–57–011, dated October 1, 1998, which describes procedures for repetitive visual inspections to detect looseness or gap of the press fit bushing installation of the actuation fittings of the aileron trim tabs. In addition, the service bulletin describes procedures for eventual replacement of existing bushings with new, staked bushings in the fittings. Such replacement when accomplished, eliminates the need for the repetitive inspections. The service bulletin also describes procedures for an optional temporary preventive action that involves the installation of washers on the bushings of the actuator fittings of the aileron trim tabs. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

The LFV classified this service bulletin as mandatory and issued Swedish airworthiness directive (SAD) No. 1–132, dated October 8, 1998, in order to assure the continued airworthiness of these airplanes in Sweden.

FAA's Conclusions

This airplane model is manufactured in Sweden and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LFV has kept the FAA informed of the situation described above. The FAA has examined the findings of the LFV, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs. This AD requires accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Differences Between this AD and Service Bulletin

Operators should note that, although the service bulletin specifies that the manufacturer may be contacted for disposition of a certain repair condition, this AD requires the repair of that condition to be accomplished in accordance with a method approved by the FAA, or the LFV (or its delegated agent).

Cost Impact

None of the airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.