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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SEP 03 1993

Mr. Les W. Bradshaw
Project Manager
Nye County Nuclear Waste
Repository Project Office
P. O. Box 1767
Tonopah, Nevada 89049

Dear Mr. Bradshaw:

Following my presentation at the "Yucca Mountain Affected Units Program Review Workshop" on August 23, 1993, covering the U.S. Nuclear Regulatory Commission's role in the high-level waste program, you asked me how affected units of local government could participate in the licensing hearing process. In response to that question, I stated that the Commission's regulations in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," contained the steps involved in becoming a party to the hearing process.

Enclosed you will find a copy of 10 CFR Part 2 which I committed to provide you. Of particular interest to you would be Subpart G, "Rules of General Applicability," and Subpart J, "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository," both of which pertain to the hearing process for a DOE application to license a high-level waste repository. The remainder of 10 CFR Part 2 is also being provided for your information. Also included for your information is 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories; Licensing Procedures."

If you have any questions regarding either of these documents, you may contact me at (301) 504-3391.

Sincerely,

Joseph J. Holonich

Joseph J. Holonich, Director
Repository Licensing and Quality Assurance
Project Directorate
Division of High-Level Waste Management
Office of Nuclear Material Safety
and Safeguards

Enclosures: On the shelf
As stated PART 60 DISPOSAL OF HIGHLEVEL

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PART 60

DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

Subpart A—General Provisions

Sec.
60.1 Purpose and scope.
60.2 Definitions.
60.3 License required.
60.4 Communications and records.
60.5 Interpretations.
60.6 Exemptions.
60.7 License not required for certain preliminary activities.
60.8 Reporting, recordkeeping, and application requirements; OMB approval not required.
60.9 Employment protection.
60.10 Completeness and accuracy of information.
60.11 Deliberate misconduct.

Subpart B—Licenses

PREAPPLICATION REVIEW

60.15 Site characterization.
60.16 Site characterization plan required.
60.17 Contents of site characterization plan.
60.18 Review of site characterization activities.

LICENSE APPLICATIONS

60.21 Content of application.
60.22 Filing and distribution of application.
60.23 Elimination of repetition.
60.24 Updating of application and environmental impact statement.

CONSTRUCTION AUTHORIZATION

60.31 Construction authorization.
60.32 Conditions of construction authorization.
60.33 Amendment of construction authorization.

LICENSE ISSUANCE AND AMENDMENT

60.41 Standards for issuance of a license.
60.42 Conditions of license.
60.43 License specification.
60.44 Changes, tests, and experiments.
60.45 Amendment of license.
60.46 Particular activities requiring license amendment.

PERMANENT CLOSURE

60.51 License amendment for permanent closure.
60.52 Termination of license.

Subpart C—Participation by State Governments and Affected Indian Tribes

60.61 Provision of information.
60.62 Site review.
60.63 Participation in license reviews.
60.64 Notice to States.
60.65 Representation.

Subpart D—Records, Reports, Tests, and Inspections

60.71 Records and reports.
60.72 Construction records.
60.73 Reports of deficiencies.
60.74 Tests.
60.75 Inspections.

Subpart E—Technical Criteria

60.101 Purpose and nature of findings.
60.102 Concepts.

PERFORMANCE OBJECTIVES

60.111 Performance of the geologic repository operations area through permanent closure.
60.112 Overall system performance objective for the geologic repository after permanent closure.
60.113 Performance of particular barriers after permanent closure.

LAND OWNERSHIP AND CONTROL

60.121 Requirements for ownership and control interests in land.

SITING CRITERIA

60.122 Siting criteria.

DESIGN CRITERIA FOR THE GEOLOGICAL REPOSITORY OPERATIONS AREA

60.130 Scope of design criteria for the geologic respository operations area.
60.131 General design criteria for the geologic repository operations area.
60.132 Additional design criteria for surface facilities in the geologic repository operations area.
60.133 Additional design criteria for the underground facility.
60.134 Design of seals for shafts and boreholes.

DESIGN CRITERIA FOR THE WASTE PACKAGE

60.135 Criteria for the waste package and its components.

PERFORMANCE CONFIRMATION REQUIREMENTS

60.137 General requirements for performance confirmation.

Subpart F—Performance Confirmation Program

60.140 General requirements.
60.141 Confirmation of geotechnical and design parameters.
60.142 Design testing.
60.143 Monitoring and testing waste packages.

Subpart G—Quality Assurance

60.150 Scope.
60.151 Applicability.
60.152 Implementation.

Subpart H—Training and Certification of Personnel

60.160 General requirements.
60.161 Training and certification program.
60.162 Physical requirements.

Subpart I—Emergency Planning Criteria [Reserved]

Subpart J—Violations

60.181 Violations.
60.183 Criminal penalties.

57 FR 55062

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213g, 2228, as amended (42 U.S.C. 10134, 10141).

102.3

PART 60 • DISPOSAL OF RADIOACTIVE WASTES • • •

Subpart A—General Provisions

56 FR 40664

§ 60.1 Purpose and scope.

This part prescribes rules governing the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982. This part does not apply to any activity licensed under another part of this chapter. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 60.11.

48 FR 28194

§ 60.2 Definitions.

As used in this part—

"Accessible environment" means: (1) The atmosphere, (2) the land surface, (3) surface water, (4) oceans, and (5) the portion of the lithosphere that is outside the controlled area.

51 FR 27158

"Affected Indian Tribe" means any Indian Tribe (1) within whose reservation boundaries a repository for high-level radioactive waste or spent fuel is proposed to be located; or (2) whose Federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of Congressionally ratified treaties or other Federal law may be substantially and adversely affected by the locating of such a facility; *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the Tribe, that such effects are both substantial and adverse to the Tribe.

48 FR 28194

"Anticipated processes and events" means those natural processes and events that are reasonably likely to occur during the period the intended performance objective must be achieved. To the extent reasonable in the light of the geologic record, it shall be assumed that those processes operating in the geologic setting during the Quaternary Period continue to operate but with the perturbations caused by the presence of emplaced radioactive waste superimposed thereon.

"Barrier" means any material or structure that prevents or substantially delays movement of water or radionuclides.

"Candidate area" means a geologic and hydrologic system within which a geologic repository may be located.

"Commencement of construction" means clearing of land, surface or subsurface excavation, or other substantial action that would adversely affect the environment of a site, but does not include changes desirable for the temporary use of the land for public recreational uses, site characterization activities, other preconstruction monitoring and investigation necessary to establish background information related to the suitability of a site or to the protection of environmental values, or procurement or manufacture of components of the geologic repository operations area.

"Commission" means the Nuclear Regulatory Commission or its duly authorized representatives.

"Containment" means the confinement of radioactive waste within a designated boundary.

"Controlled area" means a surface location, to be marked by suitable monuments, extending horizontally no more than 10 kilometers in any direction from the outer boundary of the underground facility, and the underlying subsurface, which area has been committed to use as a geologic repository and from which incompatible activities would be restricted following permanent closure.

"Director" means the Director of the Nuclear Regulatory Commission's Office of Nuclear Material Safety and Safeguards.

"Disposal" means the isolation of radioactive wastes from the accessible environment.

"Disturbed zone" means that portion of the controlled area the physical or chemical properties of which have changed as a result of underground facility construction or as a result of heat generated by the emplaced radioactive wastes such that the resultant change of properties may have a significant effect on the performance of the geologic repository.

"DOE" means the U.S. Department of Energy or its duly authorized representatives.

"Engineered barrier system" means the waste packages and the underground facility.

"Geologic repository" means a system which is intended to be used for, or may be used for, the disposal of radioactive wastes in excavated geologic media. A geologic repository includes: (1) The geologic repository operations area, and (2) the portion of the geologic setting that provides isolation of the radioactive waste.

48 FR 28194

"Geologic repository operations area" means a high-level radioactive waste facility that is part of a geologic repository, including both surface and subsurface areas, where waste handling activities are conducted.

"Geologic setting" means the geologic, hydrologic, and geochemical systems of the region in which a geologic repository operations area is or may be located.

50 FR 29641

"Groundwater" means all water which occurs below the land surface.

48 FR 28194

"High-level radioactive waste" or "HLW" means: (1) Irradiated reactor fuel, (2) liquid wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuel, and (3) solids into which such liquid wastes have been converted.

"HLW facility" means a facility subject to the licensing and related regulatory authority of the Commission pursuant to Sections 202(3) and 202(4) of the Energy Reorganization Act of 1974 (88 Stat 1244).[1]

"Host rock" means the geologic medium in which the waste is emplaced.

"Important to safety," with reference to structures, systems, and components means those engineered structures, systems, and components essential to the prevention or mitigation of an accident that could result in a radiation dose to the whole body, or any organ, of 0.5 rem or greater at or beyond the nearest boundary of the unrestricted area at any time until the completion of permanent closure.

"Isolation" means inhibiting the transport of radioactive material so that

[1] These are DOE "facilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under such Act [the Atomic Energy Act]" and "Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive wastes generated by [DOE], which are not used for, or are part of, research and development activities."

amounts and concentrations of this material entering the accessible environment will be kept within prescribed limits.

48 FR 28194

"Permanent closure" means final backfilling of the underground facility and the sealing of shafts and boreholes.

"Performance confirmation" means the program of tests, experiments, and analyses which is conducted to evaluate the accuracy and adequacy of the information used to determine with reasonable assurance that the performance objectives for the period after permanent closure will be met.

53 FR 43419

"Public Document Room" means the place at 2120 L Street N.W., Washington, D.C., at which records of the Commission will ordinarily be made available for public inspection and any other place, the location of which has been published in the Federal Register, at which public records of the Commission pertaining to a particular geologic repository are made available for public inspection.

48 FR 28194

"Radioactive waste" or "waste" means HLW and other radioactive materials other than HLW that are received for emplacement in a geologic repository.

"Restricted area" means any area access to which is controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials. "Restricted area" shall not include any areas used as residential quarters, although a separate room or rooms in a residential building may be set apart as a restricted area.

"Retrieval" means the act of intentionally removing radioactive waste from the underground location at which the waste had been previously emplaced for disposal.

50 FR 29641

"Saturated zone" means that part of the earth's crust beneath the regional water table in which all voids, large and small, are ideally filled with water under pressure greater than atmospheric.

48 FR 28194

"Site" means the location of the controlled area.

"Site characterization" means the program of exploration and research, both in the laboratory and in the field, undertaken to establish the geologic conditions and the ranges of those parameters of a particular site relevant to the procedures under this part. Site characterization includes borings, surface excavations, excavation of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing at depth needed to determine the suitability of the site for a geologic repository, but does not include preliminary borings and geophysical testing needed to decide whether site characterization should be undertaken.

"Unanticipated processes and events" means those processes and events affecting the geologic setting that are judged not to be reasonably likely to occur during the period the intended performance objective must be achieved, but which are nevertheless sufficiently credible to warrant consideration. Unanticipated processes and events may be either natural processes or events or processes and events initiated by human activities other than those activities licensed under this part. Processes and events initiated by human activities may only be found to be sufficiently credible to warrant consideration if it is assumed that: (1) The monuments provided for by this part are sufficiently permanent to serve their intended purpose; (2) the value to future generations of potential resources within the site can be assessed adequately under the applicable provisions of this part; (3) an understanding of the nature of radioactivity, and an appreciation of its hazards, have been retained in some functioning institutions; (4) institutions are able to assess risk and to take remedial action at a level of social organization and technological competence equivalent to, or superior to, that which was applied in initiating the processes or events concerned; and (5) relevant records are preserved, and remain accessible, for several hundred years after permanent closure.

48 FR 28194

"Underground facility" means the underground structure, including openings and backfill materials, but excluding shafts, boreholes, and their seals.

"Unrestricted area" means any area, access to which is not controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials, and any area used for residential quarters.

50 FR 29641

"Unsaturated zone" means the zone between the land surface and the regional water table. Generally, fluid pressure in this zone is less than atmospheric pressure, and some of the voids may contain air or other gases at atmospheric pressure. Beneath flooded areas or in perched water bodies the fluid pressure locally may be greater than atmospheric.

48 FR 28194

"Waste form" means the radioactive waste materials and any encapsulating or stabilizing matrix.

"Waste package" means the waste form and any containers, shielding, packing and other absorbent materials immediately surrounding an individual waste container.

"Water table" means that surface in a groundwater body at which the water pressure is atmospheric.

46 FR 13971

§ 60.3 License required.

(a) DOE shall not receive or possess source, special nuclear, or byproduct material at a geologic repository operations area except as authorized by a license issued by the Commission pursuant to this part.

(b) DOE shall not commence construction of a geologic repository operations area unless it has filed an application with the Commission and has obtained construction authorization as provided in this part. Failure to comply with this requirement shall be grounds for denial of a license.

46 FR 13971

§ 60.4 Communications and records.

(a) Except where otherwise specified, all communications and reports concerning the regulations in this part and applications filed under them should be addressed to the Director of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Communications reports, and applications may be delivered in person at the Commission's offices at 2120 L Street NW., Washington DC, or 11555 Rockville Pike, Rockville, Maryland.

53 FR 43419

(b) Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

53 FR 19240

§ 60.5 Interpretations.

Except as specifically authorized by the Commission, in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be considered binding upon the Commission.

46 FR 13971

§ 60.6 Exemptions.

The Commission may, upon application by DOE, any interested person, or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law, will not endanger life or property or the common defense and security, and are otherwise in the public interest.

§ 60.7 License not required for certain preliminary activities.

The requirement for a license set forth in § 60.3(a) of this part is not applicable to the extent that DOE receives and possesses source, special nuclear, and

46 FR 13971

byproduct material at a geologic repository:

(a) For purposes of site characterization; or

(b) For use, during site characterization or construction, as components of radiographic, radiation monitoring, or similar equipment or instrumentation.

47 FR 13774

§ 60.8 Reporting, recordkeeping, and application requirements: OMB approval not required.

The information collection requirements contained in this part affect fewer than ten persons. Therefore, under section 3506(c)(5) of the Paperwork Reduction Act of 1980 (Pub. L. 96-511), OMB clearance is not required for these information collection requirements.

47 FR 30425

§ 60.9 Employee protection.

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to—

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no applicaton to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

47 FR 30425

55 FR 10397

(c) A violation of paragraph (a) or paragraph (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for—

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

47 FR 30425

(e) Each licensee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

55 FR 10397

(f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

47 FR 30425

Note.—Copies of Form NRC-3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D, Part 20 of this chapter.

52 FR 49362

§ 60.10 Completeness and accuracy of information.

(a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

(b) Each applicant or licensee shall notify the Commission of information identified by the applicant or licensee as having for the regulated activity a significant implication for public health and safety or common defense and security. An applicant or licensee violates this paragraph only if the applicant or licensee fails to notify the Commission of information that the applicant or licensee has identified as having a significant implication for public health and safety or common defense and security. Notification shall be provided to the Administrator of the appropriate Regional Office within two working days of identifying the information. This requirement is not applicable to information which is already required to be provided to the Commission by other reporting or updating requirements.

56 FR 40664

§ 60.11 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

56 FR 40664

Subpart B—Licenses

Preapplication Review

§ 60.15 Site characterization.

(a) Prior to submittal of an application for a license to be issued under this part DOE shall conduct a program of site characterization with respect to the site to be described in such application.

(b) Unless the Commission determines with respect to the site described in the application that it is not necessary, site characterization shall include a program of in situ exploration and testing at the depths that wastes would be emplaced.

51 FR 27158

(c) The program of site characterization shall be conducted in accordance with the following:

(1) Investigations to obtain the required information shall be conducted in such a manner as to limit adverse effects on the long-term performance of the geologic repository to the extent practical.

(2) The number of exploratory boreholes and shafts shall be limited to the extent practical consistent with obtaining the information needed for site characterization.

(3) To the extent practical, exploratory boreholes and shafts in the geologic repository operations area shall be located where shafts are planned for underground facility construction and operation or where large unexcavated pillars are planned.

(4) Subsurface exploratory drilling, excavation, and in situ testing before and during construction shall be planned and coordinated with geologic repository operations area design and construction.

54 FR 27864

§ 60.16 Site characterization plan required.

Before proceeding to sink shafts at any area which has been approved by the President for site characterization, DOE shall submit to the Director, for review and comment, a site characterization plan for such area. DOE shall defer the sinking of such shafts until such time as there has been an opportunity for Commission comments thereon to have been solicited and considered by DOE.

§ 60.17 Contents of site characterization plan.

The site characterization plan shall contain—

(a) A general plan for site characterization activities to be conducted at the area to be characterized, which general plan shall include:

(1) A description of such area, including information on quality assurance programs that have been applied to the collection, recording, and retention of information used in preparing such description.

(2) A description of such site characterization activities, including the following—

(i) The extent of planned excavations;

(ii) Plans for any onsite testing with radioactive material, including radioactive tracers, or nonradioactive material;

(iii) Plans for any investigation activities that may affect the capability of such area to isolate high-level radioactive waste;

(iv) Plans to control any adverse impacts from such site characterization activities that are important to safety or that are important to waste isolation; and

(v) Plans to apply quality assurance to data collection, recording, and retention.

(3) Plans for the decontamination and decommissioning of such area, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities, if such area is determined unsuitable for application for a construction authorization for a geologic repository operations area;

(4) Criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982, to be used to determine the suitability of such area for the location of a geologic repository; and

(5) Any other information which the Commission, by rule or order, requires.

(b) A description of the possible waste form or waste package for the high-level radioactive waste to be emplaced in such geologic repository, a description (to the extent practicable) of the relationship between such waste form or waste package and the host rock at such area, and a description of the activities being conducted by DOE with respect to such possible waste form or waste package or their relationship; and

(c) A conceptual design for the geologic repository operations area that takes into account likely site-specific requirements.

51 FR 27158

§ 60.18 Review of site characterization activities.[3]

(a) The Director shall cause to be published in the Federal Register a notice that a site characterization plan has been received from DOE and that a staff review of such plan has begun. The notice shall identify the area to be characterized and the NRC staff members to be consulted for further information.

(b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian Tribe. The Director shall provide an opportunity, with respect to any area to be characterized, for the State in which such area is located and for affected Indian Tribes to present their views on the site characterization plan and their suggestions with respect to comments thereon which may be made by NRC. In addition, the Director shall make NRC staff available to consult with States and affected Indian Tribes as provided in Subpart C of this part.

(c) The Director shall review the site characterization plan and prepare a site characterization analysis with respect to such plan. In the preparation of such site characterization analysis, the Director may invite and consider the views of interested persons on DOE's site characterization plan and may review and consider comments made in connection with public hearings held by DOE.

(d) The Director shall provide to DOE the site characterization analysis together with such additional comments as may be warranted. These comments shall include either a statement that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations

[3] In addition to the review of site characterization activities specified in this section, the Commission contemplates an ongoing review of other information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution. This activity will include, for example, a review of the environmental assessments prepared by DOE at the time of site nomination, and review of issues related to long lead time exploratory shaft planning and procurement actions by DOE prior to issuance of site characterization plans.

pertinent to DOE's site characterization program.

(e) If DOE's planned site characterization activities include onsite testing with radioactive material, including radioactive tracers, the Director's comments shall include a determination regarding whether or not the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under § 60.22 of this part.

(f) The Director shall publish in the Federal Register a notice of availability of the site characterization anaylsis and a request for public comment. A reasonable period, not less than 90 days, shall be allowed for comment. Copies of the site characterization analysis and of the comments received shall be made available at the Public Document Room.

(g) During the conduct of site characterization activities, DOE shall report not less than once every six months to the Commission on the nature and extent of such activities and the information that has been developed, and on the progress of waste form and waste package research and development. The semiannual reports shall include the results of site characterization studies, the identification of new issues, plans for additional studies to resolve new issues, elimination of planned studies no longer necessary, identification of decision points reached and modifications to schedules where appropriate. DOE shall also report its progress in developing the design of a geologic repository operations area appropriate for the area being characterized, noting when key design parameters or features which depend upon the results of site characterization will be established. Other topics related to site characterization shall also be covered if requested by the Director.

(h) During the conduct of site characterization activities, NRC staff shall be permitted to visit and inspect the locations at which such activities are carried out and to observe excavations, borings, and in situ tests as they are done.

(i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. In particular, such comments shall be made whenever the Director, upon review of comments invited on the site characterization analysis or upon review of DOE's semiannual reports, determines that there are substantial new grounds for making recommendations or stating objections to DOE's site characterization program. The Director shall invite public comment on any comments which the Director makes to DOE upon review of the DOE semiannual reports or on any other comments which the Director makes to DOE on site characterization.

(j) The Director shall transmit copies of the site characterization analysis and all comments to DOE made by the Director under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian Tribe. When transmitting the site characterization analysis under this paragraph, the Director shall invite the addressees to review and comment thereon.

(k) All correspondence between DOE and the NRC under this section, including the reports described in paragraph (g), shall be placed in the Public Document Room.

(l) The activities described in paragraphs (a) through (k) of this section constitute informal conference between a prospective applicant and the staff, as described in § 2.101(a)(1) of this chapter, and are not part of a proceeding under the Atomic Energy Act of 1954, as amended. Accordingly, neither the issuance of a site characterization analysis nor any other comments of the Director made under this section constitutes a commitment to issue any authorization or license or in any way affect the authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any such proceeding.

51FR27158

51FR27158

License Applications

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information. 54 FR 27864

(b) The general information shall include: 46 FR 13971

(1) A general description of the proposed geologic repository identifying the location of the geologic repository operations area, the general character of the proposed activities, and the basis for the exercise of licensing authority by the Commission.

(2) Proposed schedules for construction, receipt of waste, and emplacement of wastes at the proposed geologic repository operations area.

(3) A certification that DOE will provide at the geologic repository operations area such safeguards as it requires at comparable surface facilities (of DOE) to promote the common defense and security.

(4) A description of the physical security plan for protection against radiological sabotage. Since the radiation hazards associated with high-level wastes make them inherently unattractive as a target for theft or diversion, no detailed information need be submitted on protection against theft or diversion. 46 FR 13971

(5) A description of site characterization work actually conducted by DOE at all sites considered in the application and, as appropriate, explanations of why such work differed from the description of the site characterization program described in the Site Characterization Report for each site.

(c) The Safety Analysis Report shall include:

(1) A description and assessment of the site at which the proposed geologic repository operations area is to be located with appropriate attention to those features of the site that might affect geologic repository operations area design and performance. The description of the site shall identify the location of the geologic repository operations area with respect to the boundary of the accessible environment. 48 FR 28194

(i) The description of the site shall also include the following information regarding subsurface conditions. This description shall, in all cases, include such information with respect to the controlled area. In addition, where subsurface conditions outside the controlled area may affect isolation within the controlled area, the description shall include such information with respect to subsurface conditions outside the controlled area to the extent such information is relevant and material. The detailed information referred to in this paragraph shall include—

(A) The orientation, distribution, aperture in-filling and origin of fractures, discontinuities, and heterogeneities;

(B) The presence and characteristics of other potential pathways such as solution features, breccia pipes, or other potentially permeable features;

(C) The geomechanical properties and conditions, including pore pressure and ambient stress conditions;

(D) The hydrogeologic properties and conditions;

(E) The geochemical properties; and

(F) The anticipated response of the geomechanical, hydrogeologic, and geochemical systems to the maximum design thermal loading, given the pattern of fractures and other discontinuities and the heat transfer properties of the rock mass and groundwater.

(ii) The assessment shall contain—

(A) An analysis of the geology, geophysics, hydrogeology, geochemistry, climatology, and meteorology of the site.

(B) Analyses to determine the degree to which each of the favorable and potentially adverse conditions, if present, has been characterized, and the extent to which it contributes to or detracts from isolation. For the purpose of determining the presence of the potentially adverse conditions, investigations shall extend from the surface to a depth sufficient to determine critical pathways for radionuclide migration from the underground facility to the accessible environment. Potentially adverse conditions shall be investigated outside of the controlled area if they affect isolation within the controlled area.

(C) An evaluation of the performance of the proposed geologic repository for the period after permanent closure, assuming anticipated processes and events, giving the rates and quantities of releases of radionuclides to the accessible environment as a function of time; and a similar evaluation which assumes the occurrence of unanticipated processes and events.

(D) The effectiveness of engineered and natural barriers, including barriers that may not be themselves a part of the geologic repository operations area, against the release of radioactive material to the environment. The analysis shall also include a comparative evaluation of alternatives to the major design features that are important to waste isolation, with particular attention to the alternatives that would provide longer radionuclide containment and isolation. 48 FR 28194

(E) An analysis of the performance of the major design structures, systems, and components, both surface and subsurface, to identify those that are important to safety. For the purposes of this analysis, it shall be assumed that operations at the geologic repository operations area will be carried out at the maximum capacity and rate of receipt of radioactive waste stated in the application.

(F) An explanation of measures used to support the models used to perform the assessments required in paragraphs (A) through (D). Analyses and models

that will be used to predict future conditions and changes in the geologic setting shall be supported by using an appropriate combination of such methods as field tests, in situ tests, laboratory tests which are representative of field conditions, monitoring data, and natural analog studies. 48 FR 28194

(2) A description and discussion of the design, both surface and subsurface, of the geologic repository operations area including: (i) the principal design criteria and their relationship to any general performance objectives promulgated by the Commission, (ii) the design bases and the relation of the design bases to the principal design criteria, (iii) information relative to materials of construction (including geologic media, general arrangement, and approximate dimensions), and (iv) codes and standards that DOE proposes to apply to the design and construction of the geologic repository operations area. 46 FR 13971

(3) A description and analysis of the design and performance requirements for structures, systems, and components of the geologic repository which are important to safety. This analysis shall consider—(i) The margins of safety under normal conditions and under conditions that may result from anticipated operational occurrences, including those of natural origin; and (ii) the adequacy of structures, systems, and components provided for the prevention of accidents and mitigation of the consequences of accidents, including those caused by natural phenomena. 48 FR 28194

(4) A description of the quality assurance program to be applied to the structures, systems, and components important to safety and to the engineered and natural barriers important to waste isolation.

(5) A description of the kind, amount, and specifications of the radioactive material proposed to be received and possessed at the geologic repository operations area.

(6) An identification and justification for the selection of those variables, conditions, or other items which are determined to be probable subjects of license specifications. Special attention shall be given to those items that may significantly influence the final design. 46 FR 13971

(7) A description of the program for control and monitoring of radioactive effluents and occupational radiation exposures to maintain such effluents and exposures in accordance with the requirements of Part 20 of this chapter.

(8) A description of the controls that the applicant will apply to restrict access and to regulate land use at the site and adjacent areas, including a conceptual design of monuments which would be used to identify the controlled area after permanent closure. 48 FR 28194

(9) Plans for coping with radiological emergencies at any time prior to permanent closure and decontamination or dismantlement of surface facilities. 48 FR 28194

(10) A description of the nuclear material control and accounting program. 46 FR 13971

(11) A description of design considerations that are intended to facilitate permanent closure and decontamination or dismantlement of surface facilities. 48 FR 28194

(12) A description of plans for retrieval and alternate storage of the radioactive wastes should the geologic repository prove to be unsuitable for disposal of radioactive wastes. 46 FR 13971

(13) An identification and evaluation of the natural resources of the geologic setting, including estimates as to undiscovered deposits, the exploitation of which could affect the ability of the geologic repository to isolate radioactive wastes. Undiscovered deposits of resources characteristic of the area shall be estimated by reasonable inference based on geological and geophysical evidence. This evaluation of resources, including undiscoverd deposits, shall be conducted for the site and for areas of similar size that are representative of and are within the geologic setting. For natural resources with current markets the resources shall be assessed, with estimates provided of both gross and net value. The estimate of net value shall take into account current development, extraction and marketing costs. For natural resources without current markets, but which would be marketable given credible projected changes in economic or technological factors, the resources shall be described by physical factors such as tonnage or other amount, grade, and quality. 48 FR 28194

(14) An identification of those structures, systems, and components of the geologic repository, both surface and subsurface, which require research and development to confirm the adequacy of design. For structures, systems, and components important to safety and for the engineered and natural barriers important to waste isolation, DOE shall provide a detailed description of the programs designed to resolve safety questions, including a schedule indicating when these questions would be resolved.

(15) The following information concerning activities at the geologic repository operations area:

(i) The organizational structure of DOE as it pertains to construction and operation of the geologic repository operations area including a description of any delegations of authority and assignments of responsibilities, whether in the form of regulations, administrative directives, contract provisions, or otherwise.

(ii) Identification of key positions which are assigned responsibility for safety at and operation of the geologic repository operations area.

(iii) Personnel qualifications and training requirements.

(iv) Plans for startup activities and startup testing.

(v) Plans for conduct of normal activities, including maintenance, surveillance, and periodic testing of structures, systems, and components of the geologic repository operation area. 48 FR 28194

(iv) Plans for permanent closure and plans for the decontamination or dismantlement of surface facilities.

(vii) Plans for any uses of the geologic repository operations area for purposes other than disposal of radioactive wastes, with an analysis of the effects, if any, that such uses may have upon the operation of the structures, systems, and components important to safety and the engineered and natural barriers important to waste isolation.

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee. 54 FR 27884

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made

available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

54 FR 27864

§ 60.23 Elimination of repetition.

In its application, environmental report, or Site Characterization Report the DOE may incorporate by reference information contained in previous applications, statements, or reports filed with the Commission: PROVIDED, that such references are clear and specific and that copies of the information so incorporated are available in the public document room located near the site of the proposed geologic repository.

48 FR 28194

§ 60.24 Updating of application and environmental report.

54FR27864

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

(b) The DOE shall update its application in a timely manner so as to permit the Commission to review, prior to issuance of a license:

(1) Additional geologic, geophysical, geochemical, hydrologic, meteorologic and other data obtained during construction.

(2) Conformance of construction of structures, systems, and components with the design.

(3) Results of research programs carried out to confirm the adequacy of designs.

(4) Other information bearing on the Commission's issuance of a license that was not available at the time a construction authorization was issued.

48 FR 28194

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

54 FR 27864

Construction Authorization

§ 60.31 Construction authorization.

54 FR 27864

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

(a) *Safety.* That there is reasonable assurance that the types and amounts of radioactive materials described in the application can be received, possessed, and disposed of in a geologic repository operations area of the design proposed without unreasonable risk to the health and safety of the public. In arriving at this determination, the Commission shall consider whether:

46 FR 13971

(1) DOE has described the proposed geologic repository including but not limited to: (i) The geologic, geophysical, geochemical and hydrologic characteristics of the site; (ii) the kinds and quantities of radioactive waste to be received, possessed, stored, and disposed of in the geologic repository operations area; (iii) the principal architectural and engineering criteria for the design of the geologic repository operations area; (iv) construction procedures which may affect the capability of the geologic repository to serve its intended function; and (v) features or components incorporated in the design for the protection of the health and safety of the public.

(2) The site and design comply with the performance objectives and criteria contained in Subpart E of this part.

48 FR 28194

(3) The DOE's quality assurance program complies with the requirements of Subpart G of this part.

(4) The DOE's personnel training program complies with the criteria contained in Subpart H of this part.

(5) The DOE's emergency plan complies with the criteria contained in Subpart I of this part.

(6) The DOE's proposed operating procedures to protect health and to minimize danger to life or property are adequate.

46 FR 13971

(b) *Common defense and security.* That there is reasonable assurance that the activities proposed in the application will not be inimical to the common defense and security. A DOE certification that it will provide at the geologic repository operations area such safeguards as it requires at comparable DOE surface facilities to promote the common defense and security will constitute a rebuttable presumption of noninimicality to the common defense and security.

(c) *Environmental.* That, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, the action called for is issuance of the construction authorization, with any appropriate conditions to protect environmental values.

§ 60.32 Conditions of construction authorization.

(a) A construction authorization shall include such conditions as the Commission finds to be necessary to protect the health and safety of the public, the common defense and security, or environmental values.

(b) The Commission will incorporate in the construction authorization provisions requiring DOE to furnish periodic or special reports regarding: (1) Progress of construction, (2) any data about the site obtained during construction which are not within the predicted limits upon which the facility design was based, (3) any deficiencies in design and construction which, if uncorrected, could adversely affect safety at any future time, and (4) results of research and development programs being conducted to resolve safety questions.

(c) The construction authorization will include restrictions on subsequent changes to the features of the geologic repository and the procedures authorized. The restrictions that may be imposed under this paragraph can include measures to prevent adverse effects on the geologic setting as well as measures related to the design and construction of the geologic repository operations area. These restrictions will fall into three categories of descending importance to public health and safety as follows: (1) Those features and procedures which may not be changed without: (i) 60 days prior notice to the Commission (ii) 30 days notice of opportunity for a prior hearing, and (iii) prior Commission approval; (2) those features and procedures which may not be changed without (i) 60 days prior notice to the Commission, and (ii) prior Commission approval; and (3) those features and procedures which may not be changed without 60 days notice to the Commission. Features and procedures falling in paragraph (c)(3) of this section may not be changed without prior Commission approval if the Commission, after having received the required notice, so orders.

46 FR 13971

(d) A construction authorization shall be subject to the limitation that a license to receive and possess source, special nuclear, or byproduct material at the geologic repository operations area shall not be issued by the Commission until (1) the DOE has updated its application as specified in § 60.24, and (2) the Commission has made the findings stated in § 60.41.

§ 60.33 Amendment of construction authorization.

(a) An application for amendment of a construction authorization shall be filed with the Commission fully describing any changes desired and following as far as applicable the format prescribed in § 60.21.

(b) In determining whether an amendment of a construction authorization will be approved, the Commission will be guided by the considerations which govern the issuance of the initial construction authorization, to the extent applicable.

License Issuance and Amendment

§ 60.41 Standards for issuance of a license.

A license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area may be issued by the Commission upon finding that:

(a) Construction of the geologic repository operations area has been substantially completed in conformity with the application as amended, the provisions of the Atomic Energy Act, and the rules and regulations of the Commission. Construction may be deemed to be substantially complete for the purposes of this paragraph if the construction of (1) surface and interconnecting structures, systems, and components, and (2) any underground storage space required for initial operation are substantially complete.

(b) The activities to be conducted at the geologic repository operations area will be in conformity with the application as amended, the provisions of the Atomic Energy Act and the Energy Reorganization Act, and the rules and regulations of the Commission.

(c) The issuance of the license will not be inimical to the common defense and security and will not constitute an unreasonable risk to the health and safety of the public. A DOE certification that it will provide at the geologic repository operations area such safeguards as it requires at comparable DOE facilities to promote the common defense and security, will constitute a rebuttable presumption of non-inimicality to the common defense and security.

(d) All applicable requirements of Part 51 have been satisfied.

§ 60.42 Conditions of license.

(a) A license issued pursuant to this part shall include such conditions, including license specifications, as the Commission finds to be necessary to protect the health and safety of the

46 FR 13971

public, the common defense and security, and environmental values.

(b) Whether stated therein or not, the following shall be deemed conditions in every license issued:

(1) The license shall be subject to revocation, suspension, modification, or amendment for cause as provided by the Atomic Energy Act and the Commission's regulations.

(2) The DOE shall at any time while the license is in effect, upon written request of the Commission, submit written statements to enable the Commission to determine whether or not the license should be modified, suspended or revoked.

(3) The license shall be subject to the provisions of the Atomic Energy Act now or hereafter in effect and to all rules, regulations, and orders of the Commission. The terms and conditions of the license shall be subject to amendment, revision, or modification, by reason of amendments to or by reason of rules, regulations, and orders issued in accordance with the terms of the Atomic Energy Act.

(c) Each license shall be deemed to contain the provisions set forth in Section 183 b-d, inclusive, of the Atomic Energy Act, whether or not these provisions are expressly set forth in the license.

46 FR 13971

§ 60.43 License specifications.

(a) A license issued under this part shall include license conditions derived from the analyses and evaluations included in the application, including amendments made before a license is issued, together with such additional conditions as the Commission finds appropriate.

(b) License conditions shall include items in the following categories—

(1) Restrictions as to the physical and chemical form and radioisotopic content of radioactive waste.

(2) Restrictions as to size, shape, and materials and methods of construction of radioactive waste packaging.

(3) Restrictions as to the amount of waste permitted per unit volume of storage space considering the physical characteristics of both the waste and the host rock.

(4) Requirements relating to test, calibration, or inspection to assure that the foregoing restrictions are observed.

48 FR 28194 46 FR 13971

(5) Controls to be applied to restricted access and to avoid disturbance to the controlled area and to areas outside the controlled area where conditions may affect isolation within the controlled area.

(6) Administrative controls, which are the provisions relating to organization and management, procedures, recordkeeping, review and audit, and reporting necessary to assure that activities at the facility are conducted in a safe manner and in conformity with the other license specifications.

§ 60.44 Changes, tests, and experiments.

(a)(1) Following authorization to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area, the DOE may (i) make changes in the geologic repository operations area as described in the application, (ii) make changes in the procedures as described in the application, and (iii) conduct tests or experiments not described in the application, without prior Commission approval, provided the change, test, or experiment involves neither a change in the license conditions incorporated in the license nor an unreviewed safety question.

46 FR 13971

(2) A proposed change, test, or experiment shall be deemed to involve an unreviewed safety question if (i) the likelihood of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the application is increased, (ii) the possibility of an accident or malfunction of a different type than any previously evaluated in the application is created, or (iii) the margin of safety as defined in the basis for any license condition is reduced.

(b) The DOE shall maintain records of changes in the geologic repository operations area and of changes in procedures made pursuant to this section, to the extent that such changes constitute changes in the geologic repository operations area or procedures as described in the application. Records of tests and experiments carried out pursuant to paragraph (a) of this section shall also be maintained. These records shall include a written safety evaluation which provides the basis for the determination that the change, test, or experiment does not involve an unreviewed safety question. The DOE shall prepare annually, or at such shorter intervals as may be specified in the license, a report containing a brief description of such changes, tests, and experiments, including a summary of the safety evaluation of each. The DOE shall furnish the report to the appropriate NRC Regional Office shown in Appendix D of Part 20 of this chapter with a copy to the Director, Office of Nuclear Material Safety and Safeguards U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Any report submitted pursuant to this paragraph shall be made a part of the public record of the licensing proceedings.

52 FR 31601

§ 60.45 Amendment of license.

(a) An application for amendment of a license may be filed with the Commission fully describing the changes desired and following as far as applicable the format prescribed for license applications.

(b) In determining whether an amendment of a license will be approved, the Commission will be guided by the considerations that govern the issuance of the initial license, to the extent applicable.

46 FR 13971

§ 60.46 Particular activities requiring license amendment.

(a) Unless expressly authorized in the license, an amendment of the license shall be required with respect to any of the following activities—

(1) Any action which would make emplaced high-level radioactive waste irretrievable or which would substantially increase the difficulty of retrieving such emplaced waste.

(2) Dismantling of structures.

46 FR 13971

(3) Removal or reduction of controls applied to restrict access to or avoid disturbance of the controlled area and to areas outside the controlled area where conditions may affect isolation within the controlled area.

48 FR 28194

(4) Destruction or disposal of records required to be maintained under the provisions of this part.

46 FR 13971

(5) Any substantial change to the design or operating procedures from that specified in the license.

48 FR 28194

(6) Permanent closure.

(7) Any other activity involving an unreviewed safety question.

46 FR 13971

(b) An application for such an amendment shall be filed, and shall be reviewed, in accordance with the provisions of § 60.45.

Permanent Closure

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

54 FR 27864

(1) A description of the program for post-permanent closure monitoring of the geologic repository.

(2) A detailed description of the measures to be employed—such as land use controls, construction of monuments, and preservation of records—to regulate or prevent activities that could impair the long-term isolation of emplaced waste within the geologic repository and to assure that relevant information will be preserved for the use of future generations. As a minimum, such measures shall include—

(i) Identification of the controlled area and geologic repository operations area by monuments that have been designed, fabricated, and emplaced to be as permanent as is practicable; and

(ii) Placement of records in the archives and land record systems of local State, and Federal government agencies, and archives elsewhere in the world, that would be likely to be consulted by potential human intruders—such records to identify the location of the geologic repository operations area, including the underground facility, boreholes and shafts, and the boundaries of the controlled area, and the nature and hazard of the waste.

(3) Geologic, geophysical, geochemical, hydrologic, and other site data that are obtained during the operational period pertinent to the long-term isolation of emplaced radioactive wastes.

(4) The results of tests, experiments, and any other analyses relating to backfill of excavated areas, shaft sealing, waste interaction with the host rock, and any other tests, experiments, or analyses pertinent to the long-term isolation of emplaced wastes within the geologic repository.

(5) Any substantial revision of plans for permanent closure.

(6) Other information bearing upon permanent closure that was not available at the time a license was issued.

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

§ 60.52 Termination of license.

(a) Following permanent closure and the decontamination or dismantlement of surface facilities, DOE may apply for an amendment to terminate the license.

(b) Such application shall be filed, and will be reviewed, in accordance with the provisions of § 60.45 and this section.

(c) A license shall be terminated only when the Commission finds with respect to the geologic repository:

(1) That the final disposition of radioactive wastes has been made in conformance with the DOE's plan, as amended and approved as part of the license.

(2) That the final state of the geologic repository operations area conforms to DOE's plans for permanent closure and DOE's plans for the decontamination or dismantlement of surface facilities, as amended and approved as part of the license.

(3) That the termination of the license is authorized by law, including Sections 57, 62, and 81 of the Atomic Energy Act, as amended.

Subpart C—Participation by State Governments and Affected Indian Tribes

§ 60.61 Provision of information.

(a) The Director shall provide to the Governor and legislature of any State in which a geologic repository operations area is or may be located, and to the governing body of any affected Indian Tribe, timely and complete information regarding determinations or plans made by the Commission with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, permanent closure, or decontamination and dismantlement of surface facilities, of such geologic repository operations area.

(b) For purposes of this section, a geologic repository operations area shall be considered to be one which "may be located" in a State if the location thereof in such State has been described in a site characterization plan submitted to the Commission under this part.

(c) Notwithstanding paragraph (a) of this section, the Director is not required to distribute any document to any entity if, with respect to such document, that entity or its counsel is included on a service list prepared pursuant to Part 2 of this chapter.

(d) Copies of all communications by the Director under this section shall be placed in the Public Document Room, and copies thereof shall be furnished to DOE.

§ 60.62 Site review.

(a) Whenever an area has been approved by the President for site characterization, and upon request of a State or an affected Indian Tribe, the Director shall make NRC staff available to consult with representatives of such States and Tribes.

(b) Requests for consultation shall be made in writing to the Director.

(c) Consultation under this section may include:

(1) Keeping the parties informed of the Director's views on the progress of site characterization.

(2) Review of applicable NRC regulations, licensing procedures, schedules, and opportunities for State and Tribe participation in the Commission's regulatory activities.

(3) Cooperation in development of proposals for State and Tribe participation in license reviews.

§ 60.63 Participation in license reviews.

(a) State and local governments and affected Indian Tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter. A State in which a repository for high-level radioactive waste is proposed to be located and any affected Indian Tribe shall have an unquestionable legal right to participate as a party in such proceedings.

(b) In addition, whenever an area has been approved by the President for site characterization, a State or an affected Indian Tribe may submit to the Director a proposal to facilitate its participation in the review of a site characterization plan and/or license application. The proposal may be submitted at any time and shall contain a description and schedule of how the State or affected Indian Tribe wishes to participate in the review, or what services or activities the State or affected Indian Tribe wishes NRC to carry out, and how the services or activities proposed to be carried out by NRC would contribute to such participation. The proposal may include educational or information services (seminars, public meetings) or other actions on the part of NRC, such as establishing additional public document rooms or employment or exchange of State personnel under the Intergovernmental Personnel Act.

(c) The Director shall arrange for a meeting between the representatives of the State or affected Indian Tribe and the NRC staff to discuss any proposal submitted under paragraph (b) of this section, with a view to identifying any modifications that may contribute to the effective participation by such State or Tribe.

(d) Subject to the availability of funds, the Director shall approve all or any part of a proposal, as it may be modified through the meeting described above, if it is determined that:

(1) The proposed activities are suitable in light of the type and magnitude of impacts which the State or affected Indian Tribe may bear;

(2) The proposed activities:

(i) Will enhance communications between NRC and the State or affected Indian Tribe;

(ii) Will make a productive and timely contribution to the review; and

(iii) Are authorized by law.

(e) The Director will advise the State

or affected Indian Tribe whether its proposal has been accepted or denied, and if all or any part of proposal is denied, the Director shall state the reason for the denial.

(f) Proposals submitted under this section, and responses thereto, shall be made available at the Public Document Room.

§ 60.64 Notice to States.

If the Governor and legislature of a State have jointly designated on their behalf a single person or entity to receive notice and information from the Commission under this part, the Commission will provide such notice and information to the jointly designated person or entity instead of the Governor and legislature separately.

51 FR 27158

§ 60.65 Representation.

Any person who acts under this subpart as a representative for a State (or for the Governor or legislature thereof) or for an affected Indian Tribe shall include in the request or other submission, or at the request of the Commission, a statement of the basis of his or her authority to act in such representative capacity.

53FR19240

Subpart D—Records, Reports, Tests, and Inspections

§ 60.71 Records and reports.

48 FR 28194

(a) DOE shall maintain such records and make such reports in connection with the licensed activity as may be required by the conditions of the license or by rules, regulations, and orders of the Commission as authorized by the Atomic Energy Act and the Energy Reorganization Act.

53 FR 19240

(b) Records of the receipt, handling, and disposition of radioactive waste at a geologic repository operations area shall contain sufficient information to provide a complete history of the movement of the waste from the shipper through all phases of storage and disposal. DOE shall retain these records in a manner that ensures their useability for future generations in accordance with § 60.51(a)(2).

§ 60.72 Construction records.

(a) DOE shall maintain records of construction of the geologic repository operations area in a manner that ensures their useability for future generations in accordance with § 60.51(a)(2).

48FR28194

(b) The records required under paragraph (a) shall include at least the following—

48 FR 28194

(1) Surveys of the underground facility excavations, shafts, and boreholes referenced to readily identifiable surface features or monuments;

(2) A description of the materials encountered;

(3) Geologic maps and geologic cross sections;

(4) Locations and amount of seepage;

(5) Details of equipment, methods, progress, and sequence of work;

(6) Construction problems;

(7) Anomalous conditions encountered;

(8) Instrument locations, readings, and analysis;

(9) Location and description of structural support systems;

(10) Location and description of dewatering systems; and

(11) Details, methods of emplacement, and location of seals used.

§ 60.73 Reports of deficiencies.

DOE shall promptly notify the Commission of each deficiency found in the characteristics of the site, and design and construction of the geologic repository operations area which, were it to remain uncorrected, could: (a) Be a substantial safety hazard, (b) represent a significant deviation from the design criteria and design bases stated in the application, or (c) represent a deviation from the conditions stated in the terms of a construction authorization or the license, including license specifications. The notification shall be in the form of a written report, copies of which shall be sent to the Director and to the appropriate Nuclear Regulatory Commission Regional Office listed in Appendix D of Part 20 of this chapter.

§ 60.74 Tests.

(a) DOE shall perform, or permit the Commission to perform, such tests as the Commission deems appropriate or necessary for the administration of the regulations in this part. These may include tests of: (1) Radioactive waste, (2) the geologic repository including its structures, systems, and components, (3) radiation detection and monitoring instruments, and (4) other equipment and devices used in connection with the receipt, handling, or storage of radioactive waste.

(b) The tests required under this section shall include a performance confirmation program carried out in accordance with Subpart F of this part.

§ 60.75 Inspections.

(a) DOE shall allow the Commission to inspect the premises of the geologic repository operations area and adjacent areas to which DOE has rights of access.

(b) DOE shall make available to the Commission for inspection, upon reasonable notice, records kept by DOE pertaining to activities under this part.

(c)(1) DOE shall upon requests by the Director, Office of Nuclear Material Safety and Safeguards

, provide rent-free office space for the exclusive use of the Commission inspection personnel. Heat, air-conditioning, light, electrical outlets and janitorial services shall be furnished by DOE. The office shall be convenient to and have full access to the facility and shall provide the inspector both visual and acqoustic privacy.

52 FR 31601

(2) The space provided shall be adequate to accommodate a full-time inspector, a part-time secretary and transient NRC personnel and will be generally commensurate with other office facilities at the geologic repository operations area. A space of 250 square feet either within the geologic repository operations area's office complex or in an office trailer or other onsite space at the geologic repository operations area is suggested as a guide. For locations at which activities are carried out under licenses issued under other parts of this chapter, additional space may be requested to accomodate additional full-time inspectors. The Office space that is provided shall be subject to the approval of the Director, Office of Nuclear Material Safety and Safeguards. All furniture, supplies and communication equipment will be furnished by the Commission.

(3) DOE shall afford any NRC resident inspector assigned to that location, or other NRC inspectors identified by the Regional Administrator as likely to inspect the facility, immediate unfettered access, equivalent to access provided regular employees, following proper identification and compliance with applicable access control measures for security, radiological protection and personal safety.

Subpart E—Technical Criteria

48 FR 28194

§ 60.101 Purpose and nature of findings.

(a)(1) Subpart B of this part prescribes the standards for issuance of a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area. In particular, § 60.41(c) requires a finding that the issuance of a license will not constitute an unreasonable risk to the health and safety of the public. The purpose of this subpart is to set out performance objectives and site and design criteria which, if satisfied, will support such a finding of no unreasonable risk.

(2) While these performance objectives and criteria are generally stated in unqualified terms, it is not expected that complete assurance that they will be met can be presented. A

reasonable assurance, on the basis of the record before the Commission, that the objectives and criteria will be met is the general standard that is required. For § 60.112, and other portions of this subpart that impose objectives and criteria for repository performance over long times into the future, there will inevitably be greater uncertainties. Proof of the future performance of engineered barrier systems and the geologic setting over time periods of many hundreds or many thousands of years is not to be had in the ordinary sense of the word. For such long-term objectives and criteria, what is required is reasonable assurance, making allowance for the time period, hazards, and uncertainties involved, that the outcome will be in conformance with those objectives and criteria. Demonstration of compliance with such objectives and criteria will involve the use of data from accelerated tests and predictive models that are supported by such measures as field and laboratory tests, monitoring data and natural analog studies.

(b) Subpart B of this part also lists findings that must be made in support of an authorization to construct a geologic repository operations area. In particular, § 60.31(a) requires a finding that there is reasonable assurance that the types and amounts of radioactive materials described in the application can be received, possessed, and disposed of in a geologic repository operations area of the design proposed without unreasonable risk to the health and safety of the public. As stated in that paragraph, in arriving at this determination, the Commission will consider whether the site and design comply with the criteria contained in this subpart. Once again, while the criteria may be written in unqualified terms, the demonstration of compliance may take uncertainties and gaps in knowledge into account, provided that the Commission can make the specified finding of reasonable assurance as specified in paragraph (a) of this section.

§ 60.102 Concepts.

This section provides a functional overview of Subpart E. In the event of any inconsistency with definitions found in § 60.2, those definitions shall prevail.

(a) *The HLW facility.* NRC exercises licensing and related regulatory authority over those facilities described in section 202 (3) and (4) of the Energy Reorganization Act of 1974. Any of these facilities is designated a *HLW facility.*

(b) *The geologic repository operations area.* (1) This part deals with the exercise of authority with respect to a particular class of HLW facility—namely a *geologic repository operations area.*

(2) *A geologic repository operations area* consists of those surface and subsurface areas that are part of a geologic repository where radioactive waste handling activities are conducted. The underground structure, including openings and backfill materials, but excluding shafts, boreholes, and their seals, is designated the *underground facility.*

(3) The exercise of Commission authority requires that the geologic repository operations area be used for *storage* (which includes *disposal*) of *high-level radioactive wastes (HLW).*

(4) HLW includes irradiated reactor fuel as well as reprocessing wastes. However, if DOE proposes to use the geologic repository operations area for storage of *radioactive waste* other than HLW, the storage of this radioactive waste is subject to the requirements of this part.

(c) *Areas related to isolation.* Although the activities subject to regulation under this part are those to be carried out at the geologic repository operations area, the licensing process also considers characteristics of adjacent areas that are defined in other ways. There is to be an area surrounding the underground facility referred to above, which is designated the *controlled area,* within which DOE is to exercise specified controls to prevent adverse human actions following permanent closure. The location of the controlled area is the *site.* The *accessible environment* is the atmosphere, land surface, surface water, oceans, and the portion of the lithosphere that is outside the controlled area. There is an area, designated the *geologic setting,* which includes the geologic, hydrologic, and geochemical systems of the region in which a geologic repository operations area is or may be located. The geologic repository operations area plus the portion of the geologic setting that provides isolation of the radioactive waste make up the *geologic repository.*

(d) *Stages in the licensing process.* There are several stages in the licensing process. The *site characterization* stage, though begun before submission of a license application, may result in consequences requiring evaluation in the license review. The *construction stage* would follow, after issuance of a construction authorization. A *period of operations* follows the issuance of a license by the Commission. The period of operations includes the time during which *emplacement* of wastes occurs; any subsequent period before permanent closure during which the emplaced wastes are *retrievable;* and *permanent closure,* which includes sealing of shafts. Permanent closure represents the end of active human intervention with respect to the engineered barrier system.

(e) *Isolation of waste.* (1) During the first several hundred years following permanent closure of a geologic repository, when radiation and thermal levels are high and the uncertainties in assessing repository performance are large, special emphasis is placed upon the ability to contain the wastes by waste packages within an *engineered barrier system.* This is known as the *containment period.* The *engineered barrier system* includes the waste packages and the underground facility. A *waste package* is composed of the waste form and any containers, shielding, packing, and absorbent materials immediately surrounding an individual waste container. The *underground facility* means the underground structure, including openings and backfill materials, but excluding, shafts, boreholes, and their seals.

(2) Following the containment period special emphasis is placed upon the ability to achieve isolation of the wastes by virtue of the characteristics of the geologic repository. The engineered barrier system works to control the release of radioactive material to the geologic setting and the geologic setting works to control the release of radioactive material to the accessible environment. *Isolation* means inhibiting the transport of radioactive material so that amounts and concentrations of the materials entering the accessible environment will be kept within prescribed limits.

Performance Objectives

§ 60.111 Performance of the geologic repository operations area through permanent closure.

(a) *Protection against radiation exposures and releases of radioactive material.* The geologic repository operations area shall be designed so that until permanent closure has been completed, radiation exposures and radiation levels, and releases of radioactive materials to unrestricted areas, will at all times be maintained within the limits specified in Part 20 of this chapter and such generally applicable environmental standards for radioactivity as may have been established by the Environmental Protection Agency.

(b) *Retrievability of waste.* (1) The geologic repository operations area shall be designed to preserve the option of waste retrieval throughout the period during which wastes are being emplaced and, thereafter, until the completion of a preformance confirmation program and Commission review of the information obtained from such a program. To

48 FR 28194

satisfy this objective, the geologic repository operations area shall be designed so that any or all of the emplaced waste could be retrieved on a reasonable schedule starting at any time up to 50 years after waste emplacement operations are initiated, unless a different time period is approved or specified by the Commission. This different time period may be established on a case-by-case basis consistent with the emplacement schedule and the planned performance confirmation program.

(2) This requirement shall not preclude decisions by the Commission to allow backfilling part or all of, or permanent closure of, the geologic repository operations area prior to the end of the period of design for retrievability.

(3) For purposes of this paragraph, a reasonable schedule for retrieval is one that would permit retrieval in about the same time as that devoted to construction of the geologic repository operations area and the emplacement of wastes.

§ 60.112 Overall system performance objective for the geologic repository after permanent closure.

The geologic setting shall be selected and the engineered barrier system and the shafts, boreholes and their seals shall be designed to assure that releases of radioactive materials to the accessible environment following permanent closure conform to such generally applicable environmental standards for radioactivity as may have been established by the Environmental Protection Agency with respect to both anticipated processes and events and unanticipated processes and events.

§ 60.113 Performance of particular barriers after permanent closure.

(a) *General provisions.* (1) *Engineered barrier system.* (i) The engineered barrier system shall be designed so that assuming anticipated processes and events: (A) Containment of HLW will be substantially complete during the period when radiation and thermal conditions in the engineered barrier system are dominated by fission product decay; and (B) any release of radionuclides from the engineered barrier system shall be a gradual process which results in small fractional releases to the geologic setting over long times. For disposal in the saturated zone, both the partial and complete filling with groundwater of available void spaces in the underground facility shall be appropriately considered and analysed among the anticipated processes and events in designing the engineered barrier system.

(ii) In satisfying the preceding requirement, the engineered barrier system shall be designed, assuming anticipated processes and events, so that:

(A) Containment of HLW within the waste packages will be substantially complete for a period to be determined by the Commission taking into account the factors specified in § 60.113(b) provided, that such period shall be not less than 300 years nor more than 1,000 years after permanent closure of the geologic repository; and

(B) The release rate of any radionuclide from the engineered barrier system following the containment period shall not exceed one part in 100,000 per year of the inventory of that radionuclide calculated to be present at 1,000 years following permanent closure, or such other fraction of the inventory as may be approved or specified by the Commission; provided, that this requirement does not apply to any radionuclide which is released at a rate less than 0.1% of the calculated total release rate limit. The calculated total release rate limit shall be taken to be one part in 100,000 per year of the inventory of radioactive waste, originally emplaced in the underground facility, that remains after 1,000 years of radioactive decay.

(2) *Geologic setting.* The geologic repository shall be located so that pre-waste-emplacement groundwater travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment shall be at least 1,000 years or such other travel time as may be approved or specified by the Commission.

(b) On a case-by-case basis, the Commission may approve or specify some other radionuclide release rate, designed containment period or pre-waste-emplacement groundwater travel time, provided that the overall system performance objective, as it relates to anticipated processes and events, is satisfied. Among the factors that the Commission may take into account are—

(1) Any generally applicable environmental standard for radioactivity established by the Environmental Protection Agency;

(2) The age and nature of the waste, and the design of the underground facility, particularly as these factors bear upon the time during which the thermal pulse is dominated by the decay heat from the fission products;

(3) The geochemical characteristics of the host rock, surrounding strata and groundwater; and

(4) Particular sources of uncertainty in predicting the performance of the geologic repository.

(c) Additional requirements may be found to be necessary to satisfy the overall system performance objective as it relates to unanticipated processes and events.

Land Ownership and Control

§ 60.121 Requirements for ownership and control of interests in land.

(a) *Ownership of land.* (1) Both the geologic repository operations area and the controlled area shall be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands shall be held free and clear of all encumbrances, if significant, such as: (i) Rights arising under the general mining laws; (ii) easements for right-of-way; and (iii) all other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

(b) *Additional controls.* Appropriate controls shall be established outside of the controlled area. DOE shall exercise any jurisdiction and control over surface and subsurface estates necessary to prevent adverse human actions that could significantly reduce the geologic repository's ability to achieve isolation. The rights of DOE may take the form of appropriate possessory interests, servitudes, or withdrawals from location or patent under the general mining laws.

(c) *Water rights.* (1) DOE shall also have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area.

(2) Water rights are included in the additional controls to be established under paragraph (b) of this section.

Siting Criteria

§ 60.122 Siting criteria.

(a)(1) A geologic setting shall exhibit an appropriate combination of the conditions specified in paragraph (b) of this section so that, together with the engineered barriers system, the favorable conditions present are sufficient to provide reasonable assurance that the performance objectives relating to isolation of the waste will be met.

(2) If any of the potentially adverse conditions specified in paragraph (c) of this section is present, it may compromise the ability of the geologic repository to meet the performance objectives relating to isolation of the waste. In order to show that a potentially adverse condition does not so compromise the performance of the geologic repository the following must be demonstrated:

(i) The potentially adverse human activity or natural condition has been adequately investigated, including the

extent to which the condition may be present and still be undetected taking into account the degree of resolution achieved by the investigations; and

(ii) The effect of the potentially adverse human activity or natural condition on the site has been adequately evaluated using analyses which are sensitive to the potentially adverse human activity or natural condition and assumptions which are not likely to underestimate its effect; and

(iii)(A) The potentially adverse human activity or natural condition is shown by analysis pursuant to paragraph (a)(2)(ii) of this section not to affect significantly the ability of the geologic repository to meet the performance objectives relating to isolation of the waste, or

(B) The effect of the potentially adverse human activity or natural condition is compensated by the presence of a combination of the favorable characteristics so that the performance objectives relating to isolation of the waste are met, or

(C) The potentially adverse human activity or natural condition can be remedied.

(b) *Favorable conditions.* (1) The nature and rates of tectonic, hydrogeologic, geochemical, and geomorphic processes (or any of such processes) operating within the geologic setting during the Quaternary Period, when projected, would not affect or would favorably affect the ability of the geologic repository to isolate the waste.

(2) For disposal in the saturated zone, hydrogeologic conditions that provide—

(i) A host rock with low horizontal and vertical permeability;

(ii) Downward or dominantly horizontal hydraulic gradient in the host rock and immediately surrounding hydrogeologic units; and

(iii) Low vertical permeability and low hydraulic gradient between the host rock and the surrounding hydrogeologic units.

(3) Geochemical conditions that—(i) Promote precipitation or sorption of radionuclides; (ii) Inhibit the formation of particulates, colloids, and inorganic and organic complexes that increase the mobility of radionuclides; or (iii) Inhibit the transport of radionuclides by particulates, colloids, and complexes.

(4) Mineral assemblages that, when subjected to anticipated thermal loading, will remain unaltered or alter to mineral assemblages having equal or increased capacity to inhibit radionuclide migration.

(5) Conditions that permit the emplacement of waste at a minimum depth of 300 meters from the ground surface. (The ground surface shall be deemed to be the elevation of the lowest point on the surface above the disturbed zone.)

(6) A low population density within the geologic setting and a controlled area that is remote from population centers.

(7) Pre-waste-emplacement groundwater travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment that substantially exceeds 1,000 years.

(8) For disposal in the unsaturated zone, hydrogeologic conditions that provide—

(i) Low moisture flux in the host rock and in the overlying and underlying hydrogeologic units;

(ii) A water table sufficiently below the underground facility such that fully saturated voids contiguous with the water table do not encounter the underground facility;

(iii) A laterally extensive low-permeability hydrogeologic unit above the host rock that would inhibit the downward movement of water or divert downward moving water to a location beyond the limits of the underground facility;

(iv) A host rock that provides for free drainage; or

(v) A climatic regime in which the average annual historic precipitation is a small percentage of the average annual potential evapotranspiration.

(c) *Potentially adverse conditions.* The following conditions are potentially adverse conditions if they are characteristic of the controlled area or may affect isolation within the controlled area.

(1) Potential for flooding of the underground facility, whether resulting from the occupancy and modification of floodplains or from the failure of existing or planned man-made surface water impoundments.

(2) Potential for foreseeable human activity to adversely affect the groundwater flow system, such as groundwater withdrawal, extensive irrigation, subsurface injection of fluids, underground pumped storage, military activity or construction of large scale surface water impoundments.

(3) Potential for natural phenomena such as landslides, subsidence, or volcanic activity of such a magnitude that large-scale surface water impoundments could be created that could change the regional groundwater flow system and thereby adversely affect the performance of the geologic repository.

(4) Structural deformation, such as uplift, subsidence, folding, or faulting that may adversely affect the regional groundwater flow system.

(5) Potential for changes in hydrologic conditions that would affect the migration of radionuclides to the accessible environment, such as changes in hydraulic gradient, average interstitial velocity, storage coefficient, hydraulic conductivity, natural recharge, potentiometric levels, and discharge points.

(6) Potential for changes in hydrologic conditions resulting from reasonably foreseeable climatic changes.

(7) Groundwater conditions in the host rock, including chemical composition, high ionic strength or ranges of Eh-pH, that could increase the solubility or chemical reactivity of the engineered barrier system.

(8) Geochemical processes that would reduce sorption of radionuclides, result in degradation of the rock strength, or adversely affect the performance of the engineered barrier system.

(9) Groundwater conditions in the host rock that are not reducing.

(10) Evidence of dissolutioning such as breccia pipes, dissolution cavities, or brine pockets.

(11) Structural deformation such as uplift, subsidence, folding, and faulting during the Quaternary Period.

(12) Earthquakes which have occurred historically that if they were to be repeated could affect the site significantly.

(13) Indications, based on correlations of earthquakes with tectonic processes and features, that either the frequency of occurrence or magnitude of earthquakes may increase.

(14) More frequent occurrence of earthquakes or earthquakes of higher magnitude than is typical of the area in which the geologic setting is located.

(15) Evidence of igneous activity since the start of the Quaternary Period.

(16) Evidence of extreme erosion during the Quaternary Period.

(17) The presence of naturally occurring materials, whether identified or undiscovered, within the site, in such form that:

(i) Economic extraction is currently feasible or potentially feasible during the foreseeable future; or

(ii) Such materials have greater gross value or net value than the average for other areas of similar size that are representative of and located within the geologic setting.

(18) Evidence of subsurface mining for resources within the site.

(19) Evidence of drilling for any purpose within the site.

(20) Rock or groundwater conditions that would require complex engineering measures in the design and construction of the underground facility or in the sealing of boreholes and shafts.

(21) Geomechanical properties that do not permit design of underground opening that will remain stable through permanent closure.

(22) Potential for the water table to rise sufficiently so as to cause saturation of an underground facility located in the unsaturated zone.

(23) Potential for existing or future perched water bodies that may saturate portions of the underground facility or provide a faster flow path from an underground facility located in the unsaturated zone to the accessible environment.

(24) Potential for the movement of radionuclides in a gaseous state through air-filled pore spaces of an unsaturated geologic medium to the accessible environment.

50 FR 29641

Design Criteria for the Geologic Repository Operations Area

§ 60.130 Scope of design criteria for the geologic repository operations area.

Sections 60.131 through 60.134 specify minimum criteria for the design of the geologic repository operations area. These design criteria are not intended to be exhaustive, however. Omissions in §§ 60.131 through 60.134 do not relieve DOE from any obligation to provide such safety features in a specific facility needed to achieve the performance objectives. All design bases must be consistent with the results of site characterization activities.

§ 60.131 General design criteria for the geologic repository operations area.

(a) *Radiological protection.* The geologic repository operations area shall be designed to maintain radiation doses, levels, and concentrations of radioactive material in air in restricted areas within the limits specified in Part 20 of this chapter. Design shall include—

(1) Means to limit concentrations of radioactive material in air;

(2) Means to limit the time required to perform work in the vicinity of radioactive materials, including, as appropriate, designing equipment for ease of repair and replacement and providing adequate space for ease of operation;

(3) Suitable shielding;

(4) Means to monitor and control the dispersal of radioactive contamination;

(5) Means to control access to high radiation areas or airborne radioactivity areas; and

(6) A radiation alarm system to warn of significant increases in radiation levels, concentrations of radioactive material in air, and of increased radioactivity released in effluents. The alarm system shall be designed with provisions for calibration and for testing its operability.

(b) *Structures, systems, and components important to safety.* (1) *Protection against natural phenomena and environmental conditions.*

The structures, systems, and components important to safety shall be designed so that natural phenomena and environmental conditions anticipated at the geologic repository operations area will not interfere with necessary safety functions.

(2) *Protection against dynamic effects of equipment failure and similar events.* The structures, systems, and components important to safety shall be designed to withstand dynamic effects such as missile impacts, that could result from equipment failure, and similar events and conditions that could lead to loss of their safety functions.

(3) *Protection against fires and explosions.* (i) The structures, systems, and components important to safety shall be designed to perform their safety fuctions during and after credible fires or explosions in the geologic repository operations area.

(ii) To the extent practicable, the geologic repository operations area shall be designed to incorporate the use of noncombustible and heat resistant materials.

(iii) The geologic repository operations area shall be designed to include explosion and fire detection alarm systems and appropriate suppression systems with sufficient capacity and capability to reduce the adverse effects of fires and explosions on structures, systems, and components important to safety.

(iv) The geologic repository operations area shall be designed to include means to protect systems, structures, and components important to safety against the adverse effects of either the operation or failure of the fire suppression systems.

(4) *Emergency capability.* (i) The structures, systems, and components important to safety shall be designed to maintain control of radioactive waste and radioactive effluents, and permit prompt termination of operations and evacuation of personnel during an emergency.

(ii) The geologic repository operations area shall be designed to include onsite facilities and services that ensure a safe and timely response to emergency conditions and that facilitate the use of available offsite services (such as fire, police, medical and ambulance service) that may aid in recovery from emergencies.

(5) *Utility services.* (i) Each utility service system that is important to safety shall be designed so that essential safety functions can be performed under both normal and accident conditions.

(ii) The utility services important to safety shall include redundant systems to the extent necessary to maintain, with adequate capacity, the ability to perform their safety functions.

48 FR 28194

(iii) Provisions shall be made so that, if there is a loss of the primary electric power source or circuit, reliable and timely emergency power can be provided to instruments, utility service systems, and operating systems, including alarm systems, important to safety.

(6) *Inspection, testing, and maintenance.* The structures, systems, and components important to safety shall be designed to permit periodic inspection, testing, and maintenance, as necessary, to ensure their continued functioning and readiness.

(7) *Criticality control.* All systems for processing, transporting, handling, storage, retrieval, emplacement, and isolation of radioactive waste shall be designed to ensure that a nuclear criticality accident is not possible unless at least two unlikely, independent, and concurrent or sequential changes have occurred in the conditions essential to nuclear criticality safety. Each system shall be designed for criticality safety under normal and accident conditions. The calculated effective multiplication factor (k_{eff}) must be sufficiently below unity to show at least a 5% margin, after allowance for the bias in the method of calculation and the uncertainty in the experiments used to validate the method of calculation.

(8) *Instrumentation and control systems.* The design shall include provisions for instrumentation and control systems to monitor and control the behavior of systems important to safety over anticipated ranges for normal operation and for accident conditions.

(9) *Compliance with mining regulations.* To the extent that DOE is not subject to the Federal Mine Safety and Health Act of 1977, as to the construction and operation of the geologic repository operations area, the design of the geologic repository operations area shall nevertheless include such provisions for worker protection as may be necessary to provide reasonable assurance that all structures, systems, and components important to safety can perform their intended functions. Any deviation from relevant design requirements in 30 CFR, Chapter I, Subchapters D, E, and N will give rise to a rebuttable presumption that this requirement has not been met.

(10) *Shaft conveyances used in radioactive waste handling.* (i) Hoists important to safety shall be designed to preclude cage free fall.

(ii) Hoists important to safety shall be designed with a reliable cage location system.

(iii) Loading and unloading systems for hoists important to safety shall be designed with a reliable system of interlocks that will fail safely upon malfunction.

(iv) Hoists important to safety shall be

designed to include two independent indicators to indicate when waste packages are in place and ready for transfer.

§ 60.132 Additional design criteria for surface facilities in the geologic repository operations area.

(a) *Facilities for receipt and retrieval of waste.* Surface facilities in the geologic repository operations area shall be designed to allow safe handling and storage of wastes at the geologic repository operations area, whether these wastes are on the surface before emplacement or as a result of retrieval from the underground facility.

(b) *Surface facility ventilation.* Surface facility ventilation systems supporting waste transfer, inspection, decontamination, processing, or packaging shall be designed to provide protection against radiation exposures and offsite releases as provided in § 60.111(a).

(c) *Radiation control and monitoring.* *(1) Effluent control.* The surface facilities shall be designed to control the release of radioactive materials in effluents during normal operations so as to meet the performance objectives of § 60.111(a).

(2) *Effluent monitoring.* The effluent monitoring systems shall be designed to measure the amount and concentration of radionuclides in any effluent with sufficient precision to determine whether releases conform to the design requirement for effluent control. The monitoring systems shall be designed to include alarms that can be periodically tested.

(d) *Waste treatment.* Radioactive waste treatment facilities shall be designed to process any radioactive wastes generated at the geologic repository operations area into a form suitable to permit safe disposal at the geologic repository operations area or to permit safe transportation and conversion to a form suitable for disposal at an alternative site in accordance with any regulations that are applicable.

(e) *Consideration of decommissioning.* The surface facility shall be designed to facilitate decontamination or dismantlement to the same extent as would be required, under other parts of this chapter, with respect to equivalent activities licensed thereunder.

§ 60.133 Additional design criteria for the underground facility.

(a) *General criteria for the underground facility.* (1) The orientation, geometry, layout, and depth of the underground facility, and the design of any engineered barriers that are part of the underground facility shall contribute to the containment and isolation of radionuclides.

(2) The underground facility shall be designed so that the effects of credible disruptive events during the period of operations, such as flooding, fires and explosions, will not spread through the facility.

(b) *Flexibility of design.* The underground facility shall be designed with sufficient flexibility to allow adjustments where necessary to accommodate specific site conditions identified through in situ monitoring, testing, or excavation.

(c) *Retrieval of waste.* The underground facility shall be designed to permit retrieval of waste in accordance with the performance objectives of § 60.111.

(d) *Control of water and gas.* The design of the underground facility shall provide for control of water or gas intrusion.

(e) *Underground openings.* (1) Openings in the underground facility shall be designed so that operations can be carried out safely and the retrievability option maintained.

(2) Openings in the underground facility shall be designed to reduce the potential for deleterious rock movement or fracturing of overlying or surrounding rock.

(f) Rock excavation. The design of the underground facility shall incorporate excavation methods that will limit the potential for creating a preferential pathway for groundwater to contact the waste packages or radionuclide migration to the accessible environment.

(g) *Underground facility ventilation.* The ventilation system shall be designed to—(1) Control the transport of radioactive particulates and gases within and releases from the underground facility in accordance with the performance objectives of § 60.111(a).

(2) Assure continued function during normal operations and under accident conditions; and

(3) Separate the ventilation of excavation and waste emplacement areas.

(h) *Engineered barriers.* Engineered barriers shall be designed to assist the geologic setting in meeting the performance objectives for the period following permanent closure.

(i) *Thermal loads.* The underground facility shall be designed so that the performance objectives will be met taking into account the predicted thermal and thermomechanical response of the host rock, and surrounding strata, groundwater system.

§ 60.134 Design of seals for shafts and boreholes.

(a) *General design criterion.* Seals for shafts and boreholes shall be designed so that following permanent closure they do not become pathways that compromise the geologic repository's ability to meet the performance objectives or the period following permanent closure.

(b) *Selection of materials and placement methods.* Materials and placement methods for seals shall be selected to reduce, to the extent practicable:

(1) The potential for creating a preferential pathway for groundwater to contact the waste packages or (2) for radionuclide migration through existing pathways.

Design Criteria for the Waste Package

§ 60.135 Criteria for the waste package and its components.

(a) *High-level-waste package design in general.* (1) Packages for HLW shall be designed so that the in situ chemical, physical, and nuclear properties of the waste package and its interactions with the emplacement environment do not compromise the function of the waste packages or the performance of the underground facility or the geologic setting.

(2) The design shall include but not be limited to consideration of the following factors: solubility, oxidation/reduction reactions, corrosion, hydriding, gas generation, thermal effects, mechanical strength, mechanical stress, radiolysis, radiation damage, radionuclide retardation, leaching, fire and explosion hazards, thermal loads, and synergistic interactions.

(b) *Specific criteria for HLW package design.* *(1) Explosive, pyrophoric, and chemically reactive materials.* The waste package shall not contain explosive or pyrophoric materials or chemically reactive materials in an amount that could compromise the ability of the underground facility to contribute to waste isolation or the ability of the geologic repository to satisfy the performance objectives.

(2) *Free liquids.* The waste package shall not contain free liquids in an amount that could compromise the ability of the waste packages to achieve the performance objectives relating to containment of HLW (because of chemical interactions or formation of pressurized vapor) or result in spillage and spread of contamination in the event of waste package perforation during the period through permanent closure.

(3) *Handling.* Waste packages shall be designed to maintain waste containment during transportation, emplacement, and retrieval.

(4) *Unique identification.* A label or other means of identification shall be provided for each waste package. The identification shall not impair the integrity of the waste package and shall be applied in such a way that the information shall be legible at least to the end of the period of retrievability.

PART 2

RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

Sec.
2.1 Scope.
2.2 Subparts.
2.3 Resolution of conflict.
2.4 Definitions.
2.8 Information collection requirements: OMB approval.

Subpart A—Procedure for Issuance, Amendment, Transfer, or Renewal of a License

2.100 Scope of subpart.
2.101 Filing of application.
2.102 Administrative review of application.
2.103 Action on applications for byproduct, source, special nuclear material, and operator licenses.

HEARING ON APPLICATION—HOW INITIATED

2.104 Notice of hearing.
2.105 Notice of proposed action.
2.106 Notice of issuance.
2.107 Withdrawal of application.
2.108 Denial of application for failure to supply information.
2.109 Effect of timely renewal application.
2.110 Filing and administrative action on submittals for design review or early review of site suitability issues.
2.111 Prohibition of sex discrimination.

Subpart B—Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License, or for Imposing Civil Penalties

2.200 Scope of Subpart.
2.201 Notice of violation.
2.202 Orders.
2.203 Settlement and compromise.
2.204 Demand for information.
2.205 Civil penalties.
2.206 Requests for action under this subpart.

Subpart C—[Reserved]

Subpart D—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Construct or Operate Nuclear Power Plants of Duplicate Design at Multiple Sites

2.400 Scope of subpart.
2.401 Notice of hearing on applications pursuant to Appendix N of Part 50 for construction permits.
2.402 Separate hearings on separate issues; consolidation of proceedings.
2.403 Notice of proposed action on applications for operating licenses pursuant to Appendix N of Part 50.
2.404 Hearings on applications for operating licenses pursuant to Appendix N of Part 50.
2.405 Initial decisions in consolidated hearings.
2.406 Finality of decisions on separate issues.
2.407 Applicability of other sections.

Subpart E—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Manufacture Nuclear Power Reactors To Be Operated at Sites Not Identified in the License Application and Related Licensing Proceedings

2.500 Scope of subpart.
2.501 Notice of hearing on application pursuant to Appendix M of Part 50 for a license to manufacture nuclear power reactors.
2.502 Notice of hearing on application for a permit to construct a nuclear power reactor manufactured pursuant to a Commission license issued pursuant to Appendix M of Part 50 of this chapter at the site at which the reactor is to be operated.
2.503 Finality of decision on separate issues.
2.504 Applicability of other sections.

Subpart F—Additional Procedures Applicable to Early Partial Decisions on Site Suitability Issues in Connection With an Application for a Permit To Construct Certain Utilization Facilities

2.600 Scope of subpart.
2.601 Applicability of other sections.
2.602 Filing fees.
2.603 Acceptance and docketing of application for early review of site suitability issues.
2.604 Notice of hearing on application for early review of site suitability issues.
2.605 Additional considerations.
2.606 Partial decisions on site suitability issues.

Subpart G—Rules of General Applicability

2.700 Scope of subpart.
2.700a Exceptions.
2.701 Filing of documents.
2.702 Docket.
2.703 Notice of hearing.
2.704 Designation of presiding officer, disqualification, unavailability.
2.705 Answer.
2.706 Reply.
2.707 Default.
2.708 Formal requirements for documents.
2.709 Acceptance for filing.
2.710 Computation of time.
2.711 Extension and reduction of time limits.
2.712 Service of papers, methods, proof.
2.713 Appearance and practice before the Commission in adjudicatory proceedings.
2.714 Intervention.
2.714a Petitions for review of certain rulings on petitions for leave to intervene and/or requests for hearing.
2.715 Participation by a person not a party.
2.715a Consolidation of parties in construction permit or operating license proceedings.
2.716 Consolidation of proceedings.
2.717 Commencement and termination of jurisdiction of presiding officer.
2.718 Power of presiding officer.
2.719 [removed]
2.720 Subpoenas.
2.721 Atomic safety and licensing boards.
2.722 Special assistants to the presiding officer.

MOTIONS

2.730 Motions.
2.731 Order of procedure.
2.732 Burden of proof.
2.733 Examination by experts.
2.734 Motions to reopen.

DEPOSITIONS AND WRITTEN INTERROGATORIES; DISCOVERY; ADMISSION; EVIDENCE

2.740 General provisions governing discovery.
2.740a Depositions upon oral examination and upon written interrogatories.
2.740b Interrogatories to parties.
2.741 Production of documents and things and entry upon land for inspection and other purposes.
2.742 Admissions.
2.743 Evidence.
2.744 Production of NRC records and documents.

SUMMARY DISPOSITION ON PLEADINGS

2.749 Authority of presiding officer to dispose of certain issues on the pleadings.

HEARINGS

2.750 Official reporter; transcript.
2.751 Hearings to be public.
2.751a Special prehearing conference in construction permit and operating license proceedings.
2.752 Prehearing conference.
2.753 Stipulations.
2.754 Proposed findings and conclusions.
2.755 Oral argument before presiding officer.
2.756 Informal procedures.
2.757 Authority of presiding officer to regulate procedure in a hearing.
2.758 Consideration of Commission rules and regulations in adjudicatory proceedings.
2.759 Settlement in initial licensing proceedings.

INITIAL DECISION AND COMMISSION REVIEW

2.760 Initial decision and its effect.
2.760a Initial decision in contested proceedings on applications for facility operating licenses.
2.761 Expedited decisional procedure.
2.761a Separate hearings and decisions.
2.762 [removed]

2.763 Oral argument.
2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

2.765 Immediate effectiveness of initial decision directing issuance or amendment of licenses under Part 61 of this chapter.

FINAL DECISION

2.770 Final decision.
2.771 Petition for reconsideration.
2.772 Authority of the Secretary to rule on procedural matters.

RESTRICTED COMMUNICATIONS

2.780 Ex parte communications.
2.781 Separation of functions.
2.786 Review of decisions and actions of a presiding officer.
2.788 Stays of decisions of presiding officers pending review.

AVAILABILITY OF OFFICIAL RECORDS

2.790 Public inspections, exemptions, requests for withholding.

Subpart H—Rulemaking

2.800 Scope of rulemaking.
2.801 Initiation of rulemaking.
2.802 Petition for rulemaking.
2.803 Determination of petition.
2.804 Notice of proposed rulemaking.
2.805 Participation by interested persons.
2.806 Commission action.
2.807 Effective date.
2.808 Authority of the Secretary to rule on procedural matters.
2.809 Participation by the Advisory Committee on Reactor Safeguards.

Subpart I—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

2.900 Purpose.
2.901 Scope.
2.902 Definitions.
2.903 Protection of restricted data and national security information.
2.904 Classification assistance.
2.905 Access to restricted data and national security information for parties; security clearances.
2.906 Obligation of parties to avoid introduction of restricted data or national security information.
2.907 Notice of intent to introduce restricted data or national security information.
2.908 Contents of notice of intent to introduce restricted data or other national security information.
2.909 Rearrangement or suspension of proceedings.
2.910 Unclassified statements required.
2.911 Admissibility of restricted data or other national security information.
2.912 Weight to be attached to classified evidence.
2.913 Review of Restricted Data or other National Security Information received in evidence.

Subpart J—Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

Sec.
2.1000 Scope of subpart.
2.1001 Definitions.
2.1002 High-level Waste Licensing Support System.
2.1003 Submission of material to the LSS.
2.1004 Amendments and additions.
2.1005 Exclusions.
2.1006 Privilege.
2.1007 Access.
2.1008 Potential parties.
2.1009 Procedures.
2.1010 Pre-License Application Presiding Officer
2.1011 LSS management and administration.
2.1012 Compliance.
2.1013 Use of LSS during adjudicatory proceeding.
2.1014 Intervention.
2.1015 Appeals.
2.1016 Motions.
2.1017 Computation of time.
2.1018 Discovery.
2.1019 Depositions.
2.1020 Entry upon land for inspection.
2.1021 First prehearing conference.
2.1022 Second prehearing conference.
2.1023 Immediate effectiveness.
2.1025 Authority of the Presiding Officer to dispose of certain issues on the pleadings.
2.1026 Schedule.
2.1027 Sua Sponte.

Subpart K—Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

2.1101 Purpose.
2.1103 Scope.
2.1105 Definitions.
2.1107 Notice of proposed action.
2.1109 Requests for oral argument.
2.1111 Discovery.
2.1113 Oral argument.
2.1115 Designation of issues for adjudicatory hearing.
2.1117 Applicability of other sections.

Subpart L—Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings

2.1201 Scope of subpart.
2.1203 Docket; filing; service.
2.1205 Request for a hearing; petition for leave to intervene.
2.1207 Designation of presiding officer.
2.1209 Power of presiding officer.
2.1211 Participation by a person not a party.
2.1213 Role of the NRC staff.
2.1215 Appearance and practice.

HEARINGS

2.1231 Hearing file; prohibition on discovery.
2.1233 Written presentations; written questions.
2.1235 Oral presentations; oral questions.
2.1237 Motions; burden of proof.
2.1239 Consideration of Commission rules and regulations in informal adjudications.
2.1241 Settlement of proceedings.

INITIAL DECISION, COMMISSION REVIEW, AND FINAL DECISION

2.1251 Initial decision and its effect.
2.1253 Petitions for review of initial decisions.
2.1259 Final decision; petition for reconsideration.
2.1261 Authority of the Secretary to rule on procedural matters.
2.1263 Stays of NRC staff licensing actions or of decisions of a presiding officer, or the Commission, pending hearing or review.

APPENDIX A—STATEMENT OF GENERAL POLICY AND PROCEDURE: CONDUCT OF PROCEEDINGS FOR THE ISSUANCE OF CONSTRUCTION PERMITS AND OPERATING LICENSES FOR PRODUCTION AND UTILIZATION FACILITIES FOR WHICH A HEARING IS REQUIRED UNDER SECTION 189a OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

APPENDIX B—GENERAL STATEMENT OF POLICY AND PROCEDURES CONCERNING PETITIONS PURSUANT TO § 2.802 FOR DISPOSAL OF RADIOACTIVE WASTE STREAMS BELOW REGULATORY CONCERN

APPENDIX C—GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

Appendix D—Schedule for the Proceeding on Application for a License To Receive and Possess High-Level Radioactive Waste at a Geologic Repository Operations Area.

57 FR 18388

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721, also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.104 also issued under sec. 193, Pub. L. 101–575, 104 Stat. 2835 (42 U.S.C. 2243). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and table 1A of appendix C also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99–240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

56 FR 40664

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for—

(a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license;

(b) Issuing orders and demands for information to persons subject to the Commission's jurisdiction, including licensees and persons not licensed by the Commission;

(c) Imposing civil penalties under section 234 of the Act; and

(d) Public rulemaking.

27 FR 377

§ 2.2 Subparts.

Each subpart other than Subpart G sets forth special rules applicable to the type of proceeding described in the first section of that subpart. Subpart G sets forth general rules applicable to all types of proceedings except rule making, and should be read in conjunction with the subpart governing a particular proceeding. Subpart I sets forth special procedures to be followed in proceedings in order to safeguard and prevent disclosure of Restricted Data.

28 FR 10191

§ 2.3 Resolution of conflict.

In any conflict between a general rule in Subpart G of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.

53 FR 10360

§ 2.4 Definitions.

As used in this part,

"ACRS" means the Advisory Committee on Reactor Safeguards established by the Act.

"Act" means the Atomic Energy Act of 1954, as amended (68 Stat. 919).

"Adjudication" means the process for the formulation of an order for the final disposition of the whole or any part of any proceeding subject to this part, other than rule making.

"Administrative Law Judge" means an individual appointed pursuant to section 11 of the Administrative Procedure Act to conduct proceedings subject to this part.

"Commission" means the Commission of five members or a quorum thereof sitting as a body, as provided by section 201 of the Energy Reorganization Act of 1974 (88 Stat. 1242), or any officer to whom has been delegated authority pursuant to section 161n of the Act.

53 FR 10360

"Commission adjudicatory employee" means—

(1) The Commissioners and members of their personal staffs;

56 FR 29403

(2) The employees of the Office of Commission Appellate Adjudication;

53 FR 10360

(3) The members of the Atomic Safety and Licensing Board Panel and staff assistants to the Panel;

(4) A presiding officer appointed under § 2.704, including an administrative law judge, and staff assistants to a presiding officer;

(5) Special assistants (as defined in § 2.772);

(6) The General Counsel, the Solicitor, the Deputy General Counsel for Licensing and Regulation, and employees of the Office of the General Counsel under the supervision of the Solicitor or the Deputy General Counsel for Licensing and Regulation;

(7) The Secretary and employees of the Office of the Secretary; and

(8) Any other Commission officer or employee who is appointed by the Commission, the Secretary, or the General Counsel to participate or advise in the Commission's consideration of an initial or final decision in a proceeding. Any other Commission officer or employee who, as permitted by § 2.781, participates or advises in the Commission's consideration of an initial or final decision in a proceeding must be appointed as a Commission adjudicatory employee under this paragraph and the parties to the proceeding must be given written notice of the appointment.

"Contested proceeding" means (1) a proceeding in which there is a controversy between the staff of the Commission and the applicant for a license concerning the issuance of the license or any of the terms or conditions thereof or (2) a proceeding in which a petition for leave to intervene in opposition to an application for a license has been granted or is pending before the Commission.

"Department" means the Department of Energy established by the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565 42 U.S.C. 7101 *et seq.*) to the extent that the Department, or its duly authorized representatives, exercises functions formerly vested in the U.S. Atomic Energy Commission, its Chairman, members, officers and components and transferred to the U.S. Energy Research and Development Administration and to the Administrator thereof pursuant to sections 104 (b), (c) and (d) of the Energy Reorganization Act of 1974 (Pub. L. 93-438, 88 Stat. 1233 at 1237, 42 U.S.C. 5814) and retransferred to the Secretary of Energy pursuant to section 301(a) of the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565 at 577-578, 42 U.S.C. 7151).

"Electric utility" means any entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility."

53 FR 10360

"Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

"Facility" means a production facility or a utilization facility as defined in § 50.2 of this chapter.

"Investigative or litigating function" means —

(1) Personal participation in planning, conducting, or supervising an investigation; or

(2) Personal participation in planning, developing, or presenting, or in supervising the planning, development or presentation of testimony, argument, or strategy in a proceeding.

56 FR 64943

License means a license, including a renewed license, or construction permit issued by the Commission.

Licensee means a person who is authorized to conduct activities under a license, including a renewed license, or construction permit issued by the Commission.

56 FR 7787

NRC personnel means:

(1) NRC employees;

(2) For the purpose of §§ 2.720, 2.740, and 2.1018 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and

(3) Members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings; and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

"NRC records and documents" means any book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities. "NRC records and documents" do not include objects or articles such as structures, furniture, tangible exhibits or models, or vehicles and equipment.

53 FR 10360

"Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the Department, except that the Department shall be considered a person with respect to those facilities of the Department specified in section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244),[4] any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

"Public Document Room" means the place at 2120 L Street NW., Washington, D.C., at which public records of the Commission will ordinarily be made available for inspection.

53 FR 43419

"Secretary" means the Secretary to the Commission.

53 FR 10360

Except as redefined in this section, words and phrases which are defined in the Act and in this chapter have the same meaning when used in this part.

§ 2.8 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) OMB has approved the information collection requirements contained in this part under control number 3150-0136.

56 FR 29403

58 FR 14308

(b) The approved information collection requirements contained in this part appear in appendix C.

[4]The Department facilities specified in section 202 are:

(1) Demonstration Liquid Metal Fast Breeder reactors when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.

(2) Other demonstration nuclear reactors, except those in existence on January 19, 1975, when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.

(3) Facilities used primarily for the receipt and storage of high-level radioactive wastes resulting from licensed activities.

(4) Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration, which are not used for, or are part of, research and development activities.

Subpart A — Procedure for Issuance, Amendment, Transfer, or Renewal of a License

27 FR 377

§ 2.100 Scope of subpart.

This subpart prescribes the procedures for issuance of a license; amendment of a license at the request of the licensee; and transfer and renewal of a license.

§ 2.101 Filing of application.

41 FR 15832

(a)(1) An application for a license or an amendment to a license shall be filed with the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as prescribed by the applicable provisions of this chapter. A prospective applicant may confer informally with the staff prior to the filing of an application.

(2) Each application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee will be assigned a docket number. However, to allow a determination as to whether an application for a construction permit or operating license for a production or utilization facility is complete and acceptable for docketing, it will be initially treated as a tendered application after it is received and a copy of the tendered application will be available for public inspection in the Commission's Public Document Room, 2120 L Street NW., Washington, D.C. Generally, that determination will be made within a period of thirty (30) days. However, in selected construction permit applications, the Commission may decide to determine acceptability on the basis of the technical adequacy of the application as well as its completeness. In such cases, the Commission, pursuant to § 2.104(a), will direct that the notice of hearing be issued as soon as practicable after the application has been tendered, and the determination of acceptability will generally be made within a period of sixty (60) days. For docketing and other requirements for applications pursuant to Part 61 of this chapter, see paragraph (g) of this section.

53 FR 43419

(3) If the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, determines that a tendered application for a construction permit or operating license for a production or utilization facility, and/or any environmental report required pursuant to Subpart A of Part 51 of this chapter, or part thereof as provided in paragraphs (a)(5) or (a-1) of this section are complete and acceptable for

49 FR 9352

docketing, a docket number will be assigned to the application or part thereof, and the applicant will be notified of the determination. With respect to the tendered application and/or environmental report or part thereof that is acceptable for docketing, the applicant will be requested to:

(i) Submit to the Director of Nuclear reactor Regulation of Director of Nuclear Material Safety and Safeguards, as appropriate, such additional copies as the regulations in Part 50 and Subpart A of Part 51 require;

(ii) Serve a copy on the chief executive of the municipality in which the facility is to be located or, if the facility is not to be located within a municipality, on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application, a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, and telephone number of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph (a)(3)(ii) the applicant should not make public distribution of those parts of the application subject to § 2.790(d). The applicant shall submit to the Director of Nuclear Reactor Regulation an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served; and

(iii) Make direct distribution of additional copies to Federal, State, and local officials in accordance with the requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Such written instructions will be furnished as soon as practicable after all or any part of the application, or environmental report, is tendered. The copies submitted to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and distributed by the applicant shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to applications, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(4) The tendered application for a construction permit or operating license for a production or utilization facility will be formally docketed upon receipt by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, of the required additional copies. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addresses. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Within ten (10) days after docketing the applicant shall submit to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, an affidavit that distribution of the additional copies to Federal, State, and local officials has been completed in accordance with requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Amendments to the application and environmental report shall be filed and distributed and an affidavit shall be furnished to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, in the same manner as for the initial application and environmental report. If it is determined that all or any part of the tendered application and/or environmental report is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination, and the respects in which the document is deficient.

(5) An applicant for a construction permit for a production or utilization facility which is subject to § 51.20(b) of this chapter, and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility may submit the information required of applicants by Part 50 of the chapter in three parts. One part shall be accompanied by the information required by § 50.30(f) of this chapter, another part shall include any information required by § 50.34(a) and, if applicable, § 50.34a of this chapter and a third part shall include any information required by § 50.33a. One part may precede or follow other parts by no longer than six (6) months except that the part including information required by § 50.33a shall be submitted in accordance with time periods specified in § 50.33a. If an applicant for a construction permit for a nuclear power reactor is exempted pursuant to § 50.33a of this chapter from filing the information described by § 50.33a of this chapter, such applicant shall file with the first part of its application an affidavit setting forth facts as to the electrical generating capacity of its system. If it is determined that any one of the parts as described above is incomplete and not acceptable for processing, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will inform the applicant of this determination and the respects in which the document is deficient. Such a determination of completeness will generally be made within a period of thirty (30) days. Except for the part including information required by § 50.33a, whichever part is filed first shall also include the fee required by §§ 50.30(e) and 170.21 of this chapter and the information required by §§50.33,50.34((a)(1), and 50.37 of this chapter. The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will accept for docketing an application for a construction permit for a production or utilization facility which is subject to § 51.20(b) of this chapter, and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility where one part of the application as described above is complete and conforms to the requirements of Part 50 of this chapter. Additional parts will be docketed upon a determination by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, that they are complete.

(a-1) *Early consideration of site suitability issues.* An applicant for a construction permit for a utilization facility which is subject to § 51.20(b) of this chapter and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility, may request that the Commission conduct an early review and hearing and render an early partial decision in accordance with Subpart F on issues of site suitability within the purview of the applicable provisions of Parts 50, 51 and

49 FR 9352

100 of this chapter. In such cases, the applicant for the construction permit may submit the information required of applicants by the provisions of this chapter in three or (in the case of nuclear power reactors) four parts:

42 FR 22882

(1) Part one shall include or be accompanied by any information required by §§ 50.34(a)(1) and 50.30(f) of this chapter which relates to the issue(s) of site suitability for which an early review, hearing and partial decision are sought, except that information with respect to operation of the facility at the projected initial power level need not be supplied, and shall include the information required by §§ 50.33(a) through (e) and 50.37 of this chapter. The information submitted shall also include: (i) Proposed findings on the issues of site suitability on which the applicant has requested review and a statement of the bases or the reasons for those findings, (ii) a range of postulated facility design and operation parameters that is sufficient to enable the Commission to perform the requested review of site suitability issues under the applicable provisions of Parts 50, 51 and 100, and (iii) information concerning the applicant's site selection process and long-range plans for ultimate development of the site required by § 2.603(b)(1).

(2) Part two shall include or be accompanied by the remaining information required by §§ 50.30(f), 50.33 and 50.34(a)(1) of this chapter.

(3) Part three shall include the remaining information required by §§ 50.34(a) and (in the case of a nuclear power reactor) 50.34a of this chapter.

(4) The information required for part two or part three shall be submitted during the period the partial decision on part one is effective. Submittal of the information required for part three may precede by no more than six months or follow by no more than six months the submittal of the information required for part two.

(5) Part four,[1] which is only required when the application is for a construction permit for a nuclear power reactor, shall include any information required by § 50.33a of this chapter and shall be filed in accordance with the time periods specified in § 50.33a.

47 FR 5746

(b) After the application has been docketed each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee except applicants under Part 61 of this chapter, who must comply with paragraph (g) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, and telephone number of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph (b) the applicant should not make public distribution of those parts of the application subject to § 2.790(d). The applicant shall submit to the Director of Nuclear Material Safety and Safeguards an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

47 FR 9983

(c) The notice published in the Federal Register announcing docketing of the antitrust information portion of an application for a facility construction permit under section 103 of the Act, except for those applications described in § 2.101(e) and §2.102(d)(2), shall state that:

41 FR 15832

(1) The portion of the application filed contains the information requested by the Attorney General for the purpose of an antitrust review of the application as set forth in Appendix L to Part 50 of this chapter;

(2) Upon receipt and acceptance for docketing of the remaining portions of the application dealing with radiological health and safety and environmental matters, notice of receipt will be published in the FEDERAL REGISTER including an appropriate notice of hearing; and

52 FR 31601

(3) Any person who wishes to have his views on the antitrust matters of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within sixty (60) days after publication of the notice announcing receipt and docketing of the antitrust information to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Policy Development and Technical Support Branch.

47 FR 57446

(d) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will give notice of the docketing of the public health and safety, common defense and security, and environmental parts of an application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except that for applications pursuant to Part 61 of this chapter paragraph (g) of this section applies, to the Governor or other appropriate official of the State in which the facility is to be located or the activity is to be conducted and will cause to be published in the Federal Register a notice of docketing of the application which states the purpose of the application and specifies the location at which the proposed activity would be conducted.

52 FR 31601

(e)(1) Upon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility operating license under section 103 of the Act, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall publish in the Federal Register and in appropriate trade journals a "Notice of Receipt of Operating License Antitrust Information." The notice shall invite persons to submit, within thirty (30) days after publication of the notice, comments or information concerning the antitrust aspects of the application to assist the Director in determining, pursuant to section 105c of the Act, whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review in connection with the construction permit. The notice shall also state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within thirty (30) days after publication of the notice to: U.S. Nuclear

[1] For a construction permit application in four parts, part four shall be filed second in time since it must precede both parts two and three by a period of from 9 months to 3 years.

52 FR 31601

Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Policy Development and Technical Support Branch.

47 FR 9983

(2) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, after reviewing any comments or information received in response to the published notice and any comments or information regarding the applicant received from the Attorney General, concludes that there have been no significant changes since the completion of the previous antitrust review in connection with the construction permit, a finding of no significant changes shall be published in the Federal Register, together with a notice stating that any request for reevaluation of such finding should be submitted within thirty (30) days of publication of the notice. If no requests for reevaluation are received within that time, the finding shall become the NRC's final determination. Requests for a reevaluation of the no significant changes determination may be accepted after the date when the Director's finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

(3) If, as a result of a reevaluation of the finding described in paragraph (e)(2) of this section, it is determined that there have been no significant changes, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall deny the request and shall publish a notice of finding of no significant changes in the Federal Register. The notice and finding become the final NRC decision thirty (30) days after being made and only in the event that the Commission has not exercised sua sponte review.

(4) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, concludes that significant changes have occurred since the completion of the antitrust review in connection with the construction permit, then the provisions of § 2.102(d) apply.

54 FR 27864

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

46 FR 13971

(3) If the Director of Nuclear Material Safety and Safeguards determines that the tendered document is complete and acceptable for docketing, a docket number will be assigned and the applicant will be notified of the determination. If it is determined that all or any part of the tendered document is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination and the respects in which the document is deficient.

54 FR 27864

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

54 FR 27864

46 FR 13971

(6) The tendered document will be formally docketed upon receipt by the Director of Nuclear Material Safety and Safeguards of the required additional copies. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Material Safety and Safeguards. Within ten (10) days after docketing, the applicant shall submit to the Director of Nuclear Material Safety and Safeguards a written statement that distribution of the additional copies to Federal, State, Indian Tribe, and local officials has been completed in accordance with requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Material Safety and Safeguards. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addressees.

54 FR 27864

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

46 FR 13971

(8) The Director of Nuclear Material Safety and Safeguards will cause to be published in the Federal Register a notice of docketing which identifies the State and location at which the proposed geologic repository operations area would be located and will give notice of docketing to the governor of that State. The notice of docketing will state that the Commission finds that a hearing is required in the public interest, prior to issuance of a construction authorization, and will recite the matters specified in § 2.104(a) of this part.

47 FR 57446

(g) Each application for a license to receive radioactive waste from other persons for disposal under Part 61 of this chapter and the accompanying environmental report shall be processed in accordance with the provisions of this paragraph.

53 FR 43419

(1) To allow a determination as to whether the application or environmental report is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room 2120 L Street NW., Washington, D.C. One original and two copies shall be filed to enable this determination to be made.

47 FR 57446

(i) Upon receipt of a tendered application, the Commission will publish in the Federal Register notice of the filed application and will notify the governors, legislatures and other appropriate State, county, and municipal officials and tribal governing bodies of the States and areas containing or potentially affected by the activities at the proposed site and the alternative sites. The Commission will inform these officials that the Commission staff will be available for consultation pursuant to § 61.71 of this chapter. The Federal Register notice will note the opportunity for interested persons to submit views and comments on the tendered application for consideration by the Commission and applicant. The Commission will also notify the U.S. Bureau of Indian Affairs when tribal governing bodies are notified.

(ii) The Commission will also post a public notice in a newspaper or newspapers of general circulation in the affected States and areas summarizing information contained in the applicant's tendered application and noting the opportunity to submit views and comments.

(iii) When the Director of Nuclear Material Safety and Safeguards determines that the tendered document is complete and acceptable for docketing, a docket number will be assigned and the applicant will be notified of the determination. If it is determined that all or any part of the tendered document is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination and the aspects in which the document is deficient.

49 FR 9352

(2) With respect to any tendered document that is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies as the regulations in Part 61 and Subpart A of Part 51 of this chapter require, (ii) serve a copy on the chief executive of the municipality in which the waste is to be disposed of or, if the waste is not to be disposed of within a municipality, serve a copy on the chief executive of the county in which the waste is to be disposed of, (iii) make direct distribution of additional copies to Federal State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards, and (iv) serve a notice of availability of the application and environmental report on the chief executives or governing bodies of the municipalities or counties which have been identified in the application and environmental report as the location of all or part of the alternative sites if copies are not distributed under paragraph (g)(2)(iii) of this section to the executives or bodies. All distributed copies shall be completely assembled documents identified by docket number. Subsequently distributed amendments, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages. In complying with the requirements of paragraph (g) of this section the applicant shall not make public distribution of those parts of the application subject to § 2.790(d).

47 FR 57446

(3) The tendered document will be formally docketed upon receipt by the Director of Nuclear Material Safety and Safeguards of the required additional copies. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addressees. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Material Safety and Safeguards. Within ten (10) days after docketing, the applicant shall submit to the Director of Nuclear Material Safety and Safeguards a written statement that distribution of the additional copies to Federal, State, Indian Tribe, and local officials has been completed in accordance with requirements of this section and written instructions furnished to the applicant by the Director of Nuclear Material Safety and Safeguards.

(4) Amendments to the application and environmental report shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental report.

(5) The Director of Nuclear Material Safety and Safeguards will cause to be published in the Federal Register a notice of docketing which identifies the State and location of the proposed waste disposal facility and will give notice of docketing to the governor of that State and other officials listed in paragraph (g)(3) of this section and, in a reasonable period thereafter, publish in the Federal Register a notice pursuant to § 2.105 offering opportunity to request a hearing to the applicant and other affected persons.

47 FR 57446

§ 2.102 Administrative review of application.

(a) During review of an application by the staff, an applicant may be required to supply additional information. The staff may request any one party to the proceeding to confer with the staff informally. In the case of a docketed application for a construction permit or an operating license for a facility, the staff shall establish a schedule for its review of the application, specifying the key intermediate steps from the time of docketing until the completion of its review.

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will refer the docketed application to the ACRS as required by law and in such additional cases as he or the Commission may determine to be appropriate. The ACRS will render to the Commission one or more reports as required by law or as requested by the Commission.

(c) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will make each report of the ACRS a part of the record of the docketed application, and transmit copies to the appropriate State and local officials.

37 FR 15127

(d)(1) Except as provided in paragraph (d)(2) of this section, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will refer and transmit a copy of each docketed application for a construction permit or an operating license for a utilization or production facility under section 103 of the Act to the Attorney General as required by section 105c of the Act.

(2) The requirements of paragraph (d)(1) of this section do not apply to an application for an operating license for a production or utilization facility under section 103 of the Act for which the construction permit was also issued under section 103, unless the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, determines, after consultation with the Attorney General and in accordance with § 2.101(e), that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review of the Attorney General and the Commission under section 105c of the Act in connection with the construction permit.

47 FR 9983

(3) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause the Attorney General's advice received pursuant to paragraph (d)(1) to be published in the FEDERAL REGISTER promptly upon receipt, and will make such advice a part of the record in any proceeding on antitrust matters conducted in accordance with subsection 105c(5) and section 189a of the Act. The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will also cause to be published in the FEDERAL REGISTER a notice that the Attorney General has not rendered any such advice. Any notice published in the FEDERAL REGISTER pursuant to this subparagraph will also include a notice of hearing, if appropriate, or will state that any person whose interest may be affected by the proceeding may, pursuant to and in accordance with § 2.714, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. The notice will state that petitions for leave to intervene and requests for hearing shall be filed within 30 days after publication of the notice.

36 FR 13270

§ 2.103 Action on applications for byproduct, source, special nuclear material, and operator licenses.

(a) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, finds that an application for a byproduct, source, special nuclear material, or operator license complies with the requirements of the Act, the Energy Reorganization Act, and this chapter, he will issue a license. If the license is for a facility, or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, or if it is to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, will inform the State, tribal and local officials specified in § 2.104(e) of the issuance of the license. For notice of issuance requirements for licenses issued pursuant to Part 61 of this chapter, see § 2.106(d) of this part.

47 FR 5746

(b) If the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, finds that an application does not comply with the requirements of the Act and this chapter he may issue a notice of proposed denial or a notice of denial of the application and inform the applicant in writing of:

(1) The nature of any deficiencies or the reason for the proposed denial or the denial, and

(2) The right of the applicant to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.

28 FR 10151

HEARING ON APPLICATION—HOW INITIATED

§ 2.104 Notice of hearing.

(a) In the case of an application on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest, the Secretary will issue a notice of hearing to be published in the FEDERAL REGISTER as required by law at least fifteen (15) days, and in the case of an application concerning a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility, at least thirty (30) days, prior to the date set for hearing in the notice.[1]

37 FR 15127

In addition, in the case of an application for a construction permit for a facility of the type described in § 50.22 of this chapter, or a testing facility, the notice (other than a notice pursuant to paragraph (d) of this section) shall be issued as soon as practicable after the application has been docketed: *Provided*, That if the Commission, pursuant to § 2.101(a)(2), decides to determine the acceptability of the application on the basis of its technical adequacy as well as completeness, the notice shall be issued as soon as practicable after the application has been tendered.

44 FR 47758

[1] If the notice of hearing concerning an application for a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility does not specify the time and place of initial hearing, a subsequent notice will be published in the FEDERAL REGISTER which will provide at least thirty (30) days notice of the time and place of that hearing. After this notice is given the presiding officer may reschedule the commencement of the initial hearing for a later date or reconvene a recessed hearing without again providing thirty (30) days notice.

43 FR 30793

37 FR 15127

The notice will state:

(1) The time, place, and nature of the hearing and/or prehearing conference, if any;

(2) The authority under which the hearing is to be held;

(3) The matters of fact and law to be considered; and

(4) The time within which answers to the notice shall be filed.

(b) In the case of an application for a construction permit for a facility on which the Act requires a hearing, the notice of hearing will, except as provided in paragraph (d) of this section and unless the Commission determines otherwise, state, in implementation of paragraph (a)(3) of this section:

(1) That, if the proceeding is a contested proceeding, the presiding officer will consider the following issues:[8]

31 FR 12774

(i) Whether in accordance with the provisions of § 50.35(a) of this chapter:

(a) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(b) Such further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which require research and development, have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components; and

(d) On the basis of the foregoing, there is reasonable assurance that (1) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of the proposed facility; and (2) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;

(ii) Whether the applicant is technically qualified to design and construct the proposed facility;

50 FR 18852

(iii) Whether the applicant is financially qualified to design and construct the proposed facility;

31 FR 12774

(iv) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;

49 FR 9352

(v) If the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance with the requirements of Subpart A of Part 51 of this chapter, the construction permit should be issued as proposed.

57 FR 18388

(2) That, if the proceeding is not a contested proceeding, the presiding officer will determine:

(i) Without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on (b)(1) (i) through (iii) specified in this section and a negative finding on (b)(1)(iv) specified in this section proposed to be made and the issuance of the construction permit proposed by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and

(ii) If the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel processing plant, a uranium enrichment facility, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate.

49 FR 9352

(3) That, regardless of whether the proceeding is contested or uncontested, the presiding officer will, in accordance with Subpart A of Part 51 of this chapter.

(i) Determine whether the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act and Subpart A of Part 51 of this chapter have been complied with in the proceeding;

39 FR 26279

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

44 FR 67088

(c) In the case of an application for an operating license in which a hearing will be held, the notice of hearing will, except as provided in paragraph (d) of this section and unless the Commission determines otherwise, state, in implementation of paragraph (a)(3) of this section, that the presiding officer will consider any matters in controversy among the parties and may, where he or she determines that a serious safety, environmental, or common defense and security matter has not been raised by the parties, consider such other matter within the purview of:

37 FR 15127

(1) Whether there is reasonable assurance that construction of the facility will be substantially completed on a timely basis, in conformity with the construction permit and the application as amended, the provisions of the Act, and the regulations in this chapter;

(2) Whether the facility will operate in conformity with the application as amended, the provisions of the Act, and the regulations in this chapter;

(3) Whether there is reasonable assurance: (i) That the activities to be authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter;

[8] Issues (i) to (iv) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (v) is the issue pursuant to the National Environmental Policy Act of 1969.

49 FR 35747

(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the regulations in this chapter, except that the issue of financial qualification shall not be considered by the presiding officer in an operating license hearing if the applicant is an electric utility seeking a license to operate a utilization facility of the type described in § 50.21(b) of § 50.22;

37 FR 15127

(5) Whether the applicable provisions of Part 140 of this chapter have been satisfied;

(6) Whether issuance of the license will be inimical to the common defense and security or to the health and safety of the public; and

49 FR 9352

(7) If the application is for an operating license for a nuclear power reactor, a testing facility, or a fuel reprocessing plant, or other facility whose operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance with the requirements of Subpart A of Part 51 of this chapter, the operating license should be issued as proposed.[3]

46 FR 55083

(d) In an application for a construction permit or an operating license for a facility on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest to consider the antitrust aspects of the application, the notice of hearing will, unless the Commission determines otherwise, state:

(1) A time of the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with sections 105 and 189a of the Act and this part;[4]

(2) The presiding officer for the hearing who shall be either an administrative law judge or an atomic safety and licensing board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel;

46 FR 55083

(3) That the presiding officer will consider and decide whether the activities under the proposed license would create or maintain a situation inconsistent with the antitrust laws described in section 105a of the Act; and

47 FR 17797

(4) That matters of radiological health and safety and common defense and security, and matters raised under the National Environmental Policy Act of 1969, will be considered at another hearing if otherwise required or ordered to be held, for which a notice will be published pursuant to paragraphs (a) and (b) of this section, unless otherwise authorized by the Commission.

53 FR 31651

(e) The Secretary will give timely notice of the hearing to all parties and to other persons, if any, entitled by law to notice. The Secretary will transmit a notice of hearing on an application for a license for a production or utilization facility, for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, for a license under Part 61 of this chapter, for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, and for a license under Part 72 of this chapter to acquire, receive or possess spent fuel for the purpose of storage in an independent spent fuel storage installation (ISFSI) to the governor or other appropriate official of the State and to the chief executive of the municipality in which the facility is to be located or the activity is to be conducted or, if the facility is not to be located or the activity conducted within a municipality, to the chief executive of the county (or to the Tribal organization, if it is to be so located or conducted within an Indian reservation). The Secretary will transmit a notice of hearing on an application for a license under Part 72 of this chapter to acquire, receive or possess spent fuel, high-level radioactive waste or radioactive material associated with high-level radioactive waste for the purpose of storage in a monitored retrievable storage installation (MRS) to the same persons who received the notice of docketing under § 72.16(e) of this chapter.

27 FR 377

§ 2.105 Notice of proposed action.

(a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action with respect to an application for:

(1) A license for a facility;

47 FR 57446

(2) A license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee. All licenses issued under Part 61 of this chapter shall be so noticed.

38 FR 9585

(3) An amendment of a license specified in paragraph (a) (1) or (2) of this section and which involves a significant hazards consideration;

51 FR 7744

(4) An amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 of this chapter or for a testing facility, as follows:

(i) If the Commission determines under § 50.58 of this chapter that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafter; or

(ii) If the Commission determines under § 50.58 and § 50.91 of this chapter that an emergency situation exists or that exigent circumstances exist and that the amendment involves no significant hazards consideration, it will provide notice of opportunity for a hearing pursuant to § 2.106 (if a hearing is requested, it will be held after issuance of the amendment);

(5) A license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter;

51 FR 7744

(6) An amendment to a license specified in paragraph (a)(5) of this section, or an amendment to a construction authorization granted in proceedings on an application for such a license, when such an amendment would authorize actions which may significantly affect the health and safety of the public;

53 FR 31651

(7) A license under Part 72 of this chapter to acquire, receive or possess spent fuel for the purpose of storage in an independent spent fuel storage installation (ISFSI) or to acquire, receive or possess spent fuel, high-level radioactive waste or radioactive material associated with high-level radioactive waste for the purpose of storage in a monitored retrievable storage installation (MRS);

(8) An amendment to a license specified in paragraph (a)(7) of this section when such an amendment presents a genuine issue as to whether the health and safety of the public will be significantly affected; or

(9) Any other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded.

(10) In the case of an application for an operating license for a facility of a

[3] Issues (1) to (6) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (7) is the issue pursuant to the National Environmental Policy Act of 1969.

[4] As permitted by subsection 105c of the Act, with respect to proceedings in which an application for a construction permit was filed prior to December 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER or notice of filing of the application for an operating license or December 19, 1970, whichever is later, the Commission may issue a construction permit or operating license which contains the conditions specified in § 50.55b of this chapter before the antitrust aspects of the application are finally resolved.

type described in § 50.21(b) or § 50.22 of this chapter or a testing facility, a notice of opportunity for hearing shall be issued as soon as practicable after the application has been docketed.

(11) In the case of an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, a notice of opportunity for hearing, as required by this paragraph, shall be published prior to Commission action authorizing receipt of such wastes; this requirement is in addition to the procedures set out in § 2.101(f)(8) and § 2.104 of this part, which provide for a hearing on the application prior to issuance of a construction authorization. 53 FR 31651

(b) The notice of proposed action will set forth: 38 FR 10151

(1) The nature of the action proposed; 28 FR 10151

(2) The manner in which a copy of the safety analysis and of the ACRS report, if any, may be obtained or examined. 36 FR 4686

(c) If an application for a license is complete enough to permit all evaluations, other than completion inspection, necessary for the issuance of a construction permit and operating license, the notice of proposed issuance of a construction permit may provide that on completion of construction and inspection the operating license will be issued without further prior notice. 27 FR 377

(d) The notice of proposed action will provide that, within thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER, or such lesser period authorized by law as the Commission may specify: 37 FR 15127

(1) The applicant may file a request for a hearing; and

(2) Any person whose interest may be affected by the proceeding may file a request for a hearing or a petition for leave to intervene if a hearing has already been requested. 51 FR 7744

(e)(1) If no request for a hearing or petition for leave to intervene is filed within the time prescribed in the notice, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, may take the proposed action, inform the appropriate State and local officials, and publish in the FEDERAL REGISTER a notice of issuance of the license or other action. 46 FR 55083

(2) If a request for a hearing or a petition for leave to intervene is filed within the time prescribed in the notice, the presiding officer who shall be an Atomic Safety and Licensing Board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the presiding officer will issue a notice of hearing or an appropriate order. The presiding officer designated to rule on a request or petition concerning the antitrust aspects of an application may be either an Administrative Law Judge or an Atomic Safety and Licensing Board. 46 FR 55083

(f) Applications for facility licenses under section 103 of the Act and for facility operating licenses under section 104b of the Act as to which any person intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination are also subject to the provisions of §§ 2.101(b) and 2.102(d). 35 FR 19655

§ 2.106 Notice of issuance. 38 FR 9585

(a) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER notice of, and will inform the State and local officials specified in § 2.104(e) of the issuance of:

(1) A license or an amendment of a license for which a notice of proposed action has been previously published; and

(2) An amendment of a license for a facility of the type described in § 50.21(b) or § 50.22 of this chapter, or a testing facility, whether or not a notice of proposed action has been previously published.

(b) The notice of issuance will set forth: 37 FR 15127

(1) The nature of the license or amendment;

(2) The manner in which copies of the safety analysis, if any, may be obtained and examined; and

(3) A finding that the application for the license or amendment complies with the requirements of the Act and this chapter.

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the FEDERAL REGISTER notice of, and will inform the State, local, and Tribal officials specified in § 2.104(e) of any action with respect to, an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, or for the amendment to such license for which a notice of proposed action has been previously published. 46 FR 13971

(d) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the Federal Register notice of, and will inform the State and local officials or tribal governing body specified in § 2.104(e) of any licensing action with respect to a license to receive radioactive waste from other persons for disposal under Part 61 of this chapter or the amendment of such a license for which a notice of proposed action has been previously published. 47 FR 57446

§ 2.107 Withdrawal of application.

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. 28 FR 10151

(b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.

(c) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of the withdrawal of an application if notice of receipt of the application has been previously published. 27 FR 377

27 FR 377

§ 2.108 Denial of application for failure to supply information.

(a) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, may deny an application if an applicant fails to respond to a request for additional information within thirty (30) days from the date of the request, or within such other time as may be specified.

39 FR 43135

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of denial when notice of receipt of the application has previously been published, but no notice of hearing has yet been published. The notice of denial will provide that, within thirty (30) days after the date of publication in the FEDERAL REGISTER (1) the applicant may demand a hearing, and (2) any person whose interest may be affected by the proceeding may file a petition for leave to intervene.

(c) When both a notice of receipt of the application and a notice of hearing have been published, the presiding officer, upon a motion made by the staff pursuant to § 2.730, will rule whether an application should be denied by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, pursuant to paragraph (a).

56 FR 64943

§ 2.109 Effect of timely renewal application.

(a) Except for the renewal of an operating license for a nuclear power plant under 10 CFR 50.21(b) or 50.22, if, at least 30 days prior to the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

(b) If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of an operating license at least 5 years prior to the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

54 FR 15372

§ 2.110 Filing and administrative action on submittals for design review or early review of site suitability issues.

(a)(1) A submittal pursuant to Appendix O of Part 52 of this chapter shall be subject to §§ 2.101(a) and 2.790 to the same extent as if it were an application for a permit or license.

(2) Except as specifically provided otherwise by the provisions of Appendix Q to Part 52 of this chapter, a submittal pursuant to Appendix Q shall be subject to § 2.101(a) (2) through (4) to the same extent as if it were an application for a permit or license.

42 FR 22882

(b) Upon initiation of review by the staff of a submittal of a type described in paragraph (a)(1) of this section, the Director of Nuclear Reactor Regulation shall publish in the FEDERAL REGISTER a notice of receipt of the submittal, inviting comments from interested persons within 60 days of publication or such other time as may be specified, for consideration by the staff and ACRS in their review.

(c) Upon completion of review by the staff and the ACRS of a submittal of the type described in paragraph (a)(1) of this section, the Director of Nuclear Reactor Regulation shall publish in the FEDERAL REGISTER a determination as to whether or not the design is acceptable, subject to such conditions as may be appropriate, and place in the Public Document Room an analysis of the design in the form of a report.

40 FR 8774

§ 2.111 Prohibition of sex discrimination.

No person shall on the ground of sex be excluded from participation in, be denied a license under, be denied the benefits of, or be subjected to discrimination under any program or activity carried on or receiving Federal assistance under the Act or the Energy Reorganization Act of 1974.

48 FR 44170

Subpart B—Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License, or for Imposing Civil Penalties

§ 2.200 Scope of subpart.

(a) This subpart prescribes the procedure in cases initiated by the staff, or upon a request by any person, to impose requirements by order, or to modify, suspend, or revoke a license, or to take other action as may be proper, against any person subject to the jurisdiction of the Commission.

42FR26891

(b) This subpart also prescribes the procedures in cases initiated by the staff to impose civil penalties pursuant to section 234 of the Act and section 206 of the Energy Reorganization Act of 1974.

56 FR 40664

§ 2.201 Notice of violation.

(a) In response to an alleged violation of any provision of the Act or this chapter or the conditions of a license or an order issued by the Commission, the Commission may serve on the licensee or other person subject to the jurisdiction of the Commission a written notice of violation; a separate notice may be omitted if an order pursuant to § 2.202 or demand for information pursuant to § 2.204 is issued that otherwise identifies the apparent violation. The notice of violation will concisely state the alleged violation and will require that the licensee or any other person submit, within twenty (20) days of the date of the notice or other specified time, a written explanation or statement in reply including:

(1) Corrective steps which have been taken by the licensee or other person and the results achieved;

(2) Corrective steps which will be taken; and

(3) The date when full compliance will be achieved.

(b) The notice may require the licensee or other person subject to the jurisdiction of the Commission to admit or deny the violation and to state the reasons for the violation, if admitted. It may provide that, if an adequate reply is not received within the time specified in the notice, the Commission may issue an order or a demand for information as to why the license should not be modified, suspended or revoked or why such other action as may be proper should not be taken.

§ 2.202 Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing; and

(5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

56 FR 40664

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in paragraph (d) of this section, the answer may demand a hearing.

57 FR 20194

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(1) If the answer demands a hearing with respect to an immediately effective order, the hearing will be conducted expeditiously, giving due consideration to the rights of the parties.

(2) (i) The licensee or other person to whom the Commission has issued an immediately effective order may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on. The NRC staff shall respond within (5) days of the receipt of the motion. The motion must be decided by the presiding officer expeditiously. During the pendency of the motion or at any other time, the presiding officer may not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person. The presiding officer will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immedate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immedate effectiveness. An order setting aside immediate effectiveness will be referred promptly to the Commission itself and will not be effective pending further order of the Commission.

(ii) The presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effeective order at any time for such periods as are consistent with the due process rights of the licensee and other affected parties.

56 FR 40664

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent, in the answer or other written document, of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) If the order involves the modification of a part 50 license and is a backfit, the requirements of § 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

38 FR 2330

§ 2.203 Settlement and compromise.

At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Administrative Law Judge, according due weight to the position of the staff. The presiding officer, or if none has been designated, the Chief Administrative Law Judge, may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding. If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding.

56 FR 40664

§ 2.204 Demand for information.

(a) The Commission may issue to a licensee or other person subject to the jurisdiction of the Commission a demand for information for the purpose of determining whether an order under § 2.202 should be issued, or whether other action should be taken, which demand will:

(1) Allege the violations with which the licensee or other person is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for issuing the demand; and

(2) Provide that the licensee must, or the other person may, file a written answer to the demand for information under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the demand for information.

(b) A licensee to whom the Commission has issued a demand for information under this section must respond to the demand by filing a written answer under oath or affirmation; any other person to whom the Commission has issued a demand for information may, in its discretion, respond to the demand by filing a written answer under oath or affirmation. The licensee's answer shall specifically admit or deny each allegation or charge made in the demand for information, and shall set forth the matters of fact and law on which the licensee relies. A person other than a licensee may answer as described

above, or by setting forth its reasons why the demand should not have been issued and, if the requested information is not provided, the reasons why it is not provided.

(c) Upon review of the answer filed pursuant to paragraph (a)(2) of this section, or if no answer is filed, the Commission may institute a proceeding pursuant to 10 CFR 2.202 to take such action as may be proper.

(d) An answer may consent to the entry of an order pursuant to § 2.202 in substantially the form proposed in the demand for information. Such consent shall constitute a waiver as provided in § 2.202(d).

56 FR 40664

54FR53312 **§ 2.205 Civil penalties.**

(a) Before instituting any proceeding to impose a civil penalty under section 234 of the Act, the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support or the Deputy's designee, as appropriate, shall serve a written notice of violation upon the person charged. This notice may be included in a notice issued pursuant to § 2.201. The notice of violation shall specify the date or dates, facts, and the nature of the alleged act or omission with which the person is charged, and shall indentify specifically the particular provision or provisions of the law, rule, regulation, license, permit, or cease an desist order involved in the alleged violation and must state the amount of each proposed penalty. The notice of violation shall also advise the person charged that the civil penalty may be paid in the amount specified therein, or the proposed imposition of the civil penalty may be protested in its entirety or in part, by a written answer, either denying the violation or showing extenuating circumstances. The notice of violation shall advise the person charged that upon failure to pay a civil penalty subsequently determined by the Commission, if any, unless compromised, remitted, or mitigated, be collected by civil action, pursuant to section 234c of the Act.

54 FR 53312

(b) Within twenty (20) days of the date of a notice of violation or other time specified in the notice, the person charged may either pay the penalty in the amount proposed or answer the notice of violation. The answer to the notice of violation shall state any facts, explanations, and arguments, denying the charges of violation, or demonstrating any extenuating circumstances, error in the notice of violation, or other reason why the penalty should not be imposed and may request remission or mitigation of the penalty.

36 FR 16894

(c) If the person charged with violation fails to answer within the time specified in paragraph (b) of this section, an order may be issued imposing the civil penalty in the amount set forth in the notice of violation described in paragraph (a) of this section.

52 FR 31601

(d) If the person charged with violation files an answer to the notice of violation, the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support or the Deputy's designee, upon consideration of the answer, will issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty. The person charged may, within twenty (20) days of the date of the order or other time specified in the order, request a hearing.

54 FR 53312

(e) If the person charged with violation requests a hearing, the Commission will issue an order designating the time and place of hearing.

(f) If a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, mitigating, or remitting the civil penalty.

36 FR 16894

(g) Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support or the Deputy's designee, as appropriate may compromise any civil penalty, subject to the provisions of § 2.203.

(h) If the civil penalty is not compromised, or is not remitted by the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support or the Deputy's designee, as appropriate, the presiding officer, or the Commission, and if payment is not made within ten (10) days following either the service of the order described in paragraph (c) or (f) of this section, or the expiration of the time for requesting a hearing described in paragraph (d) of this section, the Deputy Executive Director for Regional Operations, or the Deputy's designee, as appropriate, may refer the matter to the Attorney General for collection.

54 FR 53312

(i) Except when payment is made after compromise or mitigation by the Department of Justice or as ordered by a court of the United States, following reference of the matter to the Attorney General for collection, payment of civil penalties imposed under section 234 of the Act shall be made by check, draft, or money order payable to the Treasurer of the United States, and mailed to the Director, Office of Enforcement.

52 FR 31601

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Executive Director for Operations and shall be filed either (1) by delivery to the Public Document Room at 2120 Street, NW., Washington, DC, or (2) by mail or telegram addessed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC Office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

53 FR 43419

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

45 FR 74693

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

42 FR 36239

Subpart C [removed] 51 FR 7744

Subpart D—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Construct or Operate Nuclear Power Plants of Duplicate Design at Multiple Sites

§ 2.400 Scope of subpart.

This subpart describes procedures applicable to licensing proceedings which involve the consideration in hearings of a number of applications, filed by one or more applicants pursuant to Appendix N of Part 52 of this chapter, for licenses to construct and operate nuclear power reactors of essentially the same design to be located at different sites.

§ 2.401 Notice of hearing on applications pursuant to Appendix N of Part 52 for construction permits.

54 FR 15372

(a) In the case of applications pursuant to Appendix N of Part 52 of this chapter for construction permits for nuclear power reactors of the type described in § 50.22 of this chapter, the Secretary will issue notices of hearing pursuant to § 2.104.

(b) The notice of hearing will also state the time and place of the hearings on any separate phase of the proceeding.

§ 2.402 Separate hearings on separate issues; consolidation of proceedings.

(a) In the case of applications pursuant to Appendix N of Part 52 of this chapter for construction permits for nuclear power reactors of a type described in § 50.22 of this chapter, the Commission or the presiding officer may order separate hearings on particular phases of the proceeding, such as matters related to the acceptability of the design of the reactor, in the context of the site parameters postulated for the design; environmental matters; or antitrust aspects of the application.

(b) If a separate hearing is held on a particular phase of the proceeding, the Commission or presiding officers of each affected proceeding may, pursuant to § 2.716, consolidate for hearing on that phase two or more proceedings to consider common issues relating to the applications involved in the proceedings, if it finds that such action will be conducive to the proper dispatch of its business and to the ends of justice. In fixing the place of any such consolidated hearing due regard will be given to the convenience and necessity of the parties, petitioners for leave to intervene or the attorneys or representatives of such persons, and the public interest.

43 FR 17798

§ 2.403 Notice of proposed action on applications for operating licenses pursuan to Appendix N of Part 52.

In the case of applications pursuant to Appendix N of Part 52 of this chapter for operating licenses for nuclear power reactors, if the Commission has not found that a hearing is in the public interest, the Director of Nuclear Reactor Regulation will, prior to acting thereon, cause to be published in the FEDERAL REGISTER, pursuant to § 2.105, a notice of proposed action with respect to each application as soon as practicable after the applications have been docketed.

§ 2.404 Hearings on applications for operating licenses pursuant to Appendix N of Part 52.

54 FR 15372

If a request for a hearing and/or petition for leave to intervene is filed within the time prescribed in the notice of proposed action on an application for an operating license pursuant to Appendix N of Part 52 of this chapter with respect to a specific reactor(s) at a specific site and the Commission or an atomic safety and licensing board designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel has issued a notice of hearing or other appropriate order, the Commission or the atomic safety and licensing board may order separate hearings on particular phases of the proceeding and/or consolidate for hearing two or more proceedings in the manner described in § 2.402.

§ 2.405 Initial decisions in consolidated hearings.

At the conclusion of any hearing held pursuant to this subpart, the presiding officer will render a partial initial decision which may be appealed pursuant to § 2.762. No construction permit or full power operating license will be issued until an initial decision has been issued on all phases of the hearing and all issues under the Act and the National Environmental Policy Act of 1969 appropriate to the proceeding have been resolved.

40 FR 2976

§ 2.406 Finality of decisions on separate issues.

Notwithstanding any other provision of this chapter, in a proceeding conducted pursuant to this subpart and Appendix N of Part 52 of this chapter, no matter which has been reserved for consideration in one phase of the hearing shall be considered at another phase of the hearing except on the basis of significant new information that substantially affects the conclusion(s) reached at the other phase or other good cause.

54 FR 15372

§ 2.407 Applicability of other sections.

The provisions of Subparts A and G relating to construction permits and operating licenses apply, respectively, to construction permits and operating licenses subject to this subpart, except as qualified by the provisions of this subpart.

40 FR 2976

Subpart E—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Manufacture Nuclear Power Reactors To Be Operated at Sites Not Identified in the License Application and Related Licensing Proceedings

§ 2.500 Scope of subpart.

This subpart prescribes procedures applicable to licensing proceedings which involve the consideration in separate hearings of an application for a license to manufacture nuclear power reactors pursuant to Appendix M of Part 52 of this chapter, and applications for construction permits and operating licenses for nuclear power reactors which have been the subject of such an application for a license to manufacture such facilities (manufacturing license).

54 FR 15372

§ 2.501 Notice of hearing on application pursuant to Appendix M of Part 52 for a license to manufacture nuclear power reactors.

(a) In the case of an application pursuant to Appendix M of Part 52 of this chapter for a license to manufacture nuclear power reactors of the type described in § 50.22 of this chapter to be operated at sites not identified in the license application, the Secretary will issue a notice of hearing to be published in the FEDERAL REGISTER at least thirty (30) days prior to the date set for hearing in the notice.[1] The notice shall be issued as soon as practicable after the application has been docketed. The notice will state:

38 FR 30251

(1) The time, place, and nature of the hearing and/or the prehearing conference;

(2) The authority within which the hearing is to be held;

(3) The matters of fact and law to be considered; and

(4) The time within which answers to the notice shall be filed.

(b) The issues stated in the notice of hearing pursuant to paragraph (a) of this section will not involve consideration of the particular sites at which any of the nuclear power reactors to be manufactured will be located and operated. Except as the Commission determines otherwise, the notice of hearing will state:

(1) That, if the proceeding is a contested proceeding, the presiding officer will consider the following issues:[2]

(i) Whether the applicant has described the proposed design of, and the site parameters postulated for, the reactor(s), including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(ii) Whether such further technical or design information as may be required to complete the design report and which can reasonably be left for later consideration, will be supplied in a supplement to the design report;

(iii) Whether safety features or components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted a research and development program reasonably designed to resolve any safety questions associated with such features or components;

38 FR 30251

(iv) Whether on the basis of the foregoing, there is reasonable assurance that (A) such safety questions will be satisfactorily resolved before any of the proposed nuclear power reactors are removed from the manufacturing site, and (B) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed reactor(s) can be constructed and operated at sites having characteristics that fall within the site parameters postulated for the design of the reactor(s) without undue risk to the health and safety of the public;

(v) Whether the applicant is technically and financially qualified to design and manufacture the proposed reactor(s).

(vi) Whether the issuance of a license for manufacture of the reactor(s) will be inimical to the common defense and security or to the health and safety of the public; and

54FR52342

(vii) Whether, in accordance with the requirements of Subpart A of Part 51 and Appendix M of Part 52 of this chapter, the license should be issued as proposed.

38 FR 30251

(2) That, if the proceeding is not a contested proceeding, the presiding officer will determine (i) without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on paragraphs (b)(1) (i) through (v) of this section and a negative finding on paragraph (b)(1)(vi) of this section proposed to be made and the issuance of the license to manufacture proposed by the Director of Nuclear Reactor Regulation, and (ii) whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate.

54 FR 52342

(3) That, regardless of whether the proceeding is contested or uncontested, the presiding officer will, in accordance with Subpart A of Part 51 and paragraph 3 of Appendix M of Part 52 of this chapter,

(i) Determine whether the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act and Subpart A of Part 51 of this chapter have been complied with in the proceeding;

38 FR 30251

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the manufacturing license should be issued, denied or appropriately conditioned to protect environmental values.

(c) The place of hearing on an application for a manufacturing license will be Washington, D.C., or such other location as the Commission deems appropriate.

§ 2.502 Notice of hearing on application for a permit to construct a nuclear power reactor manufactured pursuant to a Commission license issued pursuant to Appendix M of Part 52 of this chapter at the site at which the reactor is to be operated.

54 FR 15372

The issues stated for consideration in the notice of hearing on an application for a permit to construct a nuclear power reactor(s) which is the subject of an application for a manufacturing license pursuant to Appendix M of Part 52 of this chapter, will be those stated in § 2.104(b) and, in addition, whether the site on which the facility is to be operated falls within the postulated site parameters specified in the relevant application for a manufacturing license.

[1] The thirty (30) day requirement of this paragraph is not applicable to a notice of the time and place of hearing published by the presiding officer after the notice of hearing described in this section has been published.

[2] Issues (i) and (vi) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (vii) is the issue pursuant to the National Environmental Policy Act of 1969.

§ 2.503 Finality of decisions on separate issues.

Notwithstanding any other provision of this chapter, no matter which has been resolved at an earlier stage of the licensing process which involves a manufacturing license, a permit to construct a reactor for which a manufacturing license is sought, a license to operate such a reactor, and any amendment to such permit or licenses shall be determined to be at issue in any subsequent state of the licensing process except on the basis of significant new information that substantially affects the conclusion(s) reached at the earlier stage or other good cause.

§ 2.504 Applicability of other sections.

38 FR 30251

The provisions of Subparts A and G relating to construction permits apply to manufacturing licenses subject to this subpart, with respect to matters of radiological health and safety, environmental protection, and the common defense and security, except that § 2.104 (a) and (b) do not apply to manufacturing licenses. The provisions of Subparts A and G relating to construction permits and operating licenses apply, respectively, to construction permits and operating licenses subject to this subpart, except as qualified by the provisions of this subpart.

42FR22882

Subpart F—Additional Procedures Applicable to Early Partial Decisions on Site Suitability Issues in Connection With an Application for a Permit To Construct Certain Utilization Facilities

§ 2.600 Scope of subpart.

49 FR 9352

This subpart prescribes procedures applicable to licensing proceedings which involve an early submittal of site suitability information in accordance with § 2.101(a-1), and a hearing and early partial decision on issues of site suitability, in connection with an application for a permit to construct a utilization facility which is subject to § 51.20(b) of this chapter and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility.

§ 2.601 Applicability of other sections.

42 FR 22882

The provisions of Subparts A and G relating to applications for construction permits and proceedings thereon apply, respectively, to applications and proceedings in accordance with this subpart, except as specifically provided otherwise by the provisions of this subpart.

§ 2.602 Filing fees.

Each application which contains a request for early review of site suitability issues under the procedures of this subpart shall be accompanied by any fee required by § 50.30(e) and Part 170 of this chapter.

§ 2.603 Acceptance and docketing of application for early review of site suitability issues.

42 FR 22882

(a) Each part of an application submitted in accordance with § 2.101(a-1) of this part will be initially treated as a tendered application. If it is determined that any one of the parts as described in § 2.101(a-1) is incomplete and not acceptable for processing, the Director of Nuclear Reactor Regulation will inform the applicant of this determination and the respects in which the document is deficient. Such a determination of completeness will generally be made within a period of thirty (30) days.

49 FR 9352

(b)(1) The Director of Nuclear Reactor Regulation will accept for docketing an application for a construction permit for a utilization facility which is subject to § 51.20(b) of this chapter and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 or is a testing facility where part one of the application as described in § 2.101(a-1) is complete. Part one of an application will not be considered complete unless it contains proposed findings as required by § 2.101(a-1)(1)(i) and unless it describes the applicant's site selection process, specifies the extent to which that process involves the consideration of alternative sites, explains the relationship between that process and the application for early review of site suitability issues, and briefly describes the applicant's long-range plans for ultimate development of the site. Upon assignment of a docket number, the procedures in § 2.101 (a)(3) and (a)(4) relating to formal docketing and the submission and distribution of additional copies of the application shall be followed.

42 FR 22882

(2) Additional parts of the application will be docketed upon a determination by the Director of Nuclear Reactor Regulation that they are complete.

(c) If part one of the application is docketed, the Director of Nuclear Reactor Regulation will cause to be published in the FEDERAL REGISTER and send to the Governor or other appropriate official of the State in which the site is located, a notice of docketing of the application which states the purpose of the application, states the location of the proposed site, states that a notice of hearing will be published, requests comments within 120 days or such other time as may be specified on the initiation or outcome of an early site review from Federal, State, and local agencies and interested persons, and in the case of applications filed under section 103 of the Act, states that a person who wishes to have his views on the antitrust aspects of the application presented to the Attorney General for consideration shall submit such views in accordance with a subsequent notice that will be published in the FEDERAL REGISTER. In the case of a nuclear power reactor, such subsequent notice will be published following submission of the information required by § 50.33a.

§ 2.604 Notice of hearing on application for early review of site suitability issues.

(a) Where an applicant for a construction permit for a utilization facility subject to this subpart requests an early review and hearing and an early partial decision on issues of site suitability pursuant to § 2.101(a-1), the provisions in the notice of hearing setting forth the matters of fact and law to be considered, as required by § 2.104, shall be modified so as to relate only to the site suitability issue or issues under review.

(b) After docketing of part two of the application, as provided in §§ 2.101(a-1) and 2.603, a supplementary notice of hearing will be published pursuant to § 2.104 with respect to the remaining unresolved issues in the proceeding within the scope of § 2.104. Such supplementary notice of hearing will provide that any person whose interest may be affected by the proceeding and who desires to participate as a party in the resolution of the remaining issues shall file a petition for leave to intervene pursuant to § 2.714 within the time prescribed in the notice. Such supplementary notice will also provide appropriate opportunities for participation by a representative of an interested state under § 2.715(c) and for limited appearances pursuant to § 2.715 (a).

42 FR 22882

(c) Any person who was permitted to intervene as a party pursuant to the initial notice of hearing on site suitability issues and who was not dismissed or did not withdraw as a party may continue to participate as a party to the proceeding with respect to the remaining unresolved issues, provided that within the time prescribed for filing of petitions for leave to intervene in the supplementary notice of hearing, he files a notice of his intent to continue as a party, along with a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to continue to participate as a party, and setting forth with particularity the basis for his contentions with regard to each such aspect or aspects. A party who files a nontimely notice of intent to continue as a party may be dismissed from the proceeding, absent a determination that the party has made a substantial showing of good cause for failure to file on time, and with particular reference to the factors specified in §§ 2.714(a)(1)-(4) and 2.714(d). The notice will be ruled upon by the Commission or atomic safety and licensing board designated to rule on petitions for leave to intervene.

(d) To the maximum extent practicable, the membership of the atomic safety and licensing board designated to preside in the proceeding on the remaining unresolved issues pursuant to the supplemental notice of hearing will be the same as the membership designated to preside in the initial notice of hearing on site suitability issues.

§ 2.605 Additional considerations.

(a) The Commission will not conduct more than one review of site suitability issues with regard to a particular site prior to filing and review of part two of the application described in § 2.101 (a-1) of this part.

(b) The Commission, upon its own initiative, or upon the motion of any party to the proceeding filed at least sixty (60) days prior to the date of the commencement of the evidentiary hearing on site suitability issues, may decline to initiate an early hearing or render an early partial decision on any issue or issues of site suitability:

49 FR 9352

(1) In cases where no partial decision on the relative merits of the proposed site and alternative sites under Subpart A of Part 51 is requested, upon determination that there is a reasonable likelihood that further review would identify one or more preferable alternative sites and the partial decision on one or more site suitability issues would lead to an irreversible and irretrievable commitment of resources prior to the submittal of the remainder of the information required by § 50.30(f) of this chapter that would prejudice the later review and decision on such alternative sites; or

42 FR 22887

(2) In cases where it appears that an early partial decision on any issue or issues of site suitability would not be in the public interest considering (i) the degree of likelihood that any early findings on those issues would retain their validity in later reviews, (ii) the objections, if any, of cognizant state or local government agencies to the conduct of an early review on those issues, and (iii) the possible effect on the public interest and the parties of having an early, if not necessarily conclusive, resolution of those issues.

56 FR 29403

§ 2.606 Partial decisions on site suitability issues.

(a) The provisions of §§ 2.754, 2.755, 2.760, 2.761, 2.762, 2.763, and 2.764(a) shall apply to any partial initial decision rendered in accordance with this subpart. Section 2.764(b) shall not apply to any partial initial decision rendered in accordance with this subpart. No limited work authorization may be issued pursuant to § 50.10(e) of Part 50 of this chapter and no construction permit may be issued without completion of the full review required by section 102(2) of the National Environmental Policy Act of 1969, as amended, and Subpart A of Part 51 of this chapter. The authority of the Commission to review such a partial initial decision *sua sponte*, or to raise *sua sponte* an issue that has not been raised by the parties, will be exercised within the same time period as in the case of a full decision relating to the issuance of a construction permit.

(b)(1) A partial decision on one or more site suitability issues pursuant to the applicable provisions of Part 50, Subpart A of Part 51, and Part 100 of this chapter issued in accordance with this subpart shall (i) clearly identify the site to which the partial decision applies and (ii) indicate to what extent additional information may be needed and additional review may be required to enable the Commission to determine in accordance with the provisions of the Act and the applicable provisions of the regulations in this chapter whether a construction permit for a facility to be located on the site identified in the partial decision should be issued or denied.

(2) Following completion of Commission review of the partial initial decision of the Atomic Safety and Licensing Board, after hearing, on the site suitability issues, the partial decision shall remain in effect either for a period of five years or, where the applicant for the construction permit has made timely submittal of the information required to support the application as provided in § 2.101(a-1), until the proceeding for a permit to construct a facility on the site identified in the partial decision has been concluded,[3] unless the Commission, or Atomic Safety and Licensing Board, upon its own initiative or upon motion by a party to the proceeding, finds that there exists significant new information that substantially affects the earlier conclusions and reopens the hearing record on site suitability issues. Upon good cause shown, the Commission may extend the five year period during which a partial decision shall remain in effect for a reasonable period of time not to exceed one year.

Subpart G—Rules of General Applicability

56 FR 40664

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order pursuant to § 2.202, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3). The procedures applicable to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are set forth in Subpart J.

47 FR 4490

§ 2.700a Exceptions.

(a) Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

(b) This rule shall apply to proceedings in progress where hearings have already been requested or ordered as well as to future proceedings.

53FR43419

§ 2.701 Filing of documents.

(a) Documents shall be filed with the Commission in adjudications subject to this part either: (1) By delivery to the Public Document Room at 2120 L Street NW., Washington, D.C., or (2) by mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section.

29 FR 12829

(b) All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. The staff of the Commission shall be deemed to be a party.

27 FR 377

(c) Filing by mail or telegram will be deemed to be complete as of the time of deposit in the mail or with a telegraph company.

57 FR 4152

§ 2.702 Docket.

The Secretary shall maintain a docket for each proceeding subject to this part, commencing with the issuance of the initial notice of hearing, notice of consideration of issuance of facility operating license or other proposed action specified in § 2.105, or order. The Secretary shall maintain all files and records, including the transcripts of testimony and exhibits and all papers, correspondence, decisions and orders filed or issued.

27 FR 377

§ 2.703 Notice of hearing.

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing, and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) The time within which an answer shall be filed.

(b) The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding, and the public interest.

31 FR 16309

§ 2.704 Designation of presiding officer, disqualification, unavailability.

(a) The Commission may provide in the notice of hearing that one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, shall preside.

[3] The partial decision on site suitability issues shall be incorporated in the decision regarding issuance of a construction permit to the extent that it serves as a basis for the decision on a specific site issue(s).

If the Commission does not so provide, the Chairman of the Atomic Safety and Licensing Board Panel will issue an order designating an atomic safety and licensing board appointed pursuant to section 191 of the Atomic Energy Act of 1954, as amended, or, if the Commission has not provided for the hearing to be conducted by an atomic safety and licensing board, the Chief Administrative Law Judge will issue an order designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code. 35 FR 11459

(b) If a designated presiding officer or a designated member of an atomic safety and licensing board deems himself disqualified to preside or to participate as a board member in the hearing, he shall withdraw by notice on the record and shall notify the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, of his withdrawal. 40 FR 51995

(c) If a party deems the presiding officer or a designated member of an atomic safety and licensing board to be disqualified, he may move that the presiding officer or the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred to the Commission 56FR29403

which will determine the sufficiency of the grounds alleged.

(d) If a presiding officer or a designated member of an atomic safety and licensing board becomes unavailable during the course of a hearing, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, will designate another presiding officer or atomic safety and licensing board member. If he becomes unavailable after the hearing has been concluded: 40 FR 51995

(1)(i) The Commission may designate another presiding officer to make the decision; or

(ii) The Chairman of the Atomic Safety and Licensing Board Panel or the Commission, as appropriate, may designate another atomic safety and licensing board member to participate in the decision;

(2) The Commission may direct that the record be certified to it for decision; or 56FR29403

(3) The Commission may designate another presiding officer.

(e) In the event of substitution of a presiding officer or a designated member of an atomic safety and licensing board for the one originally designated, any motion predicated upon the substitution shall be made within five (5) days thereafter. 40 FR 51995

§ 2.705 Answer. 27 FR 377

(a) Within twenty (20) days after service of the notice of hearing, or such other time as may be specified in the notice of hearing, a party may file an answer which shall concisely state: (1) The nature of his defense or other position; (2) the items of the specification of issues he controverts and those he does not controvert; and (3) whether he proposes to appear and present evidence.

(b) If facts are alleged in the specification of issues, the answer shall admit or deny specifically each material allegation of fact; or, where the party has no knowledge or information sufficient to form a belief, the answer may so state and the statement shall have the effect of a denial. Material allegations of fact not denied shall be deemed to be admitted. Matters alleged as affirmative defenses or positions shall be separately stated and identified and, in the absence of a reply, shall be deemed to be controverted.

(c) If a party does not oppose an order or proposed action embodied in or accompanying the notice of hearing, or does not wish to appear and present evidence at the hearing, the answer shall so state. In lieu of appearing at the hearing, a party may request leave to file a statement under oath or affirmation of reasons why the proposed order or action should not be issued or should differ from that proposed. Such a statement, if accepted, will be accorded whatever weight is deemed proper.

§ 2.706 Reply. 43 FR 17798

A party may file a reply to an answer within ten (10) days after it is served.

§ 2.707 Default. 37 FR 15127

On failure of a party to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading; to appear at a hearing or prehearing conference, to comply with any prehearing order entered pursuant to § 2.751a or § 2.752, or to comply with any discovery order entered by the presiding officer pursuant to § 2.740, the Commission or the presiding officer[4] may make such orders in regard to the failure as are just, including, among others, the following:

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate; or

(b) Proceed without further notice to take proof on the issues specified.

[4] When a reference is made to the Commission or the presiding officer in this subpart and a presiding officer has been designated, the specified action will be taken by the presiding officer, unless otherwise provided.

§ 2.708 Formal requirements for documents. 27 FR 377

(a) Each document filed in an adjudication subject to this part to which a docket number has been assigned shall bear the docket number and title of the proceeding.

(b) Each document shall be bound on the left side and typewritten, printed or otherwise reproduced in permanent form on good unglazed paper of standard letterhead size. Each page shall begin not less than one and one-quarter inches from the top, with side and bottom margins of not less than one and one-quarter inches. Text shall be double-spaced, except that quotations may be single-spaced and indented. The requirements of this paragraph do not apply to original documents or admissible copies offered as exhibits, or to specially prepared exhibits.

(c) The original of each document shall be signed in ink by the party or his authorized representative, or by an attorney having authority with respect to it. The capacity of the person signing, his address, and the date shall be stated. The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information, and belief the statements made in it are true, and that it is not interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken. 28 FR 10151

(d) Except as otherwise provided by this part or by order, a pleading (or other document) other than correspondence shall be filed in an original and two conformed copies. 45 FR 49535

(e) The first document filed by any person in a proceeding shall designate the name and address of a person on whom service may be made. 27 FR 377

(f) A document filed by telegraph need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section. 39 FR 35332

§ 2.709 Acceptance for filing. 27 FR 377

A document which fails to conform to the requirements of § 2.708 may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any matter so tendered but not accepted for filing shall not be entered on the Commission's docket.

46 FR 58279

§ 2.710 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added when a document is served by express mail.

37 FR 15127

§ 2.711 Extension and reduction of time limits.

(a) Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer, or by stipulation approved by the Commission or the presiding officer.

(b) In any instance in which this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for that action.

28FR10151

§ 2.712 Service of papers, methods, proof.

(a) *Service of papers by the Commission.* Except for subpoenas, the Commission will serve all orders, decisions, notices, and other papers issued by it upon all parties.

31 FR 4389

(b) *Who may be served.* Any paper required to be served upon a party shall be served upon him or upon the representative designated by him or by law to receive service of papers. When a party has appeared by attorney, service must be made upon the attorney of record.

46 FR 18279

(c) *How Service may be made.* Service may be made by personal delivery, by first class, certified or registered mail including air mail, by telegraph, or as otherwise authorized by law. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer may require service by express mail upon some or all parties and the presiding officer.

54 FR 26730

(d) *Service on the Secretary.* (1) All pleadings must be served on the Secretary of the Commission in the same or equivalent manner, *i.e.*, telefax, express mail, personal delivery, or courier, that they are served upon the adjudicatory tribunals and the parties to the proceedings so that the Secretary will receive the pleading at approximately the same time that it is received by the tribunal to which the pleading is directed.

(2) When pleadings are personally delivered to tribunals while they are conducting proceedings outside the Washington, DC area, service on the Secretary may be accomplished by overnight mail.

(3) Service of pre-filed testimony and demonstrative evidence (*e.g.*, maps and other physical exhibits) on the Secretary may be made by first-class mail in all cases.

(4) The addresses for the Secretary are:

54 FR 29008

(i) First class mail: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

(ii) Express mail: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Docketing and Service Branch.

(iii) Telecopier: (301) 492-1672; (301) 492-0275; and (301) 492-1977 (verification).

54 FR 26730

(e) *When service complete.* Service upon a party is complete:

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By telegraph, when deposited with a telegraph company, properly addressed and with charges prepaid;

(3) By mail, on deposit in the United States mail, properly stamped and addressed; or

(4) When service cannot be effected in a manner provided by paragraphs (d)(1) to (3) inclusive of this section in any other manner authorized by law.

(f) *Proof of service.* Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, and may be made by:

(1) Written acknowledgment of the party served or his counsel;

(2) The certificate of counsel if he has made the service; or

(3) The affidavit of the person making the service.

(g) *Free copying and service.* Except in an antitrust proceeding, in any adjudicatory proceeding on an application for a license or an amendment thereto, the Commission, upon request by a party other than the applicant, will copy and serve without cost to that party that party's testimony (including attachments), proposed findings of fact and conclusions of law, and responses to discovery requests. These documents should be filed with Docketing and Service not less than five days before they are due to be submitted to an adjudicatory board, unless the presiding officer provides otherwise.[1]*

56 FR 29403

§ 2.713 Appearance and practice before the Commission in adjudicatory proceedings.

(a) Standards of Practice. In the exercise of their functions under this subpart, the Commission, the Atomic Safety and Licensing Boards, and Administrative Law Judges function in a quasijudicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) Representation. A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law provided the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number; the name and address of the person on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) Reprimand, Censure or Suspension from the Proceeding.

(1) A presiding officer, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

(2) A reprimand, a censure or a suspension which is ordered to run for one day or less shall be ordered with grounds stated on the record of the proceeding and shall advise the person disciplined of the right to appeal pursuant to paragraph (c)(3) of this section. A suspension which is ordered for a longer period shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal and to

*[1] This paragraph is suspended until further action of the Commission. 46 FR 13681

request a stay pursuant to paragraphs (c)(3) and (c)(4) of this section. A proceeding may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Commission, as appropriate. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Commission shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Commission may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Commission, provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, the Commission, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Commission.

(4) A suspension exceeding 1 day shall not be effective for 72 hours from the date the suspension order is issued. Within this time a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension shall be stayed until the reviewing tribunal rules on the motion. The stay request shall be in writing and contain the information specified in § 2.788(b)(1), (2), and (3) of this part. The Commission shall rule on the stay request within 10 days after the filing of the motion. The Commission shall consider the factors specified in § 2.788(e) (1) and (2) of this part is determining whether to grant or deny a stay application.

56 FR 29403

§ 2.714 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102(d)(3). Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

54 FR 33168

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

43 FR 17798

(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph(d)(1)of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

54FR33168

(3) Any person who has filed a petition for leave to intervene or who has been admitted as a party pursuant to this section may amend his petition for leave to intervene. A petition may be amended without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in paragraph (a)(1) of this section. Such an amended petition for leave to intervene must satisfy the requirements of this paragraph (a) of this section pertaining to specificity.

43 FR 17798

(b)(1) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or if no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

54 FR 33168

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

(c) Any party to a proceeding may file an answer to a petition for leave to intervene or a supplement thereto within ten (10) days after service of the petition or supplement, with particular attention

to the factors set forth in paragraph (d)(1) of this section. The staff may file such an answer within fifteen (15) days after service of the petition or supplement.

(d) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on petitions to intervene and/or requests for hearing shall permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by the State in which such area is located and by any affected Indian Tribe as defined in part 60 of this chapter. In all other circumstances, such ruling body or officer shall, in ruling on--

(1) A petition for leave to intervene or a request for a hearing, consider the following factors, among other things:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

(2) The admissibility of a contention, refuse to admit a contention if:

(i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

(e) If the Commission or the presiding officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the Commission or presiding officer.

(f) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, presiding officer or the designated atomic safety and licensing board may direct in the interests of: (1) Restricting irrelevant, duplicative, or repetitive evidence and argument, (2) having common interests represented by a spokesman, and (3) retaining authority to determine priorities and control the compass of the hearing.

(g) In any case in which, after consideration of the factors set forth in paragraph (d)(1) of this section, the Commission or the presiding officer finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention shall limit his participation accordingly.

(h) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (f) of this section.

(i) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

(j) The provisions of this section do not apply to license applications docketed under subpart J of this part.

54 FR 33168

§ 2.714a Petitions for review of certain rulings on petitions for leave to intervene and/or requests for hearing.

(a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal. No other appeals from rulings on petitions and/or requests for hearing shall be allowed.

56 FR 29403

(b) An order wholly denying a petition for leave to intervene and/or request for a hearing is appealable by the petitioner on the question whether the petition and/or hearing request should have been granted in whole or in part.

(c) An order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied.

37 FR 28710

§ 2.715 Participation by a person not a party.

(a) A person who is not a party may, in the discretion of the presiding officer, be permitted to make a limited appearance by making oral or written statement of his position on the issues at any session of the hearing or any prehearing converence within such limits and on such conditions as may be fixed by the presiding officer, but he may not otherwise participate in the proceeding.

43 FR 17798

(b) The Secretary will give notice of a hearing to any person who requests it prior to the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. When a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

28 FR 10151

(c) The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue. Such participants may also file proposed findings and exceptions pursuant to §§ 2.754 and 2.762 and petitions for review by the Commission pursuant to § 2.786. The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.

43 FR 17798

(d) If a matter is taken up by the Commission pursuant to § 2.786 or sua sponte, a person who is not a party may, in the discretion of the Commission, respectively, be permitted to file a brief "amicus curiae". A person who is not a party and desires to file a brief must submit a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Except as otherwise provided by the Commission such brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before or the Commission will be granted at the discretion of the Commission.

56 FR 29403

§ 2.715a Consolidation of parties in construction permit or operating license proceedings.

On motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding for the issuance of a construction permit or an operating license for a production or utilization facility who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

37 FR 15127

§ 2.716 Consolidation of proceedings.

On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings, or may hold joint hearings with interested States and/or other federal agencies on matters of concurrent jurisdiction, if it is found that such action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

43 FR 17798

§ 2.717 Commencement and termination of jurisdiction of presiding officer.

(a) Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Administrative Law Judge has such jurisdiction or, if he is unavailable, another administrative law judge has such jurisdiction. 38 FR 2330

A proceeding is deemed to commence when a notice of hearing or a notice of proposed action pursuant to § 2.105 is issued. 37 FR 28710

When a notice of hearing provides that the presiding officer is to be an administrative law judge, the Chief Administrative Law Judge will designate by order the administrative law judge who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest. 31 FR 12774

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding. 28 FR 10151

§ 2.718 Power of presiding officer.

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the powers to: 27 FR 377

(a) Administer oaths and affirmations.

(b) Issue subpoenas authorized by law.

(c) Rule on offers of proof, and receive evidence.

(d) Order depositions to be taken.

(e) Regulate the course of the hearing and the conduct of the participants.

(f) Dispose of procedural requests or similar matters.

(g) Examine witnesses.

(h) Hold conferences before or during the hearing for settlement, simplification of the issues, or any other proper purpose.

(i) Certify questions to the Commission for its determination, either in his discretion or on direction of the Commission. 27 FR 377

(j) Reopen a proceeding for the reception of further evidence at any time prior to initial decision.

(k) Appoint special assistants from the Atomic Safety and Licensing Board Panel pursuant to § 2.722; 45 FR 62027

(l) Issue initial decisions; and

(m) Take any other action consistent with the Act, this chapter, and sections 551–558 of title 5 of the United States Code.

§ 2.719 [Removed] 53 FR 10360

§ 2.720 Subpoenas. 31 FR 16309

(a) On application by any party, the designated presiding officer or, if he is not available, the Chairman of the Atomic Safety and Licensing Board Panel, the Chief Administrative Law Judge† or other designated officer will issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence. The officer to whom application is made may require a showing of general relevance of the testimony or evidence sought, and may withhold the subpoena if such a showing is not made, but he shall not attempt to determine the admissibility of evidence.

(b) Every subpoena will bear the name of the Commission, the name and office of the issuing officer and the title of the hearing, and will command the person to whom it is directed to attend and give testimony or produce specified documents or other things at a designated time and place. The subpoena will also advise of the quashing procedure provided in paragraph (f) of this section.

(c) Unless the service of a subpoena is acknowledged on its face by the witness or is served by an officer or employee of the Commission, it shall be served by a person who is not a party to the hearing and is not less than eighteen (18) years of age. Service of a subpoena shall be made by delivery of a copy of the subpoena to the person named in it and tendering him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commission, fees and mileage need not be tendered, and the subpoena may be served by registered mail. 27 FR 377

(d) Witnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to witnesses in the district courts of the United States.

(e) The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgement of service with the officer before whom the witness is required to testify or produce evidence or with the Secretary. Failure to make proof of service shall not affect the validity of the service.

(f) On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued the presiding officer or, if he is unavailable, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. 27 FR 377

(g) On application and for good cause shown, the Commission will seek judicial enforcement of a subpoena issued to a party and which has not been quashed.

(h)(1) The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in the custody thereof. 35 FR 19500

(2)(i) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commis- 40 FR 2973

sioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: *Provided*, That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

(ii) In addition, a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the staff answer the interrogatories.

(iii) No deposition of a particular named NRC employee or answer to interrogatories by NRC personnel pursuant to paragraphs (h) (2) (i) and (ii) of this section shall be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, pursuant to § 2.751a, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

(iv) The provisions of § 2.740(c) and (e) shall apply to interrogatories served pursuant to this subparagraph.

(3) Records or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing pursuant to §§ 2.744 and 2.790.

§ 2.721 Atomic safety and licensing boards.

(a) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may from time to time establish one or more atomic safety and licensing boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission or the Chairman of the Atomic Safety and Licensing Board Panel deems appropriate to the issues to be decided, to preside in such proceedings for granting, suspending revoking, or amending licenses or authorizations as the Commission may designate, and to perform such other adjudicatory functions as the Commission deems appropriate. The members of an atomic safety and licensing board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission.

(b) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may designate an alternate qualified in the conduct of administrative proceedings, or an alternate having technical or other qualifications, or both, for an atomic safety and licensing board established pursuant to paragraph (a) of this section. If a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may constitute the alternate qualified in the conduct of administrative proceedings, or the alternate having technical or other qualifications, as appropriate, as a member of the board by notifying the alternate who will, as of the date of such notification, serve as member of the board. In the event that an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may appoint a member of the Atomic Safety and Licensing Board Panel who is qualified in the conduct of administrative proceedings or a member having technical or other qualifications, as appropriate, as a member of the atomic safety and licensing board by notifying the appointee who will, as of the date of such notification, serve as a member of the board.

(c) An atomic safety and licensing board shall have the duties and may exercise the powers of a presiding officer as granted by § 2.718 and otherwise in this part. At any time when such a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Law Judge* may be exercised with respect to such a proceeding by the chairman of the board having jurisdiction over it.

Two members of an atomic safety and licensing board constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.722 Special assistants to the presiding officer.

(a) In consultation with the Panel Chairman, the presiding officer may, at his discretion, appoint from the Atomic Safety and Licensing Board Panel established by the Commission, personnel to assist the presiding officer in taking evidence and preparing a suitable record for review. Such appointment may occur at any appropriate time during the proceeding but shall, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.704. Such special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. Such interrogators shall be required to study the written testimony and sit with the presiding officer to hear the presentation and cross-examination by the parties of all witnesses on the issues of the interrogators' expertise, taking a leading role in examining such witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, Special Masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special Masters may rule on evidentiary issues brought before them, in accordance with §§ 2.743 and 2.757. Appeals from such rulings may be taken to the presiding officer in accordance with procedures which shall be established in the presiding officer's order appointing the Special Master. Special Masters' reports are advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master; or

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer shall retain final authority on the issue for which the alternate member was designated.

(4) Discovery Master to rule on the matters specified in § 2.1018(a)(2) of this part.

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of Members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues which the presiding officer might otherwise have difficulty in quickly grasping. Such informal briefings shall take place prior to the hearing on the subject involved and shall supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in § 2.704.

MOTIONS

§ 2.730 Motions.

39 FR 24219

(a) *Presentation and disposition.* All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer. All written motions shall be filed with the Secretary, and served on all parties to the proceeding.

(b) *Form and content.* Unless made orally on the record during a hearing, or the presiding officer directs otherwise, a motion shall be in writing, shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.

43 FR 17798

(c) *Answers to motions.* Within ten (10) days after service of a written motion, or such other period as the Secretary or the Assistant Secretary or presiding officer may prescribe, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. However, the staff may file such an answer within fifteen (15) days after service of a written motion. The moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary.

27 FR 377

(d) *Oral arguments; briefs.* No oral argument will be heard on a motion unless the presiding officer or the Commission directs otherwise. A written brief may be filed with a motion or an answer to a motion, stating the arguments and authorities relied on.

46 FR 30328

(e) The Board may dispose of written motions either by written order or by ruling orally during the course of a prehearing conference or hearing. The Board should ensure that parties not present for the oral ruling are notified promptly of the order.

27 FR 377

(f) *Interlocutory appeals to the Commission.* No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session.

28 FR 10151

(g) *Effect of filing a motion or certification of question to the Commission.* Unless otherwise ordered, neither the filing of a motion nor the certification of a question to the Commission shall stay the proceeding or extend the time for the performance of any act.

46 FR 58279

(h) Where the motion in question is a motion to compel discovery under § 2.720(h)(2) or § 2.740(f), parties may file answers to the motion pursuant to paragraph (c) of this section. The presiding officer in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone the presiding officer shall issue a written order on the motion which summarizes the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter which is effective at the time of such ruling, provided that the terms of the ruling are incorporated in the subsequent written order.

§ 2.731 Order of procedure.

27 FR 377

The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.732 Burden of proof.

Unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof.

§ 2.733 Examination by experts.

37 FR 15127

A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and crossexamination of expert witnesses. The presiding officer may permit such individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, where it would serve the purpose of furthering the conduct of the proceeding, upon finding (a) that the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

§ 2.734 Motions to Reopen.

51 FR 19535

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

51 FR 23523

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

51 FR 19535

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.714(a)(1)(i–v).

DEPOSITIONS AND WRITTEN INTERROGATORIES; DISCOVERY; ADMISSION; EVIDENCE

§ 2.740 General provisions governing discovery.

37 FR 15127

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written interrogatories (§ 2.740a); written interrogatories (§ 2.740b); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§ 2.741); and requests for admission (§ 2.742).

37 FR 15127

(b) *Scope of discovery.* Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

54 FR 33168

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Where any book, document or other tangible thing sought is reasonably available from another source, such as from the Commission's Public Document Room or local Public Document Room, a sufficient response to an interrogatory involving such materials would be the location, the title and a page reference to the relevant book, document or tangible thing. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing

conference. In such a proceeding, no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 54 FR 33168

(2) *Trial preparation materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding. 37 FR 15127

(3) While interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party, such interrogatories may not be addressed to, or be construed to require: (A) Reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position; or (B) Performance of additional research or analytical work beyond that which is needed to support the party's position on any particular matter. 54 FR 33168

(c) *Protective order.* Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) *Sequence and timing of discovery.* Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows: 37 FR 15127

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or agreement of the parties.

(f) *Motion to compel discovery.* (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request for an order compelling a response or inspection in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section. 43 FR 17798

(2) In ruling on a motion made pursuant to this section, the presiding officer may make such a protective order as he is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the regulatory staff pursuant to § 2.720 (h) (2) or production of NRC documents pursuant to § 2.744 or § 2.790, except for paragraphs (c) and (e) of this section. 37 FR 15127

§ 2.740a Depositions upon oral examination and upon written interrogatories.

(a) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if, the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) [Deleted 37 FR 15127.]

(c) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission. 27 FR 377

37 FR 15127

(d) The deponent shall be sworn or shall affirm before any questions are put to him. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevance of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

27 FR 377

(e) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

43 FR 17798

(f) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers shall be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

27 FR 377

(g) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition.

(h) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(i) The witness may be accompanied, represented, and advised by legal counsel.

37 FR 15127

(j) The provisions of paragraphs (a) through (i) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.720(h).

§ 2.740b Interrogatories to parties.

(a) Any party may serve upon any other party (other than the staff)[6] written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission and shall be served on the presiding officer and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 14 days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.740a(g)).

§ 2.741 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Request for discovery.* Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of § 2.740 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.740.

(b) *Service.* The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in § 2.740, the request may be served after the proceeding is set for hearing.

(c) *Contents.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) *Response.* The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

(e) *NRC records and documents.* The provisions of paragraphs (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of such records or documents is subject to the provisions of §§ 2.744 and 2.790.

§ 2.742 Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document shall be delivered with the request unless a copy has already been furnished.

27 FR 377

(b) Each requested admission shall be deemed made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the re-

[6] Interrogatories addressed to the staff are subject to § 2.720(h)(2)(ii).

quest is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated. 27 FR 377

(c) Admissions obtained pursuant to the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 2.743 Evidence.

(a) *General.* Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and to conduct, in accordance with an approved cross-examination plan that contains the information specified in paragraph (b)(2) of this section if so directed by the presiding officer, such cross-examination as may be required for full and true disclosure of the facts.

(b)(1) *Testimony and cross-examination.* The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its proposed written testimony on each other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity to examine it. Written testimony must be incorporated into the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit. 54 FR 33168

(2) The presiding officer may require a party seeking an opportunity to cross-examine to request permission to do so in accordance with a schedule established by the presiding officer. A request to conduct cross-examination shall be accompanied by a cross-examination plan that contains the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination. The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(3) Paragraphs (b)(1) and (2) of this section do not apply to proceedings under subpart B of this part for modification, suspension, or revocation of a license or to proceedings for imposition of a civil penalty. 54FR33168

(c) *Admissibility.* Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(d) *Objections.* An objection to evidence shall briefly state the grounds of objection. The transcript shall include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on the record. 27 FR 377

(e) *Offer of proof.* An offer of proof made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony shall consist of a statement of the substance of the proffered evidence. If the excluded evidence is written, a copy shall be marked for identification. Rejected exhibits, adequately marked for identification, shall be retained in the record.

(f) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence. Exhibits in the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are governed by § 2.1013 of this part. 54 FR 14925

(g) *Proceedings involving applications.* In any proceeding involving an application, there shall be offered in evidence by the staff any report submitted by the ACRS in the proceeding in compliance with section 182b. of the Act, any safety evaluation prepared by the staff and any environmental impact statement prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee in the proceeding pursuant to Subpart A of Part 51 of this chapter. 49 FR 9352

(h) *Official record.* An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody. 27 FR 377

(i) *Official notice.* (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact. 37 FR 15127

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision clearly and concisely setting forth the information relied upon to show the contrary. 48 FR 52282

§ 2.744 Production of NRC records and documents.

(a) A request for the production of an NRC record or document not available pursuant to § 2.790 by a party to an initial licensing proceeding may be served on the Executive Director for Operations, without leave of the Commission or the presiding officer. The request shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(b) If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party. 37FR15127

(c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance with § 2.730 (a) through (d). The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine:

(1) The relevancy of that record or document;

(2) Whether the document is exempt from disclosure under § 2.790;

(3) Whether the disclosure is necessary to a proper decision in the proceeding;

(4) Whether the document or the information therein is reasonably obtainable from another source.

(d) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under § 2.790 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations, to produce the document. 40 FR 2973

(e) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.790, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating pursuant to § 2.715(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act. 46 FR 51718

(f) A ruling by the presiding officer, or the Commission for the production of a record or document will specify the time, place, and manner of production. 56 FR 29403

(g) No request pursuant to this section shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown. 40 FR 2973

(h) The provisions of § 2.740 (c) and (e) shall apply to production of NRC records and documents pursuant to this section. 37 FR 15127

SUMMARY DISPOSITION ON PLEADINGS

§ 2.749 Authority of presiding officer to dispose of certain issues on the pleadings.

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The presiding officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the presiding officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion and thereby extend the proceeding. 54 FR 33168

(b) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The presiding officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered. 37 FR 15127

(c) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record. 37 FR 15127

(d) The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction permit for a production or utilization facility, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall be issued. 37 FR 15127

HEARINGS

§ 2.750 Official reporter; transcript.

(a) A hearing will be reported under the supervision of the presiding officer, stenographically or by other means, by an official reporter who may be designated from time to time by the Commission or may be a regular employee of the Commission. The transcript prepared by the reporter shall be the sole official transcript of the proceeding. Except as limited pursuant to Section 181 of the Act 27 FR 377

or order of the Commission, the transcript will be open for inspection at the Public Document Room. Copies of transcripts are available to parties and to the public from the official reporter on payment of the charges fixed therefor.

(b) Transcript corrections. Corrections of the official transcript may be made only in the manner provided by this paragraph. Corrections ordered or approved by the presiding officer shall be included in the record as an appendix, and when so incorporated the Secretary shall make the necessary physical corrections in the official transcript so that it will incorporate the changes ordered. In making corrections there shall be no substitution of pages but, to the extent practicable, corrections shall be made by running a line through the matter to be changed without obliteration and writing the matter as changed immediately above. Where the correction consists of an insertion, it shall be added by rider or interlineation as near as possible to the text which is intended to precede and follow it.

27 FR 377

(c) Free transcript. Except in an antitrust proceeding, in any adjudicatory proceeding on an application for a license or an amendment thereto, the presiding officer may arrange for provision of one free transcript to a party, other than the applicant, upon request by that party. The transcript will be made available to a party at the same time and location as it is made available to the NRC staff. If a transcript is mailed to the staff, it will also be mailed to the requesting party. A presiding officer has the discretion to control the distribution of transcripts to parties. [1*]

45 FR 49535

§ 2.751 Hearings to be public.

Except as may be requested pursuant to Section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

27 FR 377

* [1]This paragraph is suspended until further action of the Commission. 46 FR 13681

§ 2.751a Special prehearing conference in construction permit and operating license proceedings.

37 FR 15127

(a) In any proceeding involving an application for a construction permit or an operating license for a production or utilization facility, the Commission or the presiding officer will direct the parties and any petitioners for intervention, or their counsel, to appear at a specified time and place, within ninety (90) days after the notice of hearing is published, or such other time as the Commission or the presiding officer may deem appropriate, for a conference[7] to:

43 FR 17798

(1) Permit identification of the key issues in the proceeding;

(2) Take any steps necessary for further identification of the issues;

(3) Consider all intervention petitions to allow the presiding officer to make such preliminary or final determination as to the parties to the proceeding, as may be appropriate; and

(4) Establish a schedule for further actions in the proceeding.

(b) The presiding officer may order any further informal conferences among the parties, including telephone conferences, to the extent that he considers that such a conference would expedite the proceeding.

(c) A prehearing conference held pursuant to this section may be stenographically reported.

37 FR 15127

(d) The presiding officer shall enter an order which recites the action taken at the conference, the schedule for further actions in the proceeding, any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties in the proceeding, and provides for the submission of status reports on discovery. The order shall be served upon all parties to the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order, except that the staff may file objections to such order within ten (10) days after service. Parties may not file replies to the objections unless the Board so directs. The filing of objections shall not stay the decision unless the presiding officer so orders. The board may revise the order in consideration of the objections presented and, as permitted by § 2.718(i), may certify for determination to the Commission such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

56 FR 29403

§ 2.752 Prehearing conference.

(a) The Commission or the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter or a testing facility, shall direct the parties or their counsel to appear at a specified time and place for a conference to consider:

(1) Simplification, clarification, and specification of the issues;

(2) The necessity or desirability of amending the pleadings;

(3) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

(4) Identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(5) The setting of a hearing schedule; and

(6) Such other matters as may aid in the orderly disposition of the proceeding.

40 FR 8774

A prehearing conference held under this section in a proceeding involving a construction permit or operating license shall be held within sixty (60) days after discovery has been completed,[8] or such other time as the Commission or the presiding officer may specify.

[7]This conference may be omitted in proceedings other than contested proceedings.

[8]Discovery, as used in this section, does not include the production of the ACRS report, the safety evaluation prepared by the regulatory staff, or any detailed statement on environmental considerations prepared by the Director of Regulation or his designee in the proceeding pursuant to Appendix D of Part 50 of this chapter.

27 FR 7

(b) Prehearing conferences may be stenographically reported.

58 FR 29403

(c) The presiding officer shall enter an order which recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and which limits the issues or defines the matters in controversy to be determined in the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order, except that the regulatory staff may file objections to such order within ten (10) days after service. Parties may not file replies to the objections unless the board so directs. The filing of objections shall not stay the decision unless the presiding officer so orders. The board may revise the order in the light of the objections presented and, as permitted by § 2.718(i) may certify for determination to the Commission

such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

37 FR 15127

§ 2.753 Stipulations.

Apart from any stipulations made during or as a result of a prehearing conference, the parties may stipulate in writing at any stage of the proceeding or orally during the hearing, any relevant fact or the contents or authenticity of any document. Such a stipulation may be received in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

46 FR 30328

§ 2.754 Proposed findings and conclusions.

(a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law, briefs and a proposed form or order of decision within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:

(1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law and briefs, and a proposed form of order or decision.

(2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed. However, the staff may file such proposed findings, conclusions of law and briefs within fifty (50) days after the record is closed.

(3) A party who has the burden of proof may reply within five (5) days after filing of proposed findings and conclusions of law and briefs by other parties.

43 FR 17798

(b) Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

54 FR 33168

(c) Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law must be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. An intervenor's proposed findings of fact and conclusions of law must be confined to issues which that party placed in controversy or sought to place in controversy in the proceeding.

27 FR 377

§ 2.755 Oral argument before presiding officer.

When, in the opinion of the presiding officer, time permits and the nature of the proceeding and the public interest warrant, he may allow and fix a time for the presentation of oral argument. He will impose appropriate limits of time on the argument. The transcript of the argument shall be a part of the record.

35 FR 11459

§ 2.756 Informal procedures.

The Commission encourages the use of informal procedures consistent with the Act, sections 551-558 of title 5 of the United States Code, and the regulations in this chapter, and with the orderly conduct of the proceeding and the necessity for preserving a suitable record for review.

§ 2.757 Authority of presiding officer to regulate procedure in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer may:

(a) Limit the number of witnesses whose testimony may be cumulative;

(b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;

(c) Take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and

(d) Impose such time limitations on arguments as he determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

37 FR 15127

§ 2.758 Consideration of Commission rules and regulations in adjudicatory proceedings.

56 FR 64943

(a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof, issued in its program for the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial or renewal licensing subject to this subpart.

(b)(1) A party to an adjudicatory proceeding involving initial licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition for waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific subject matter of the proceeding as to which the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and must set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counteraffidavit or otherwise.

(2) A party to an adjudicatory proceeding involving issuance of a renewed license under 10 CFR part 54 may petition that the requirements applicable to renewed licenses under this title should be waived or an exception made for the particular proceeding. The sole grounds for the petition must be one or both of the following:

(i) With respect to the subject matter of the particular proceeding, special circumstances pertaining to age-related degradation unique to license renewal (as defined in 10 CFR part 54) or environmental protection are such that the application of specific requirements of 10 CFR part 54 or 10 CFR part 51 in question would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific section (or portion thereof) of either 10 CFR part 54 addressing age-related degradation or 10 CFR part 51 for which a waiver or exception is sought, the subject matter of the proceeding as to which the application of the identified requirement would not serve the purposes for which the rule or regulation was adopted, and must set forth with particularity the special circumstances alleged to justify the waiver or exception requested.

(ii) Because of circumstances unique to the requested term that result in:

(A) Operation that is inimical to the public health and safety or common defense and security or

(B) Noncompliance with the current licensing basis during the period of extended operation, requirements in addition to those in the plant's current licensing basis or otherwise needed for compliance with 10 CFR 54.29 must be imposed to provide compliance with the current licensing basis or to ensure that operation is not inimical to the public health and safety or common defense and security during the period of extended operation.

The petition must be accompanied by an affidavit that identifies the circumstances, explains how they will result either in operation that is inimical to public health and safety or common defense and security or noncompliance with the current licensing basis, describes what additional requirements must be imposed, and explains why the requirements are necessary for compliance with the current licensing basis or to ensure that operation will not be inimical to the public health and safety or common defense and security during the period of extended operation.

(3) Any other party may file a response to a petition submitted pursuant to paragraphs (b) (1) or (2) of this section by counteraffidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission[7] for determination the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial licensing proceeding may file a petition for rule making pursuant to § 2.802.

[7]The matter will be certified to the Commission notwithstanding the provisions of § 2.785.

§ 2.759 Settlement in initial licensing proceedings.

The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

Initial Decision and Commission Review

§ 2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review sua sponte or the decision is subject to the provisions of § 2.764.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may—

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration pursuant to § 2.771; or

27 FR 377

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decision;

31 FR 4339

(3) The appropriate ruling, order or denial of relief with the effective date;

56 FR 29403

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

44 FR 67088

§ 2.760a Initial decision in contested proceedings on applications for facility operating licenses.

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the license.

27 FR 377

§ 2.761 Expedited decisional procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

56 FR 29403

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

27 FR 377

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered pursuant to paragraph (a) of this section shall be subject to review by the Commission on its own motion within thirty (30) days after its date.

28 FR 10151

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter when:

56 FR 29403

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

27 FR 377

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

35 FR 5317

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization.

49 FR 9352

§ 2.761a Separate hearings and decisions.

In a proceeding on an application for a construction permit for a utilization facility which is subject to § 51.20(b) of this chapter, and is of the type specified in §§ 51.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility, the presiding officer shall unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by § 50.10(e)(2)(ii) and Subpart A of Part 51 of this chapter as soon as practicable after issuance of the staff of its final environmental impact statement, but no later than thirty (30) days after issuance of such statement, and complete such a hearing and issue an initial decision on such matters. Pehearing procedures regarding issues covered by Subpart A of Part 51 and § 51.10(e)(2)(ii) of this chapter, including any discovery and special prehearing conferences and prehearing conferences as provided in §§ 2.740, 2.740a, 2.740b, 2.741, 2.742, 2.751a, and 2.752, shall be scheduled accordingly. The provisions of §§ 2.754, 2.755, 2.760, 2.762, 2.763, and 2.764(a) shall apply to any proceeding conducted and any initial decision rendered in accordance with this section. Paragraph 2.764(b) shall not apply to any partial initial decision rendered in accordance with this section. This section shall not preclude separate hearings and decisions on other particular issues.

49 FR 9352

§ 2.762 [Removed] 56 FR 29403

§ 2.763 Oral argument.

In its discretion the Commission may allow oral argument upon the request of a party made in a petition for review or brief on review, or upon its own initiative.

§ 2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

56FR29403

(a) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to review thereof and further decision by the Commission upon petition for review filed by any party pursuant to § 2.786 or upon its own motion.

(b) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or granting of a petition for review, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

53 FR 31651

(c) An initial decision directing the issuance of an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) or monitored retrievable storage installation (MRS) under 10 CFR Part 72 shall become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards shall not issue an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) or a monitored retrievable storage installation (MRS) under 10 CFR Part 72 until expressly authorized to do so by the Commission.

(d) removed [54 FR 14925]

46 FR 47764

(e) *Nuclear power reactor construction permits*

56 FR 29403

(1) *Atomic Safety and Licensing Boards.* Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The Boards' decisions concerning construction permits shall not become effective until the Commission actions outlined in paragraph (e)(2) of this section have taken place.

47 FR 2286

(ii) In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. As provided in paragraph (e)(3) of this section, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any apects of the case which in their judgment, present issues on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directives, such policy issues shall not be the subject of discovery, examination, or cross-examination.

56 FR 29403

(2) Commission. Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Commission will seek to issue a decision on any stay motions that are timely filed. Such motions shall be filed as provided by 10 CFR 2.788. For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Commission action described herein. If no stay papers are filed, the Commission will, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and will seek to issue a decision on whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard. The initial decision will be considered stayed pending the Commission's decision. In deciding these stay questions, the Commission shall employ the procedures set out in 10 CFR 2.788.

(f) *Nuclear power reactor operating licenses—*

(1) *Atomic Safety and Licensing Boards.* Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. A Board's decision authorizing issuance of an operating license may not become effective insofar as it authorizes operating at greater than 5 percent of rated power until the Commission actions outlined below in paragraph (f)(2) of this section have taken place. Insofar as it authorizes operation up to 5 percent, the decision is effective and the Director shall issue the appropriate license in accordance with paragraph (b) of this section.

54 FR 7756

(ii) In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. As provided in paragraph (f)(2) of this section, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment, present issues on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

46 FR 28627

(2) *Commission.* (i) Reserving the power to step in at an earlier time, the Commission will, upon receipt of the Licensing Board decision authorizing issuance of an operating license, other than a decision authorizing only fuel loading and low power (up to 5 percent of rated power) testing, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission, insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

(ii) For operating license decisions other than those authorizing only fuel loading and low power testing consistent with the target schedule set forth below, the parties may file brief comments with the Commission pointing out matters which, in their view, pertain to the immediate effectiveness issue. To be considered, such comments must be received within 10 days of the Board decision. However, the Commission may dispense with comments by so advising the parties. No extensive stay shall be issued without giving the affected parties an opportunity to be heard.

(iii) The Commission intends to issue a stay decision within 30 days of receipt of the Licensing Board's decision. The Licensing Board's initial decision will be considered stayed pending the Commission's decision insofar as it may authorize operations other than fuel loading and low power (up to 5 percent of rated power) testing.

46 FR 47764

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

56 FR 29403

(g) The Commission's effectiveness determination is entirely without prejudice to proceedings under § 2.786 or § 2.788.

§ 2.765 Immediate effectiveness of initial decision directing issuance or amendment of licenses under Part 61 of this chapter.

An initial decision directing the issuance of a license under Part 61 of this chapter (relating to land disposal of radioactive waste) or any amendment to such a license authorizing actions which may significantly affect the health and safety of the public, will become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards may not issue a license under Part 61 of this chapter, or any amendment to such a license which may significantly affect the health and safety of the public, until expressly authorized to do so by the Commission.

47 FR 57446

FINAL DECISION

56 FR 29403

§ 2.770 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

27 FR 377

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

48 FR 52282

(3) The ruling on each material issue; and

27 FR 377

(4) The appropriate ruling, order, or denial of relief, with the effective date.

56 FR 29403

§ 2.771 Petition for reconsideration.

(a) A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision.

42 FR 2214

(b) The petition for reconsideration shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the petition, and the relief sought. Within ten (10) days after a petition for reconsideration has been filed, any other party may file an answer in opposition to or in support of the petition. However, the staff may file such an answer within twelve (12) days after a petition for reconsideration has been filed.

27 FR 377

(c) Neither the filing nor the granting of the petition shall stay the decision unless the Commission orders otherwise.

39 FR 24219

§ 2.772 Authority of the Secretary to rule on procedural matters.

When briefs, motions or other papers listed herein are submitted to the Commission itself, as opposed to officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary are authorized to:

(a) Prescribe schedules for the filing of briefs, motions, or other pleadings, where such schedules may differ from those elsewhere prescribed in these rules or where these rules do not prescribe a schedule;

39 FR 24219

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the Commission later than the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule, or regulation of the Commission unless good cause is shown for the late filing;

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission;

43 FR 22345

(e) Extend the time for the Commission to rule on a petition for review under 10 CFR 2.786(b);

(f) Extend the time for the Commission to grant review on its own motion under 10 CFR 2.786(a);

(g) Extend time for Commission review on its own motion of a Director's denial under 10 CFR 2.206(c);

46 FR 3479

(h) Direct pleadings improperly filed before the Commission to the appropriate adjudicatory board for action;

47 FR 47802

(i) Deny a request for hearings, where the request fails to comply with the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further proceedings;

(j) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Law Judge, as appropriate, requests for hearings not falling under § 2.104 of this part, where the requester is entitled to further proceedings; and

(k) Take action on minor procedural matters.

Restricted Communications

53 FR 10360

§ 2.780 Ex parte communications.

In any proceeding under this subpart—

(a) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, and ex parte communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it and any responses to the communication promptly are served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

53 FR 10360

(e) (1) The prohibitions of this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.

56 FR 29403

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to—

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

§ 2.781 Separation of functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any

53 FR 10360

investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except—

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on the record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to—

(1) Communications to or from any Commission adjudicatory employee regarding—

(i) The status of a proceeding;

(ii) Matters with regard to which the communications specifically are permitted by statute or regulation;

(iii) Agency participation in matters pending before a court or another agency; or

(iv) Generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding—

(i) Initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) Supervision of agency staff to ensure compliance with the general policies and procedures of the agency;

(iii) Staff priorities and schedules or the allocation of agency resources; or

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.

(3) None of the communications permitted by paragraph (b)(2) (i)–(iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses to the communication are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

53 FR 10360

(d) (1) The prohibitions in this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.

56 FR 29403

(2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

53 FR 10360

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.780.

56 FR 29403

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

§ 2.785 [Removed] 56 FR 29403

§ 2.786 Review of decisions and actions of a presiding officer.

(a) Within forty (40) days after the date of a decision or action by a presiding officer, or within thirty (30) days after a petition for review of the decision or action has been filed under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) A petition for review under this paragraph must be no longer than ten (10) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer must be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party shall have no right to reply, except as permitted by the Commission.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) If within thirty (30) days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto.

(d) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both.

(e) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided.

(f) Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission.

(g) Certified questions and referred rulings. A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either—

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

§ 2.787 [Removed]

§ 2.788 Stays of decisions of presiding officers pending review.

(a) Within ten (10) days after service of a decision or action of a presiding officer any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay must be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g., telecopier message, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer must be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., telecopier message, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by

56 FR 29403

56 FR 29403 telecopier message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

AVAILABILITY OF OFFICIAL RECORDS

§ 2.790 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), and (e) of this section, final NRC records and documents,[10] including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rule making proceeding subject to this part shall not, in the absence of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying in the NRC Public Document Room, except for matters that are:

41 FR 11808

(1) (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (ii) are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

42 FR 12875

(3) specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types or matters to be withheld.

41 FR 11808

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

52 FR 49350

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information.

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right

[10] Such records and documents do not include handwritten notes and drafts.

to a fair trial or an impartial adjudication:

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b)(1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains trade secrets or privileged or confidential commercial or financial information shall submit an application for withholding accompanied by an affidavit which:

(i) Identifies the document or part sought to be withheld and the position of the person making the affidavit, and

(ii) Contains a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section. In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper. The affiant may designate with appropriate markings information submitted in the affidavit as a trade secret or confidential or privileged commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and such information shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(2) A person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the bases for and effects of licensing or rule making actions, and that it is within the discretion of the Commission to withhold such information from public disclosure.

(3) The Commission shall determine whether the information sought to be withheld from public disclosure pursuant to this paragraph: (i) is a trade secret or confidential or privileged commercial or financial information; and (ii) if so, should be withheld from public disclosure.

(4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(5) If the Commission determines pursuant to paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine (i) whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it shall be returned to the applicant.

(6) Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. The Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection: (i) under a protective agreement, by contractor personnel or government officials other than NRC officials; (ii) by the presiding officer in a proceeding; and (iii) under protective order, by parties to a proceeding, pending a decision of the Commission on the matter of whether the information should be made publicly available or when a decision has been made that the information should be withheld from public disclosure. In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available.

(c) If a request for withholding pursuant to paragraph (b) of this section is denied, the Commission will notify an applicant for withholding of the denial with a statement of reasons. The notice or denial will specify a time, not less than thirty (30) days after the date of the notice, when the document will be placed in the Public Document Room. If, within the time specified in the notice, the applicant requests withdrawal of the document, the document will not be placed in the Public Document Room and will be returned to the applicant: Provided

That information submitted in a rule making proceeding which subsequently forms the basis for the final rule will not be withheld from public disclosure by the Commission and will not be returned to the applicant after denial of any application for withholding submitted in connection with that information. If a request for withholding pursuant to paragraph (b) of this section is granted, the Commission will notify the applicant of its determination to withhold the information from public disclosure. 41 FR 118

(d) The following information shall be deemed to be commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter. 53 FR 17688

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

(2) Information submitted in confidence to the Commission by a foreign source.

(e) The presiding officer, if any, or the Commission may, with reference to the NRC records and documents made available pursuant to this section, issue orders consistent with the provisions of this section and § 2.740(c). 41 FR 11808

Subpart H—Rulemaking

§ 2.800 Scope of rulemaking. 35 FR 11459

This subpart governs the issuance, amendment and repeal of regulations in which participation by interested persons is prescribed under section 553 of Title 5 of the U.S. Code.

§ 2.801 Initiation of rulemaking. 27 FR 377

Rulemaking may be initiated by the Commission at its own instance, on the recommendation of another agency of the United States, or on the petition of any other interested person.

§ 2.802 Petition for rulemaking.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Branch.

(b) A prospective petitioner may consult with the NRC before filing a petition for rulemaking by writing the Director, Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Regulatory Publications Branch. A prospective petitioner may also telephone the Regulatory Publications Branch on (301) 492-7086 or toll free on (800) 368-5642. 56 FR 10359

(1) In any consultation prior to the filing of a petition for rulemaking, the assistance that may be provided by the NRC staff is limited to—

(i) Describing the procedure and process for filing and responding to a petition for rulemaking;

(ii) Clarifying an existing NRC regulation and the basis for the regulation; and

(iii) Assisting the prospective petitioner to clarify a potential petition so that the Commission is able to understand the nature of the issues of concern to the petitioner.

(2) In any consultation prior to the filing of a petition for rulemaking, in providing the assistance permitted in paragraph (b)(1) of this section, the NRC staff will not draft or develop text or alternative approaches to address matters in the prospective petition for rulemaking.

(c) Each petition filed under this section shall: 44 FR 61320

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

(3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.

(e) If it is determined that the petition includes the information required by paragraph (c) of this section and is complete, the Director, Division of Freedom of Information and Publications Services, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will deposit a copy of the docketed petition in the Commission's Public Document Room. Public comment may be requested by publication of a notice of the docketing of the petition in the FEDERAL REGISTER, or, in appropriate cases, may be invited for the first time upon publication in the FEDERAL REGISTER of a proposed rule developed in response to the petition. Publication will be limited by the requirements of section 181 of the Atomic Energy Act of 1954, as amended, and may be limited by order of the Commission. 53 FR 52993

(f) If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be made within 30 days from the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete, the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition. 44 FR 61320

(g) The Director, Division of Freedom of Information and Publications Services, Office of Administration, will prepare on a quarterly basis a summary of petitions for rulemaking before the Commission, including the status of each petition. A copy of the report will be available for public inspection and copying for a fee in the Commission's Public Document Room, 2120 L Street, NW., Washington, DC. 54 FR 53312

§ 2.803 Determination of petition. 27 FR 377

No hearing will be held on the petition unless the Commission deems it advisable. If the Commission determines that sufficient reason exists, it will publish a notice of proposed rulemaking. In any other case, it will deny the petition and will notify the petitioner with a simple statement of the grounds of denial.

§ 2.804 Notice of proposed rulemaking. 50 FR 13006

(a) Except as provided by paragraph (d) of this section, when the Commission proposes to adopt, amend, or repeal a regulation, it will cause to be published in the FEDERAL REGISTER a notice of proposed rulemaking, unless all persons subject to the notice are named and either are personally served or otherwise have actual notice in accordance with law.

(b) The notice will include: 53 FR 40019

(1) Either the terms or substance of the proposed rule, or a specification of the subjects and issues involved;

(2) The manner and time within which interested members of the public may comment, and a statement that copies of comments may be examined in the Public Document Room;

(3) The authority under which the regulation is proposed;

(4) The time, place, and nature of the public hearing, if any;

(5) If a hearing is to be held, designation of the presiding officer and any special directions for the conduct of the hearing; and

(6) Such explanatory statement as the Commission may consider appropriate.

(c) The publication or service of notice will be made not less than fifteen (15) days prior to the time fixed for hearing, if any, unless the Commission for good cause stated in the notice provides otherwise.

27 FR 377

(d) The notice and comment provisions contained in paragraphs (a), (b), and (c) of this section will not be required to be applied—

(1) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(2) When the Commission for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest, and are not required by statute. This finding, and the reasons therefor, will be incorporated into any rule issued without notice and comment for good cause.

(e) The Commission shall provide for a 30-day post-promulgation comment period for—

50 FR 13006

(1) Any rule adopted without notice and comment under the good cause exception on paragraph (d)(2) of this section where the basis is that notice and comment is "impracticable" or "contrary to the public interest."

(2) Any interpretative rule, or general statement of policy adopted without notice and comment under paragraph (d)(1) of this section, except for those cases for which the Commission finds that such procedures would serve no public interest, or would be so burdensome as to outweigh any foreseeable gain.

(f) For any post-promulgation comments received under paragraph (e) of this section, the Commission shall publish a statement in the Federal Register containing an evaluation of the significant comments and any revisions of the rule or policy statement made as a result of the comments and their evaluation.

§ 2.805 Participation by interested persons.

(a) In all rulemaking proceedings conducted under the provisions of § 2.804(a), the Commission will afford interested persons an opportunity to participate through the submission of statements, information, opinions, and arguments in the manner stated in the notice. The Commission may grant additional reasonable opportunity for the submission of comments.

50FR13006

(b) The Commission may hold informal hearings at which interested persons may be heard, adopting procedures which in its judgment will best serve the purpose of the hearing.

§ 2.806 Commission action.

The Commission will incorporate in the notice of adoption of a regulation a concise general statement of its basis and purpose, and will cause the notice and regulation to be published in the FEDERAL REGISTER or served upon affected persons.

27 FR 377

§ 2.807 Effective date.

The notice of adoption of a regulation will specify the effective date. Publication or service of the notice and regulation, other than one granting or recognizing exemptions or relieving from restrictions, will be made not less than thirty (30) days prior to the effective date unless the Commission directs otherwise on good cause found and published in the notice of rule making.

§ 2.808 Authority of the Secretary to Rule on Procedural Matters.

When briefs, motions or other papers listed herein are submitted to the Commission itself, as opposed to officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary are authorized to:

39 FR 24219

(a) Prescribe schedules for the filing of statements, information, briefs, motions, responses or other pleadings, where such schedules may differ from those elsewhere prescribed in these rules or where these rules do not prescribe a schedule.

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the Commission later than the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule, or regulation of the Commission unless good cause is shown for the late filing; and

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission.

46FR22358

§ 2.809 Participation by the Advisory Committee on Reactor Safeguards.

(a) In its advisory capacity to the Commission, the ACRS may recommend that the Commission initiate rulemaking in a particular area. The Commission will respond to such rulemaking recommendation in writing within 90 days, noting its intent to implement, study, or defer action on the recommendation. In the event the Commission decides not to accept or decides to defer action on the recommendation, it will give its reasons for doing so. Both the ACRS recommendation and the Commission's response will be placed in the NRC Public Document Room following transmittal of the Commission's response to the ACRS.

46 FR 22358

(b) When a rule involving nuclear safety matters within the purview of the ACRS is under development by the NRC Staff, the Staff will ensure that the ACRS is given an opportunity to provide advice at appropriate stages and to identify issues to be considered during rulemaking hearings.

Subpart I—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

§ 2.900 Purpose.

This subpart is issued pursuant to section 181 of the Atomic Energy Act of 1954, as amended, and section 201 of the Energy Reorganization Act of 1974, as amended, to provide such procedures in proceedings subject to this part as will effectively safeguard and prevent disclosure of Restricted Data and National Security Information to unauthorized persons, with minimum impairment of procedural rights.

41 FR 53328

§ 2.901 Scope.

This subpart applies to all proceedings subject to subpart G.

§ 2.902 Definitions.

As used in this subpart:

(a) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America, which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(b) "Interested party" means a party having an interest in the issue or issues to which particular Restricted Data or National Security Information is relevant. Normally the interest of a party in an issue may be determined by examination of the notice of hearing, the answers and replies.

41 FR 53328

(c) The phrase "introduced into a proceeding" refers to the introduction or incorporation of testimony or documentary matter into any part of the official record of a proceeding subject to this part.

47 FR 56314

(d) "National Security Information" means information that has been classified pursuant to Executive Order 12356.

41 FR 53328

(e) "Party," in the case of proceedings subject to this subpart includes a person admitted as a party pursuant to § 2.714 or in interested State admitted pursuant to § 2.715(c).

§ 2.903 Protection of restricted data and national security information.

Nothing in this subpart shall relieve any person from safeguarding Restricted Data or National Security Information in accordance with the applicable provisions of laws of the United States and rules,

regulations or orders of any Government Agency.

§ 2.904 Classification assistance.

On request of any party to a proceeding or of the presiding officer, the Commission will designate a representative to advise and assist the presiding officer and the parties with respect to security classification of information and the safeguards to be observed.

§ 2.905 Access to restricted data and national security information for parties; security clearances.

(a) Access to restricted data and national security information introduced into proceedings. Except as provided in paragraph (h) of this section, restricted data or national security information introduced into a proceeding subject to this part will be made available to any interested party having the required security clearance; to counsel for an interested party provided the counsel has the required security clearance; and to such additional persons having the required security clearance as the Commission or the presiding officer determined are needed by such party for adequate preparation or presentation of his case. Where the interest of such party will not be prejudiced, the Commission or presiding officer may postpone action upon an application for access under this subparagraph until after a notice of hearing, answers, and replies have been filed.

(b) Access to Restricted Data or National Security Information not introduced into proceedings. (1) On application showing that access to Restricted Data or National Security Information may be required for the preparation of a party's case, and except as provided in paragraph (h) of this section, the Commission or the presiding officer will issue an order granting access to such Restricted Data or National Security Information to the party upon his obtaining the required security clearance, to counsel for the party upon their obtaining the required security clearance, and to such other individuals as may be needed by the party for the preparation and presentation of his case upon their obtaining the required clearance.

(2) Where the interest of the party applying for access will not be prejudiced, the Commission or the presiding officer may postpone action on an application pursuant to this paragraph until after a notice of hearing, answers and replies have been filed.

(c) The Commission will consider requests for appropriate security clearances in reasonable numbers pursuant to this section. A reasonable charge will be made by the Commission for costs of security clearance pursuant to this section.

(d) The presiding officer may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising under this section. Any party affected by a determination or order of the presiding officer under this section may appeal forthwith to the Commission from the determination or order. The filing by the staff of an appeal from an order of a presiding officer granting access to Restricted Data or National Security Information shall stay the order pending determination of the appeal by the Commission.

(e) Application granting access to restricted data or national security information. (1) An application under this section for orders granting access to restricted data or national security information not received from another Government agency will normally be acted upon by the presiding officer, or if a proceeding is not before a presiding officer, by the Commission. (2) An application under this section for orders granting access to restricted data or national security information where the information has been received by the Commission from another Government agency will be acted upon by the Commission.

(f) To the extent practicable, an application for an order granting access under this section shall describe the subjects of Restricted Data or National Security Information to which access is desired and the level of classification (confidential, secret or other) of the information; the reasons why access to the information is requested; the names of individuals for whom clearances are requested; and the reasons why security clearances are being requested for those individuals.

(g) On the conclusion of a proceeding, the Commission will terminate all orders issued in the proceeding for access to Restricted Data or National Security Information and all security clearances granted pursuant to them; and may issue such orders requiring the disposal of classified matter received pursuant to them or requiring the observance of other procedures to safeguard such classified matter as it deems necessary to protect Restricted Data or National Security information.

(h) Refusal to grant access to restricted data or national security information. (1) The Commission will not grant access to restricted data or national security information unless it determines that the granting of access will not be inimical to the common defense and security. (2) Access to Restricted Data or National Security Information which has been received by the Commission from another Government agency will not be granted by the Commission if the originating agency determines in writing that access should not be granted. The Commission will consult the originating agency prior to granting access to such data or information received from another Government agency.

§ 2.906 Obligation of parties to avoid introduction of restricted data or national security information.

It is the obligation of all parties in a proceeding subject to this part to avoid, where practicable, the introduction of Restricted Data or National Security Information into the proceeding. This obligation rests on each party whether or not all other parties have the required security clearance.

§ 2.907 Notice of intent to introduce restricted data or national security information.

(a) If, at the time of publication of a notice of hearing, it appears to the staff that it will be impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding, it will file a notice of intent to introduce Restricted Data or National Security Information.

(b) If, at the time of filing of an answer to the notice of hearing it appears to the party filing that it will be impracticable for the party to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall state in the answer a notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(c) If, at any later stage of a proceeding, it appears to any party that it will be impracticable to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall give to the other parties prompt written notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(d) Restricted Data or National Security Information shall not be introduced into a proceeding after publication of a

notice of hearing unless a notice of intent has been filed in accordance with § 2.908, except as permitted in the discretion of the presiding officer when it is clear that no party or the public interest will be prejudiced.

§ 2.908 Contents of notice of intent to introduce restricted data or other national security information.

(a) A party who intends to introduce Restricted Data or other National Security Information shall file a notice of intent with the Secretary. The notice shall be unclassified and, to the extent consistent with classification requirements, shall include the following:

(1) The subject matter of the Restricted Data or other National Security Information which it is anticipated will be involved;

(2) The highest level of classification of the information (confidential, secret, or other);

(3) The stage of the proceeding at which he anticipates a need to introduce the information; and

(4) The relevance and materiality of the information to the issues on the proceeding.

(b) In the discretion of the presiding officer, such notice, when required by § 2.907(c), may be given orally on the record.

41 FR 53328

§ 2.909 Rearrangement or suspension of proceedings.

In any proceeding subject to this part where a party gives a notice of intent to introduce Restricted Data or other National Security Information, and the presiding officer determines that any other interested party does not have required security clearances, the presiding officer may in his discretion:

(a) Rearrange the normal order of the proceeding in a manner which gives such interested parties an opportunity to obtain required security clearances with minimum delay in the conduct of the proceeding.

(b) Suspend the proceeding or any portion of it until all interested parties have had opportunity to obtain required security clearances. No proceeding shall be suspended for such reasons for more than 100 days except with the consent of all parties or on a determination by the presiding officer that further suspension of the proceeding would not be contrary to the public interest.

(c) Take such other action as he determines to be in the best interest of all parties and the public.

§ 2.910 Unclassified statements required.

(a) Whenever Restricted Data or other National Security Information is introduced into a proceeding, the party offering it shall submit to the presiding officer and to all parties to the proceeding an unclassified statement setting forth the information in the classified matter as accurately and completely as possible.

(b) In accordance with such procedures as may be agreed upon by the parties or prescribed by the presiding officer, and after notice to all parties and opportunity to be heard thereon, the presiding officer shall determine whether the unclassified statement or any portion of it, together with any appropriate modifications suggested by any party, may be substituted for the classified matter or any portion of it without prejudice to the interest of any party or to the public interest.

(c) If the presiding officer determines that the unclassified statement, together with such unclassified modifications as he finds are necessary or appropriate to protect the interest of other parties and the public interest, adequately sets forth information in the classified matter which is relevant and material to the issues in the proceeding, he shall direct that the classified matter be excluded from the record of the proceeding. His determination will be considered by the Commission as a part of the decision in the event of review.

41 FR 53328

(d) If the presiding officer determines that an unclassified statement does not adequately present the information contained in the classified matter which is relevant and material to the issues in the proceeding, he shall include his reasons in his determination. This determination shall be included as part of the record and will be considered by the Commission in the event of review of the determination.

(e) The presiding officer may postpone all or part of the procedures established in this section until the reception of all other evidence has been completed. Service of the unclassified statement required in paragraph (a) of this section shall not be postponed if any party does not have access to Restricted Data or other National Security Information.

§ 2.911 Admissibility of restricted data or other national security information.

A presiding officer shall not receive any Restricted Data or other National Security Information in evidence unless:

(a) The relevance and materiality of the Restricted Data or other National Security Information to the issues in the preceeding, and its competence, are clearly established; and

(b) The exclusion of the Restricted Data or other National Security Information would prejudice the interests of a party or the public interest.

41 FR 53328

§ 2.912 Weight to be attached to classified evidence.

In considering the weight and effect of any Restricted Data or other National Security Information received in evidence to which an interested party has not had opportunity to receive access, the presiding officer and the Commission shall give to such evidence such weight as is appropriate under the circumstances, taking into consideration any lack of opportunity to rebut or impeach the evidence.

§ 2.913 Review of Restricted data or other National Security Information received in evidence.

At the close of the reception of evidence, the presiding officer shall review the record and shall direct that any Restricted Data or other National Security Information be expunged from the record where such expunction would not prejudice the interests of a party or the public interest. Such directions by the presiding officer will be considered by the Commission in the event of review of the determinations of the presiding officer.

§ 2.914 [Deleted 40 FR 44124.]

Subpart J—Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

§ 2.1000 Scope of subpart.

56 FR 29403

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR part 2, subpart G, rules of general applicability, except for the following provisions: §§ 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.788, and 2.790.

§ 2.1001 Definitions.

"ASCII File" means a computerized text file conforming to the American Standard Code for Information Interchange which represent characters and symbols.

"Bibliographic header" means the minimum series of descriptive fields that a potential party, interested governmental participant, or party must submit with a document or other material. The bibliographic header fields are a subset of the fields in the full header.

"Circulated draft" means a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

"Document" means any written, printed, recorded, magnetic, graphic matter, or other documentary material, regardless of form or characteristic.

"Documentary material" means any material or other information that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide. 54 FR 14925

"DOE" means the U.S. Department of Energy or its duly authorized representatives.

"Full header" means the series of descriptive fields and subject terms given to a document or other material.

"Image" means a visual likeness of a document, presented on a paper copy, microform, or a bit-map on optical or magnetic media.

"Interested governmental participant" means any person admitted under § 2.715(c) of this part to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter.

"LSS Administrator" means the person within the U.S. Nuclear Regulatory Commission responsible for administration, management, and operation of the Licensing Support System. The LSS Administrator shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste licensing proceeding or is a part of the management chain reporting to the Director of the Office of Nuclear Material Safety and Safeguards. For purposes of this subpart the organizational unit within the NRC selected to be the LSS Administrator shall not be considered to be a party to the proceeding.

"Marginalia" means handwritten, printed, or other types of notations added to a document excluding underlining and highlighting. 54 FR 14925

"NRC" means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

Party for the purpose of this subpart means the DOE, the NRC staff, the host State and any affected Indian Tribe in accordance with § 60.63(a) of this chapter, and a person admitted under § 2.1014 of this subpart to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter; provided that a host State or affected Indian Tribe shall file a list of contentions in accordance with the provisions of §§ 2.1014(a)(2) (ii) and (iii) of this subpart. 56 FR 7787

"Personal record" means a document in the possession of an individual associated with a party, interested governmental participant, or potential party that was not required to be created or retained by the party, interested governmental participant, or potential party, and can be retained or discarded at the possessor's sole discretion, or documents of a personal nature that are not associated with any business of the party, interested governmental participant, or potential party. 54 FR 14925

Potential party means any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d) of this subpart, is granted access to the Licensing Support System and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart. 56 FR 7787

"Pre-license application phase" means the time period before the license application to receive and possess high-level radioactive waste at a geologic repository operations area is docketed under section 2.101(f)(3) of this part. 54FR14925

Pre-License Application Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation. 56 FR 7787

"Preliminary draft" means any nonfinal document that is not a circulated draft. 54FR14925

Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, designated in the notice of hearing to preside. 56 FR 7787

"Searchable full text" means the electronic indexed entry of a document in ASCII into the Licensing Support System that allows the identification of specific words or groups of words within a text file.

§ 2.1002 High-level waste Licensing Support System.

(a) The Licensing Support System is an electronic information management system containing the documentary material of the DOE and its contractors, and the documentary material of all other parties, interested governmental participants and potential parties and their contractors. Access to the Licensing Support System by the parties, interested governmental participants, and potential parties provides the document discovery in the proceeding. The Licensing Support System provides for the electronic transmission of filings by the parties during the high-level waste proceeding, and orders and decisions of the Commission and Commission adjudicatory boards related to the proceeding.

(b) The Licensing Support System shall include documentary material not privileged under § 2.1006 or excluded under § 2.1005 of this subpart.

(c) The participation of the host State in the Licensing Support System during the pre-license application phase shall not have any affect on the State's exercise of its disapproval rights under section 116(b)(2) of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10136(b)(2). 54 FR 14925

(d) This subpart shall not affect any independent right of a potential party, interested governmental participant or party to receive information.

§ 2.1003 Submission of material to the LSS.

(a) Subject to the exclusions in § 2.1005 of this subpart and paragraphs (c) and (d) of this section, each potential party, interested governmental participant or party, with the exception of the DOE and the NRC, shall submit to the LSS Administrator—

(1) Subject to paragraph (a)(3) of this section, an ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party after the date on which such potential party, interested governmental participant or party is given access to the Licensing Support System.

(2) An image, a bibliographic header, and, if available, an ASCII file, no later than six months before the license application is submitted under § 60.22 of this chapter, for all documentary material (including circulated drafts but excluding preliminary drafts), generated

by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party, on or before the date on which such potential party, interested governmental participant, or party was given access to the Licensing Support System.

(3) An image and bibliographic header for documentary material included under paragraphs (a)(1) of this section that were acquired from a person that is not a potential party, party, or interested governmental participant.

(b) Subject to the exclusions in § 2.1005 of this subpart, and subject to paragraphs (c) and (d) of this section, the DOE and the NRC shall submit to the LSS Administrator—

(1) An ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC after the date on which the Licensing Support System is available for access.

(2) An ASCII file, an image, and a bibliographic header no later than six months before the license application is submitted under § 60.22 of this chapter for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC on or before the date on which the Licensing Support System is available for access.

54 FR 14925

(c)(1) Each potential party, interested governmental participant, or party shall submit, subject to the claims of privilege in § 2.1006, an image and a bibliographic header, in a time frame to be established by the access protocols under § 2.1011(d)(10) of this subpart, for all graphic oriented documentary material. Graphic-oriented documentary material includes, raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs which have been printed, scripted, hand written or otherwise displayed in any hard copy form and which, while capable of being captured in electronic image by a digital scanning device, may be captured and submitted to the LSS Administrator in any form of image. Text embedded within these documents need not be separately entered in searchable full text. Such graphic-oriented documents may include: Calibration procedures, logs, guidelines, data and discrepancies; Gauge, meter and computer settings; Probe locations; Logging intervals and rates; Data logs in whatever form captured; Text data sheets; Equations and sampling rates; Sensor data and procedures; Data Descriptions; Field and laboratory notebooks; Analog computer, meter or other device print-outs; Digital computer print-outs; Photographs; Graphs, plots, strip charts, sketches; Descriptive material related to the information above.

(2) Each potential party, interested governmental participant, or party, in a time frame to be established by the access protocols under § 2.1011(d)(10) of this subpart, shall submit, subject to the claims of privilege in § 2.1006, only a bibliographic header for each item of documentary material that is not suitable for entry into the Licensing Support System in image or searchable full text. The header shall include all required fields and shall sufficiently describe the information and references to related information and access protocols. Whenever any documentary material is transferred to some other media, a new header shall be supplied. Any documentary material for which a header only has been supplied to the system shall be made available to any other party, potential party or interested governmental participant through the access protocols determined by the LSS Administrator under § 2.1011(d)(10) or through entry upon land for inspection and other purposes pursuant to § 2.1020.

(3) Whenever documentary material described in paragraphs (c)(1) or (c)(2) of this section has been collected or used in conjunction with other such information to analyze, critique, support or justify any particular technical or scientific conclusion, or relates to other documentary material as part of the same scope of technical work or investigation, then an appropriate bibliographic header shall be submitted for a table of contents describing that package of information, and documentary material contained within that package shall be named and identified.

54 FR 14925

(d) Each potential party, interested governmental participant, or party shall submit a bibliographic header for each documentary material—

(1) For which a claim of privilege is asserted; or

(2) Which constitutes confidential financial or commercial information; or

(3) Which constitutes safeguards information under § 73.21 of this Chapter.

(e) In addition to the submission of documentary material under paragraphs (a) and (b) of this section, potential parties, interested governmental participants, or parties may request that another potential party's, interested governmental participant's, party's, or third party's documentary material be entered into the Licensing Support System in searchable full text if they or the other potential party, interested governmental participant, or party intend to rely on such documentary material during the licensing proceeding.

(f) Submission of ASCII files, images, and bibliographic headers shall be in accordance with established criteria.

(g) Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be submitted to the LSS Administrator by the respective agency that generated the document.

(h)(1) Docketing of the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall not be permitted under Subpart J of this part unless the LSS Administrator has certified, at least six months in advance of the submission of the license application, that the DOE has substantially complied with its obligations under this section.

54 FR 14925

(2)(i) The LSS Administrator shall evaluate the extent of the DOE's compliance with the provisions of this section at six month intervals beginning six months after his or her appointment under § 2.1011 of this subpart.

(ii) The LSS Administrator shall issue a written report of his or her evaluation of DOE compliance under paragraph (h)(1) of this section. The report shall include recommendations to the DOE on any actions necessary to achieve substantial compliance pursuant to paragraph (h)(1) of this section.

(iii) The LSS administrator shall circulate each evaluation prepared pursuant to paragraph (h)(2)(i) of this section, and the written report prepared pursuant to paragraph (h)(2)(ii) of this section, to potential parties to the high level waste proceeding. Potential parties may submit comments on or objections to the evaluations prepared pursuant to paragraph (h)(2)(i) of this section or the report prepared pursuant to paragraph (h)(2)(ii) of this section, to the LSS Administrator within 30 days of issuance of the evaluation or report. Comments or objections not filed within this time period are waived.

56 FR 7787

(3)(i) In the event that the LSS Administrator does not certify substantial compliance under paragraph (h)(1) of this section, the proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall be governed by Subpart G of this part.

54 FR 14925

(ii) If, subsequent to the submission of such application under Subpart G of this part, the LSS Administrator issues the certification described in paragraph (h)(1) of this section, the Commission may, upon request by any party or interested governmental participant to the proceeding, specify the extent to which the provisions of Subpart J of this part may be used in the proceeding.

§ 2.1004 Amendments and additions.

(a) Within sixty days after a document has been entered into the Licensing Support System by the LSS Administrator during the pre-license application phase, and within five days after a document has been entered into the Licensing Support System by the LSS Administrator after the license application has been docketed, the submitter shall make reasonable efforts to verify that the document has been entered correctly, and shall notify the LSS Administrator of any errors in entry.

(b) After the time period specified for verification in paragraph (a) of this section has expired, a submitter who desires to amend an incorrect document shall—

(1) Submit the corrected version to the LSS Administrator for entry as a separate document; and

(2) Submit a bibliographic header for the corrected version that identifies all revisions to the corrected version.

(3) The LSS Administrator shall ensure that the bibliographic header for the original document specifies that a corrected version is also in the Licensing Support System.

(c)(1) A submitter shall submit any revised pages of a document in the Licensing Support System to the LSS Administrator for entry into the Licensing Support System as a separate document.

(2) The LSS Administrator shall ensure that the bibliographic header for the original document specifies that revisions have been entered into the Licensing Support System.

54 FR 14925

(d) Any document that has been incorrectly excluded from the Licensing Support System must be submitted to the LSS Administrator by the potential party, interested governmental participant, or party responsible for the submission of the document within two days after its exclusion has been identified unless some other time is approved by the Pre-License Application Presiding Officer or the Presiding Officer designated for the high-level waste proceeding; provided, however, that the time for submittal under this paragraph will be stayed pending Officer action on a motion to extend the time for submittal.

56 FR 7787

§ 2.1005 Exclusions.

The following material is excluded from entry into the Licensing Support System, either through initial entry pursuant to § 2.1003 of this subpart, or through derivative discovery pursuant to § 2.1019(i) of this subpart—

54 FR 14925

(a) Official notice materials;

(b) Reference books and text books;

(c) Material pertaining exclusively to administration, such as material related to budgets, financial management, personnel, office space, general distribution memoranda, or procurement, except for the scope of work on a procurement related to repository siting, construction, or operation, or to the transportation of spent nuclear fuel or high-level waste;

(d) Press clippings and press releases;

(e) Junk mail;

(f) Preferences cited in contractor reports that are readily available;

(g) Classified material subject to Subpart I of this Part.

54 FR 14925

§ 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(d) of this subpart, the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.790 of this part may be asserted by potential parties, interested governmental participants, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by State and local government entities and Indian Tribes.

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be submitted by the party, interested governmental participant, or potential party that asserted the claim to—

(1) The LSS Administrator for entry into the Licensing Support System into an open access file; or

(2) To the LSS Administrator or to the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under § 2.1010(b) or § 2.1018(c) of this subpart.

56 FR 7787

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be submitted for entry into the Licensing Support System pursuant to §§ 2.1003(a) and 2.1003(b) of this subpart.

54 FR 14925

§ 2.1007 Access.

(a)(1) Terminals for access to full headers for all documents in the Licensing Support System during the pre-license application phase, and images of the non-privileged documents of DOE, shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository.

(2) Terminals for access to full headers for all documents in the Licensing Support System during the pre-license application phase, and images of the non-privielged documents of NRC, shall be provided at the headquarters Public Document Room of NRC, and at all NRC Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, and at the NRC Regional Offices, including the Uranium Recovery Field Office in Denver, Colorado.

(3) The access terminals specified in paragraphs (a)(1) and (a)(2) of this section shall include terminals at Las Vegas, Nevada; Reno, Nevada; Carson City, Nevada; Nye County, Nevada; and Lincoln County, Nevada.

(4) The headers specified in paragraphs (a)(1) and (a)(2) of this section shall be available at the same time that those headers are made available to the potential parties, parties, and interested governmental participants.

(5) Public access to the searchable full text and images of all the documents in the Licensing Support System, not privileged under section 2.1006, shall be provided by the LSS Administrator at all the locations specified in paragraphs (a)(1) and (a)(2) of this section after a notice of hearing has been issued pursuant to § 2.101(f)(8) or § 2.105(a)(5) on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area.

54 FR 14925

(b) Public availability of paper copies of the records specified in paragraph (a) of this section, as well as duplication fees, and fee waiver for those records, will be governed by the Freedom of Information Act regulations of the respective agencies.

(c) Access to the Licensing Support System for potential parties, interested governmental participants, and parties will be provided in the following manner—

(1) Full text search capability through dial-up access from remote locations at the requestor's expense;

(2) Image access at remote locations at the requestor's expense;

(3) The capability to electronically request a paper copy of a document at the time of search;

(4) Generic fee waiver for the paper copy requested under paragraph (c)(3) of this section for requestors who meet the criteria in § 9.41 of this chapter.

(d) Documents submitted to the LSS Administrator for entry into the Licensing Support System shall not be considered as agency records of the LSS Administrator for purposes of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and shall remain under the

54 FR 14925

custody and control of the agency or organization that submitted the documents to the LSS Administrator. Requests for access pursuant to the FOIA to documents submitted by a Federal agency shall be transmitted to that Federal agency.

56 FR 7787

§ 2.1008 Potential parties.

(a) A person may petition the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart for access to the Licensing Support System.

54FR14925

(b) A petition must set forth with particularity the interest of the petitioner in gaining access to the Licensing Support System with particular reference to—

56 FR 7787

(1) The factors set out in § 2.1014(c) (1), (2), and (3) of this subpart as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide; or

54FR14925

(2) The criteria in § 2.715(c) of this part as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide.

56 FR 7787

(c) The Pre-License Application Presiding Officer shall, in ruling on a petition for access, consider the factors set forth in paragraph (b) of this section.

(d) Any person whose petition for access is approved pursuant to paragraph (c) of this section shall comply with the regulations set forth in this subpart, including § 2.1003 and agree to comply with the orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart.

54 FR 14925

§ 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall—

(1) Designate an official who will be responsible for administration of its Licensing Support System responsibilities;

(2) Establish procedures to implement the requirements in § 2.1003 of this subpart;

(3) Provide training to its staff on the procedures for implementation of Licensing Support System responsibilities;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the LSS Administrator pursuant to § 2.1011(e) of this subpart.

(b) The responsible official designated pursuant to paragraph (a)(1) of this section shall certify to the LSS Administrator, at six month intervals designated by the LSS Administrator, that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 of this subpart has been identified and submitted to the Licensing Support System.

54 FR 14925

56 FR 7787

§ 2.1010 Pre-License Application Presiding Officer.

(a)(1) The Commission may designate one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority on the matter (Pre-License Application Presiding Officer) to rule on all petitions for access to the Licensing Support System submitted under § 2.1008; disputes over the entry of documents during the pre-license application phase, including disputes relating to relevance and privilege; disputes relating to the LSS Administrator's decision on substantial compliance pursuant to § 2.1003(h); discovery disputes; disputes relating to access to the Licensing Support System; disputes relating to the design and development of the Licensing Support System by DOE or the operation of the Licensing Support System by the LSS Administrator under § 2.1011, including disputes relating to the implementation of the recommendations of the LSS Advisory Review Panel established under § 2.1011(e).

(2) The Pre-License Application Presiding Officer shall be designated six months before access to the Licensing Support System is scheduled to be available.

(b) The Pre-License Application Presiding Officer shall rule on any claim of document withholding to determine—

54 FR 14925

(1) Whether it is documentary material within the scope of this subpart;

(2) Whether the material is excluded from entry into the Licensing Support System under § 2.1005 of this subpart;

(3) Whether the material is privileged or otherwise excepted from disclosure under section 2.1006 of this subpart;

(4) If privileged, whether it is an absolute or qualified privilege;

(5) If qualified, whether the document should be disclosed because it is necessary to a proper decision in the proceeding;

56 FR 7787

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a potential party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The Pre-License Application Presiding Officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Pre-License Application Presiding Officer for violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

54 FR 14925

(c) Upon a final determination that the material is relevant, and not privileged, exempt from disclosure, or otherwise exempt from entry into the Licensing Support System under § 2.1005 of this subpart, the potential party, interested governmental participant, or party who asserted the claim of withholding must submit the document to the LSS Administrator within two days for entry into the Licensing Support System.

(d) The service of all pleadings, discovery requests and answers, orders, and decisions during the pre-license application phase shall be made according to the procedures specified in § 2.1013(c) of this subpart.

56 FR 7787

(e) The Pre-License Application Presiding Officer shall possess all the general powers specified in §§ 2.721(d) and 2.718.

(f) The Commission, in designating the Pre-License Application Presiding Officer in accordance with paragraphs (a) (1) and (2) of this section, shall specify the jurisdiction of the Officer.

54 FR14925

§ 2.1011 LSS Management and administration.

(a) The Licensing Support System shall be administered by the LSS Administrator who will be designated within sixty days after the effective date of the rule.

(b)(1) Consistent with the requirements in this subpart, and in consultation with the LSS Administrator, DOE shall be responsible for the design and development of the computer system necessary to implement the Licensing Support

System, including the procurement of computer hardware and software, and, with the concurrence of the LSS Administrator, the follow-on redesign and procurement of equipment necessary to maintain the Licensing Support System.

(2) With respect to the procurement undertaken pursuant to paragraph (b)(1) of this section, a representative of the LSS Administrator shall participate as a member of the Source Evaluation Panel for such procurement.

(3) DOE shall implement consensus advice from the LSS Advisory Review Panel under paragraph (f)(1) of this section that is consistent with the requirements of this subpart.

(c)(1) The Licensing Support System, described in § 2.1002, shall not be part of any computer system that is controlled by any party, interested governmental participant, or potential party, including DOE and its contractors, or that is physically located on the premises of any party, interested governmental participant, or potential party, including DOE and that of its contractors.

(2) Nothing in this subpart shall preclude DOE, NRC, or any other party, potential party, or interested governmental participant, from using the Licensing Support System computer facility for a records management system for documentary material independent of the Licensing Support System.

(d) The LSS Administrator shall be responsible for the management and administration of the Licensing Support System, including the responsibility to—

(1) Implement the consensus advice of the LSS Advisory Review Panel under paragraph (f) of this section that is consistent with the requirements of this subpart;

(2) Provide the necessary personnel, materials, and services for operation and maintenance of the Licensing Support System;

(3) Identify and recommend to DOE any redesign or procurement actions necessary to ensure that the design and operation of the Licensing Support System meets the objectives of this subpart;

(4) Make a concurrence decision, within thirty days of a request from DOE, on any redesign and related procurement performed by DOE under paragraph (b) of this section;

(5) Consult with DOE on the design and development of the Licensing Support System under paragraph (b) of this section;

(6) Evaluate and certify compliance with the requirements of this subpart under § 2.1003(h);

(7) Ensure LSS availability and the integrity of the LSS data base;

(8) Receive and enter the documentary material specified in § 2.1003 of this subpart into the Licensing Support System in the appropriate format;

(9) Maintain security for the Licensing Support System data base, including assigning user password security codes;

(10) Establish access protocols for raw data, field notes, and other items covered by § 2.1003(c) of this subpart;

(11) Maintain the thesaurus and authority tables for the Licensing Support System;

(12) Establish and implement a training program for Licensing Support System users;

(13) Provide support staff to assist users of the Licensing Support System;

(14) Other duties as specified in this subpart or necessary for Licensing Support System operation and maintenance.

(e)(1) The LSS Administrator shall establish an LSS Advisory Review Panel composed of the LSS Advisory Committee members identified in paragraph (e)(2) of this section who wish to serve within sixty days after designation of the LSS Administrator pursuant to paragraph (a) of this section. The LSS Administrator shall have the authority to appoint additional representatives to the Advisory Review Panel consistent with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, giving particular consideration to potential parties, parties, and interested governmental participants who were not members of the NRC HLW Licensing Support System Advisory Committee.

(2) Pending the establishment of the LSS Advisory Review Panel under paragraph (e)(1) of this section, the NRC will establish a Licensing Support System Advisory Committee whose membership will initially include the State of Nevada, a coalition of affected units of local government in Nevada who were on the NRC High-Level Waste Licensing Support System Advisory Committee, DOE, NRC, the National Congress of American Indians, the coalition of national environmenal groups who were on the NRC High-Level Waste Licensing Support System Advisory Committee and such other members as the Commission may from time to time designate to perform the responsibilities in paragraph (f) of this section.

(f)(1) The LSS Advisory Review Panel shall provide advice to—(i) DOE on the fundamental issues of the design and development of the computer system necessary to implement the Licensing Support System under paragraph (b) of this section; and

(ii) The LSS Administrator on the operation and maintenance of the Licensing Support System under paragraph (d) of this section.

(2) The responsibilities of the LSS Advisory Review Panel shall include advice on—(i) Format standards for the submission of documentary material to the Licensing Support System by the parties, interested governmental participants, or potential parties, such as ASCII files, bibliographic headers, and images;

(ii) The procedures and standards for the electronic transmission of filings, orders, and decisions during both the pre-license application phase and the high-level waste licensing proceeding;

(iii) Access protocols for raw data, field notes, and other items covered by § 2.1003(c) of this subpart;

(iv) A thesaurus and authority tables;

(v) Reasonable requirements for headers, the control of duplication, retrieval, display, image delivery, query response, and "user friendly" design;

(vi) Other duties as specified in this subpart or as directed by the LSS Administrator.

54 FR 14925

§ 2.1012 Compliance.

(a) In addition to the requirements of § 2.101(f) of this part, the Director of the NRC Office of Nuclear Materials Safety and Safeguards may determine that the tendered application is not acceptable for docketing under this subpart, if the LSS Administrator has not issued the certification described in § 2.1003(h)(1) of this part.

(b)(1) A person, including a potential party granted access to the Licensing Support System under § 2.1008 of this subpart, shall not be granted party status under § 2.1014 of this part, or status as an interested governmental participant under § 2.715(c) of this part, if it cannot demonstrate substantial and timely compliance with ther requirements of § 2.1003 of this subpart at the time it requests participation in the high-level waste licensing proceeding under either § 2.1014 or § 2.715(c) of this part.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of § 2.1003 of this subpart. Admission of such a party or interested governmental participant under § 2.1014 of this subpart or § 2.715(c) of this part, respectively, shall be conditioned on accepting the status of the proceeding at the time of admission.

56 FR 7787

(c) The Presiding Officer shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any person who is not in compliance with all applicable orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

(d) Access to the Licensing Support System may be suspended or terminated by the Pre-License Application Presiding Officer or the Presiding Officer for any potential party, interested governmental participant or party who is in noncompliance with any applicable order of the Pre-License Application Presiding Officer or the Presiding Officer or the requirements of this subpart.

54 FR 14925

§ 2.1013 Use of LSS during the adjudicatory proceeding.

(a)(1) Pursuant to § 2.702, the Secretary of the NRC will maintain the official docket of the proceeding on the application for a license to receive and possess waste at a geologic repository operations area.

(2) Commencing with the docketing of the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, the LSS Administrator shall establish a file within the Licensing Support System to contain the official record materials of the high-level radioactive waste licensing proceeding in searchable full text, or for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been entered into the Licensing Support System before the commencement of that portion of the hearing in which the exhibit will be offered. The official record file in the Licensing Support System will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. Transcripts will be entered into the Licensing Support System by the LSS Administrator on a daily basis in order to provide next-day availability at the hearing.

56 FR 7787

(c)(1) All filings in the adjudicatory proceeding on the license application to receive and possess high-level radioactive waste at a geologic respository operations area pursuant to Part 60 of this chapter shall be transmitted electronically by the submitter to the Presiding Officer, parties, the LSS Administrator, and the Secretary, according to established format requirements. Parties and interested governmental participants will be required to use a password security code for the electronic transmission of these documents.

54 FR 14925

(2) Filings required to be served shall be served upon either the parties and interested governmental participants, or their designated representatives. When a party or interested governmental participant has appeared by attorney, service must be made upon the attorney of record.

(3) Service upon a party or interested governmental participant is completed when the sender receives electronic acknowledgment ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox.

(4) Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, by—

(i) Electronic acknowledgment ("delivery receipt"); or

(ii) The affidavit of the person making the service; or

(iii) The certificate of counsel.

(5) One signed paper copy of each filing shall be served promptly on the Secretary by regular mail pursuant to the requirements of § 2.708 and 2.701 of this part.

56 FR 7787

(6) All Presiding Officer and Commission issuances and orders will be transmitted electronically to the parties, interested governmental participants, and the LSS Administration.

(d) Online access to the Licensing Support System, including a Protective Order File if authorized by a Presiding Officer shall be provided to the Presiding Officer, the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use during the hearing. Use of paper copy and other images will also be permitted at the hearing.

§ 2.1014 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105 of this part, any person whose interest may be affected may also request a hearing. The petition and/or request, and any request to participate under § 2.715(c) of this part, shall be filed within thirty days after the publication of the notice of hearing in the Federal Register. Nontimely filings will not be entertained absent a determination by the Commission, or the Presiding Officer designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors, in addition to satisfying those set out in paragraphs (a)(2) and (c) of this section:

54 FR 14925

(i) Good cause, if any, for failure to file on time;

(ii) The availability of other means whereby the petitioner's interest will be protected;

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) The extent to which the petitioner's interest will be represented by existing parties;

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(2) The petition shall set forth with particularity—

(i) The interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (c) of this section;

56 FR 7787

(ii) A list of the contentions that petitioner seeks to have litigated in the matter;

(iii) With respect to each contention:

(A) A specific statement of the issue of law or fact to be raised or controverted.

(B) A brief explanation of the basis of the contention.

(C) A concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(D) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include reference to the specific documentary material that provides a basis for the contention, or if the petitioner believes that any documentary material fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. In determining whether a genuine dispute exists on a material issue of law or fact, a dispositive factor shall be whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

(E) The specific regulatory or statutory requirement to which the contention is relevant.

(3) Any petitioner who fails to satisfy paragraphs (a)(2) (ii) and (iii) of this section with respect to at least one contention shall not be permitted to participate as a party.

(4) Any party may amend its contentions specified in paragraph (a)(2)(ii) of this section. The Presiding

Officer shall rule on any petition to amend such contentions based on the balancing of the factors specified in paragraph (a)(1) of this section, and a showing that a significant safety or environmental issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by §§ 60.112 and 60.113 of this chapter. 56 FR 7787

(b) Any party or interested governmental participant may file an answer to a petition for leave to intervene or a petition to amend contentions within twenty days after service of the petition. 54 FR 14925

(c) Subject to paragraph (a)(3) of this section, the Commission, or the Presiding Officer designated to rule on petitions to intervene and/or requests for hearing shall permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by an affected unit of local government as defined in section 2(31) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101. In all other circumstances, the Commission or Presiding Officer shall, in ruling on a petition for leave to intervene, consider the following factors, among other things: 56 FR 7787

(1) The nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding;
(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding;
(3) The possible effect of any order that may be entered in the proceeding on the petitioner's interest; 54 FR 14925

(4) The failure of the petitioner to participate as a potential party in the Licensing Support System.
(5) In determining whether a genuine dispute exists on a material issue of law or fact, whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.
(d) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, or the designated Presiding Officer may direct in the interests of:
(1) Restricting irrelevant, duplicative, or repetitive evidence and argument,
(2) Having common interests represented by a spokesman, and
(3) Retaining authority to determine priorities and control the compass of the hearing.
(e) In any case in which, after consideration of the factors set forth in paragraph (c) of this section, the Commission or the Presiding Officer finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention shall limit the petitioner's participation accordingly. 56 FR 7787

(f) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (e) of this section.
(g) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing. 54 FR 14925

(h) If the Commission or the Presiding Officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the Commission or the Presiding Officer. 56 FR 7787

§ 2.1015 Appeals.

(a) No appeals from any Pre-License Application Presiding Officer or Presiding Officer order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), and (d) of this section.
(b) A notice of appeal from (1) a Pre-License Application Presiding Officer order issued pursuant to § 2.1010, (2) a Presiding Officer First or Second Prehearing Conference Order issued pursuant to § 2.1021 or § 2.1022, (3) a Presiding Officer order granting or denying a motion for summary disposition issued in accordance with § 2.1025 of this part, or (4) a Presiding Officer order granting or denying a petition to amend one or more contentions pursuant to § 2.1014(a)(4), must be filed with the Commission no later than (10) days after service of the order. A supporting brief must accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten days after service of the appeal.

(c) Appeals from a Presiding Officer initial decision or partial initial decision must be filed and briefed before the Commission in accordance with the following requirements.
(1) *Notice of appeal.* Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal. The notice shall specify:
(i) The party taking the appeal; and
(ii) The decision being appealed.
(2) *Filing appellant's brief.* Each appellant shall file a brief supporting its position on appeal within thirty (30) days (40 days if Commission staff is the appellant) after the filing of notice required by paragraph (a) of this section.
(3) *Filing responsive brief.* Any party who is not an appellant may file a brief in support of or in opposition to the appeal within thirty (30) days after the period has expired for the filing and service of the brief of all appellants. Commission staff may file a responsive brief within forty (40) days after the period has expired for the filing and service of the briefs of all appellants. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed. 56 FR 29403
(4) *Brief content.* A brief in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.
(i) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. An intervenor-appellant's brief must be confined to issues which the intervenor-appellant placed in controversy or sought to place in controversy in the proceeding. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.
(ii) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.
(5) *Brief length.* A party shall not file a brief in excess of seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request an increase of this page limit for good cause. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement requested.
(6) *Certificate of service.* All documents filed under this section must be accompanied by a certificate reflecting service upon all other parties to the proceeding.
(7) *Failure to comply.* A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

(d) When, in the judgment of a Pre-License Application Presiding Officer or Presiding Officer, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Pre-License Application Presiding Officer or Presiding Officer may refer the ruling promptly to the Commission, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Pre-License Application Presiding Officer or Presiding Officer certify, pursuant to § 2.718(i) of this part, rulings not immediately appealable under paragraph (b) of this section. 56 FR 7787
(e) Unless otherwise ordered, the filing of an appeal, petition for review,

56FR7787 referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

55 FR 42944 Note: Any appeal taken pursuant to the terms of this regulation after October 24, 1990, shall be filed with the Commission rather than with an Atomic Safety and Licensing Appeal Board notwithstanding any provisions of this regulation to the contrary.

§ 2.1016 Motions.

56 FR 7787 (a) All motions shall be addressed to the Commission or, when a proceeding is pending before a Presiding Officer, to the Presiding Officer. All motions, unless made orally on the record, shall be filed according to the provisions of § 2.1013(c) of this subpart.

54 FR 14925 (b) A motion shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.

(c) Within ten days after service of a motion a party, potential party, or interested governmental participant may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the Presiding Officer or the Secretary or the Assistant Secretary.

(d) The Presiding Officer may dispose of motions either by order or by ruling orally during the course of a prehearing conference or hearing.

56 FR 7787 (e) Where the motion in question is a motion to compel discovery under § 2.720(h)(2) of this part or § 2.1018(f) of this subpart, parties, potential parties, and interested governmental participants may file answers to the motion pursuant to paragraph (c) of this section. The Presiding Officer in its discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than filed electronically. If responses are given over the telephone the Presiding Officer shall issue a written order on the motion which summarizes the views presented by the parties, potential parties, and interested governmental participants unless the conference has been transcribed. This does not preclude the Presiding Officer from issuing a prior oral ruling on the matter which is effective at the time of its issuance, provided that the terms of the ruling are incorporated in the subsequent written order.

§ 2.1017 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party, potential party, or interested governmental participant, has the right or is required to do some act within a prescribed period after the service of a notice or other document upon it, one day shall be added to the prescribed period. If the Licensing Support System is unavailable for more than four access hours of any day that would be counted in the computation of time, that day will not be counted in the computation of time.

54 FR 14925

§ 2.1018 Discovery.

(a)(1) Parties, potential parties, and interested governmental participants in the high-level waste licensing proceeding may obtain discovery by one or more of the following methods: Access to the documentary material in the Licensing Support System submitted pursuant to § 2.1003 of this subpart; entry upon land for inspection, access to raw data, or other purposes pursuant to § 2.1020 of this subpart; access to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to § 2.1003 (c) and (d) of this subpart; depositions upon oral examination pursuant to § 2.1019 of this subpart; requests for admission pursuant to § 2.742 of this subpart; informal requests for information not available in the Licensing Support System, such as the names of witnesses and the subjects they plan to address; and interrogatories and depositions upon written questions, as provided in paragraph (a)(2) of this section.

(2) Interrogatories and depositions upon written questions may be authorized by order of the discovery master appointed under paragraph (g) of this section, or if no discovery master has been appointed, by order of the Presiding Officer , in the event that the parties are unable, after informal good faith efforts, to resolve a dispute in a timely fashion concerning the production of information.

56 FR 7787

(b)(1) Parties, potential parties, and interested governmental participants, pursuant to the methods set forth in paragraph (a) of this section, may obtain discovery regarding any matter, not privileged, which is relevant to the licensing of the likely candidate site for a geologic repository, whether it relates to the claim or defense of the person seeking discovery or to the claim or defense of any other person. Except for discovery pursuant to §§ 2.1018(a)(2) and 2.1019 of this subpart, all other discovery shall begin during the pre-license application phase. Discovery pursuant to §§ 2.1018(a)(2) and 2.1019 of this subpart shall begin after the issuance of the first pre-hearing conference order under § 2.1021 of this subpart, and shall be limited to the issues defined in that order or subsequent amendments to the order. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

54 FR 14925

(2) A party, potential party, or interested governmental participant may obtain discovery of documentary material otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of, or for the hearing by, or for another party's, potential party's, or interested governmental participant's representative (including its attorney, surety, indemnitor, insurer, or similar agent) only upon a showing that the party, potential party, or interested governmental participant seeking discovery has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the Presiding Officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, potential party, or interested governmental participant concerning the proceeding.

56 FR 7787

(c) Upon motion by a party, potential party, interested governmental participant, or the person from whom discovery is sought, and for good cause shown, the Presiding Officer may make any order that justice requires to protect a party, potential party, interested governmental participant, or other person from annoyance, embarrassment, oppression, or undue burden, delay, or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Presiding Officer ; (6) that, subject to the provisions of § 2.790 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the Presiding Officer may, on such terms and conditions as are just, order that any party, potential party, interested governmental participant or other person provide or permit discovery.

(d) Except as provided in paragraph (b) of this section, and unless the Presiding Officer upon motion, for the convenience of parties, potential parties, interested governmental participants, and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party, potential party, or interested governmental participant is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's, potential party's, or interested governmental participant's discovery.

56 FR 7787

(e) A party, potential party, or interested governmental participant who has included all documentary material relevant to any discovery request in the Licensing Support System or who has responded to a request for discovery with a response that was complete when made is under no duty to supplement its response to include information thereafter acquired, except as follows:

(1) To the extent that written interrogatories are authorized pursuant to paragraph (a)(2) of this section, a party or interested governmental participant is under a duty to seasonably supplement its response to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the witness is expected to testify, and the substance of the witness's testimony.

54 FR 14925

(2) A party, potential party, or interested governmental participant is under a duty seasonably to amend a prior response if it obtains information upon the basis of which (i) it knows that the response was incorrect when made, or (ii) it knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Presiding Officer or agreement of the parties, potential parties, and interested governmental participants.

56 FR 7787

(f)(1) If a deponent of a party, potential party, or interested governmental participant upon whom a request for discovery is served fails to respond or objects to the request, or any part thereof, the party, potential party,

or interested governmental participant submitting the request or taking the deposition may move the Presiding Officer, within five days after the date of the response or after failure to respond to the request, for an order compelling a response in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party, potential party, interested governmental participant, or other person upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person, party, potential party, or interested governmental participant failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the Presiding Officer may make such a protective order as it is authorized to make on a motion made pursuant to paragraph (c) of this section.

56 FR 7787

(3) An independent request for issuance of a subpoena may be directed to a nonparty for production of documents. This section does not apply to requests for the testimony of the NRC regulatory staff pursuant to § 2.720(h)(2)(i) of this part.

54 FR 14925

(g) The Presiding Officer pursuant to § 2.722 of this part may appoint a discovery master to resolve disputes between parties concerning informal requests for information as provided in paragraphs (a)(1) and (a)(2) of this section.

§ 2.1019 Depositions.

(a) Any party or interested governmental participant desiring to take the testimony of any person by deposition on oral examination shall, without leave of the Commission or the Presiding Officer , give reasonable notice in writing to every other party and interested governmental participant, to the person to be examined, and to the Presiding Officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or her or the class or group to which he or she belongs, the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

56 FR 7787

(b) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission. Depositions may be conducted by telephone or by video teleconference at the option of the party or interested governmental participant taking the deposition.

(c) The deponent shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

54 FR 14925

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless the deponent is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly transmit the deposition to the LSS Administrator for submission into the Licensing Support System.

(e) Where the deposition is to be taken on written questions as authorized under § 2.1018(a)(2) of this subpart, the party or interested governmental participant taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party and interested governmental participant with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be asked. Within ten days after service, any other party or interested governmental participant may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, returned, and transmitted to the LSS Administrator as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the evidentiary record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party or interested governmental participant, any other party or interested governmental participant may introduce any other parts. A party or interested governmental participant shall not be deemed to make a person its own witness for any purpose by taking his or her deposition.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party or interested governmental participant at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

(i)(1) After receiving written notice of the deposition under paragraph (a) or paragraph (e) of this section, and ten days before the scheduled date of the deposition, the deponent shall submit an index of all documents in his or her possession, relevant to the subject matter of the deposition, including the categories of documents set forth in paragraph (i)(2) of this section, to all parties and interested governmental participants. The index shall identify those records which have already been entered into the Licensing Support System. All documents that are not identical to documents already in the Licensing Support System, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents.

54 FR 14925

(2) The following material is excluded from initial entry into the Licensing Support System, but is subject to derivative discovery under paragraph (i)(1) of this section—

(i) Personal records;
(ii) Travel vouchers;
(iii) Speeches;
(iv) Preliminary drafts;
(v) Marginalia.

(3) Subject to paragraph (i)(6) of this section, any party or interested governmental participant may request from the deponent a paper copy of any or all of the documents on the index that have not already been entered into the Licensing Support System.

(4) Subject to paragraph (i)(6) of this section, the deponent shall bring a paper copy of all documents on the index that the deposing party or interested governmental participant requests that have not already been entered into the Licensing Support System to an oral deposition conducted pursuant to paragraph (a) of this section, or in the case of a deposition taken on written

questions pursuant to paragraph (e) of this section, shall submit such documents with the certified deposition.

(5) Subject to paragraph (i)(6) of this section, a party or interested governmental participant may request that any or all documents on the index that have not already been entered into the Licensing Support System, and on which it intends to rely at hearing, be entered into the LSS by the deponent.

(6) The deposing party or interested governmental participant shall assume the responsibility for the obligations set forth in paragraphs (i)(1), (i)(3), (i)(4), and (i)(5) of this section when deposing someone other than a party or interested governmental participant.

54 FR 14925

(j) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the Presiding Officer, by subpoena or otherwise: *Provided*, That the Presiding Officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations and the testimony sought is not reasonably obtainable from another source by any party, require the attendance and testimony of named NRC personnel.

56 FR 7787

§ 2.1020 Entry upon land for inspection.

(a) Any party, potential party, or interested governmental participant may serve on any other party, potential party, or interested governmental participant a request to permit entry upon designated land or other property in the possession or control of the party, potential party, or interested governmental participant upon whom the request is served for the purpose of access to raw data, inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.1018 of this subpart.

54 FR 14925

(b) The request may be served on any party, potential party, or interested governmental participant without leave of the Commission or the Presiding Officer.

56FR7787

(c) The request shall describe with reasonable particularity the land or other property to be inspected either by individual item or by category. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

54FR14925

(d) The party, potential party, or interested governmental participant upon whom the request is served shall serve on the party, potential party, or interested governmental participant submitting the request a written response within ten days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

54 FR 14925

§ 2.1021 First prehearing conference.

(a) In any proceeding involving an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter the Commission or the Presiding Officer will direct the parties, interested governmetal participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, within seventy days after the notice of hearing is published, or such other time as the Commission or the Presiding Officer may deem appropriate, for a conference to:

56 FR 7787

(1) Permit identification of the key issues in the proceeding;

(2) Take any steps necessary for further identification of the issues;

(3) Consider all intervention petitions to allow the Presiding Officer to make such preliminary or final determination as to the parties and interested governmental participants, as may be appropriate;

(4) Establish a schedule for further actions in the proceeding; and

54 FR 14925

(5) Establish a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d).

(b) The Presiding Officer may order any further formal and informal conferences among the parties and interested governmental participants including teleconferences, to the extent that it considers that such a conference would expedite the proceeding.

56 FR 7787

(c) A prehearing conference held pursuant to this section shall be stenographically reported.

54 FR 14925

(d) The Presiding Officer shall enter an order which recites the action taken at the conference, the schedule for further actions in the proceeding, and any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties and interested governmental participants in the proceeding, and provides for the submission of status reports on discovery.

56 FR 7787

§ 2.1022 Second prehearing conference.

(a) The Commission or the Presiding Officer in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than thirty days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

(1) Any amended contentions submitted under § 2.1014(a)(4) of this subpart;

(2) Simplification, clarification, and specification of the issues;

(3) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

54 FR 14925

(4) Identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(5) The setting of a hearing schedule;

(6) Establishing a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d); and

(7) Such other matters as may aid in the orderly disposition of the proceeding.

(b) A prehearing conference held pursuant to this section shall be stenographically reported.

(c) The Presiding Officers shall enter an order which recites the action taken at the conference and the agreements by the parties, limits the issues or defines the matters in controversy to be determined in the proceeding, sets a discovery schedule, and sets the hearing schedule.

56 FR 7787

§ 2.1023 Immediate effectiveness.

(a) Pending review and final decision by the Commission, an initial decision resolving all issues before the Presiding Officer in favor of issuance or amendment of a construction authorization pursuant to § 60.31 of this

chapter or a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to § 60.41 of this chapter, will be immediately effective upon issuance except—

(1) As provided in any order issued in accordance with § 2.788 of this part that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

(b) The Director of Nuclear Material Safety and Safeguards, notwithstanding the filing or pendency of an appeal or a petition for review pursuant to § 2.1015 of this subpart, promptly shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic respository operations area, or amendments thereto, following an initial decision resolving all issues before the Presiding Officer in favor of the licensing action, upon making the appropriate licensing findings, except—

(1) As provided in paragraph (c) of this section; or

(2) As provided in any order issued in accordance with § 2.788 of this part that stays the effectiveness of an initial decision; or

(3) As otherwise provided by the Commission in special circumstances.

(c)(1) Before the Director of Nuclear Material Safety and Safeguards may issue a construction authorization or a license to receive and possess waste at a geologic repository operations area in accordance with paragraph (b) of this section, the Commission, in the exercise of its supervisory authority over agency proceedings, shall undertake and complete a supervisory examination of those issues contested in the proceeding before the Presiding Officer to consider whether there is any significant basis for doubting that the facility will be constructed or operated with adequate protection of the public health and safety, and whether the Commission should take action to suspend or to otherwise condition the effectiveness of a Presiding Officer decision that resolves contested issues in a proceeding in favor of issuing a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area. This supervisory examination is not part of the adjudicatory proceeding. The Commission shall notify the Director in writing when its supervisory examination conducted in accordance with this paragraph has been completed.

(2) Before the Director of Nuclear Material Safety and Safeguards issues a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission shall review those issues that have not been contested in the proceeding before the Presiding Officer but about which the Director must make appropriate findings prior to the issuance of such a license. The Director shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area only after written notification from the Commission of its completion of its review under this paragraph and of its determination that it is appropriate for the Director to issue such a construction authorization or license. This Commission review of uncontested issues is not part of the adjudicatory proceeding.

(3) No suspension of the effectiveness of a Presiding Officer's initial decision or postponement of the Director's issuance of a construction authorization or license that results from a Commission supervisory examination of contested issues under paragraph (c)(1) of this section or a review of uncontested issues under paragraph (c)(2) of this section will be entered except in writing with a statement of the reasons. Such suspension or postponement will be limited to such period as is necessary for the Commission to resolve the matters at issue. If the supervisory examination results in a suspension of the effectiveness of the Presiding Officer's initial decision under paragraph (c)(1) of this section, the Commission will take review of the decision sua sponte and further proceedings relative to the contested matters at issue will be in accordance with procedures for participation by the DOE, the NRC staff, or other parties and interested governmental participants to the Presiding Officer proceeding established by the Commission in its written statement of reasons. If a postponement results from a review under paragraph (c)(2) of this section, comments on the uncontested matters at issue may be filed by the DOE within ten days of service of the Commission's written statement.

§ 2.1025 Authority of the Presiding Officer to dispose of certain issues on the pleadings.

(a) Any party may move, with or without supporting affidavits, for a decision by the Presiding Officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise, statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement to be filed by the moving party will be deemed to be admitted unless controverted by the statement required to be filed by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The Presiding Officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the Presiding Officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

(b) Affidavits must set forth those facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. The Presiding Officer may permit affidavits to be supplemented or opposed by further affidavits. When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, must be rendered.

(c) The Presiding Officer shall render the decision sought if the filings in the proceeding show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.

§ 2.1026 Schedule.

(a) Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.

(b)(1) Pursuant to § 2.711, the Presiding Officer may approve extensions of no more than 15 days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforseen circumstances, requests for extensions of more than 15 days must be filed no later than 5 days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

(2) Extensions beyond 15 days must be referred to the Commission. If the Commission does not disapprove the extension within 10 days of receiving the request, the extension will be effective. If the Commission disapproves the extension, the date which was the subject of the extension request will be set for 5 days after the Commission's disapproval action.

(c)(1) The Presiding Officer may delay the issuance of an order up to thirty days beyond the time set forth for the issuance in appendix D.

(2) If the Presiding Officer anticipates that the issuance of an order will not occur until after the thirty day extension specified in paragraph (c)(1) of this section, the Presiding Officer shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

56 FR 7787

§ 2.1027 Sua Sponte.

In any initial decision in a proceeding on an application to receive and possess waste at a geologic repository operations area, the Presiding Officer, other than the Commission, shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties and determined to be litigable issues in the proceeding.

Subpart K—Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

§ 2.1101 Purpose.

The regulations in this subpart establish hybrid hearing procedures, as authorized by section 134 of the Nuclear Waste Policy Act of 1982 (98 Stat. 2230), to be used at the request of any party in certain contested proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant. These procedures are intended to encourage and expedite onsite expansion of spent nuclear fuel storage capacity.

50 FR 41662

§ 2.1103 Scope.

The procedures in this subpart apply to contested proceedings on applications filed after January 7, 1983, for a license or license amendment under Part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian

nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means. This subpart also applies to proceedings on applications for a license under Part 72 of this chapter to store spent nuclear fuel in an independent spent fuel storage installation located at the site of a civilian nuclear power reactor. This subpart shall not apply to the first application for a license or license amendment to expand the spent fuel storage capacity at a particular site through the use of a new technology not previously approved by the Commission for use at any other nuclear power plant.

§ 2.1105 Definitions.

As used in this part:

(a) "Civilian nuclear power reactor" means a civilian nuclear power plant required to be licensed as a utilization facility under section 103 or 104(b) of the Atomic Energy Act of 1954.

(b) "Spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

50 FR 41662

§ 2.1107 Notice of proposed action.

In connection with each application filed after January 7, 1983, for a license or an amendment to a license to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant, for which the Commission has not found that a hearing is required in the public interest, for which an adjudicatory hearing has not yet been convened, and for which a notice of proposed action has not yet been published as of the effective date of this subpart, the Commission will, prior to acting thereon, cause to be published in the Federal Register a notice of proposed action in accordance with § 2.105. The notice of proposed action will identify the availability of the hybrid hearing procedures in this subpart, specify that any party may invoke these procedures by filing a timely request for oral argument under § 2.1109, and provide that if a request for oral argument is granted, any hearing held on the application shall be conducted in accordance with the procedures in this subpart.

§ 2.1109 Requests for oral argument.

(a)(1) Within ten (10) days after an order granting a request for hearing or petition for leave to intervene, any party may invoke the hybrid hearing procedures in this subpart by requesting an oral argument. Requests for oral argument shall be in writing and shall be filed with the presiding officer. The presiding officer shall grant a timely request for oral argument.

(2) The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for failure to file on time and after providing the other parties an opportunity to respond to the untimely request.

(b) The presiding officer shall issue a written order ruling on any requests for oral argument. If the presiding officer grants a request for oral argument, the order shall include a schedule for discovery and subsequent oral argument with respect to the admitted contentions.

(c) If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, the presiding officer shall conduct the proceeding in accordance with Subpart G of 10 CFR Part 2.

§ 2.1111 Discovery.

Discovery shall begin and end at such times as the presiding officer shall order. It is expected that all discovery shall be completed within 90 days. The presiding officer may extend the time for discovery upon good cause shown based on exceptional circumstances and after providing the other parties an opportunity to respond to the request.

50 FR 41662

§ 2.1113 Oral argument.

(a) Fifteen (15) days prior to the date set for oral argument, each party, including the NRC staff, shall submit to the presiding officer a detailed written summary of all the facts, data, and arguments which are known to the party at such time and on which the party proposes to rely at the oral argument either to support or to refute the existence of a genuine and substantial dispute of fact. Each party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission. Each party's written summary and supporting information shall be simultaneously served on all other parties to the proceeding.

(b) Only facts and data in the form of sworn written testimony or other sworn written submission may be relied on by the parties during oral argument, and the presiding officer shall consider those facts and data only if they are submitted in that form.

§ 2.1115 Designation of issues for adjudicatory hearing.

(a) After due consideration of the oral presentation and the written facts and data submitted by the parties and relied on at the oral argument, the presiding officer shall promptly by written order:

(1) Designate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing; and

(2) Dispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.

With regard to each issue designated for resolution in an adjudicatory hearing, the presiding officer shall identify the specific facts that are in genuine and substantial dispute, the reason why the decision of the Commission is likely to depend on the resolution of that dispute, and the reason why an adjudicatory hearing is likely to resolve the dispute. With regard to issues not designated for resolution in an adjudicatory hearing, the presiding officer shall include a brief statement of the reasons for the disposition. If the presiding officer finds that there are no disputed issues of fact or law requiring resolution in an adjudicatory hearing, the presiding officer shall also dismiss the proceeding.

(b) No issue of law or fact shall be designated for resolution in an adjudicatory hearing unless the presiding officer determines that:

(1) There is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(2) The decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

50 FR 41662

(c) In making a determination under paragraph (b) of this section, the presiding officer shall not consider:

(1) Any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at the site, or any civilian nuclear power reactor for which a construction permit has been granted at the site, unless the presiding officer determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being considered; or

(2) Any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at that site, unless (i) such issue results from any revision of siting or design criteria by the Commission following such decision; and (ii) the presiding officer determines that such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being

considered.

(d) The provisions of paragraph (c) of this section shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations applied for under the Atomic Energy Act of 1954, as amended, before December 31, 2005.

50 FR 41662

(e) Unless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's order disposing of issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding.

§ 2.1117 Applicability of other sections.

In proceedings subject to this subpart, the provisions of Subparts A and G of 10 CFR Part 2 are also applicable, except where inconsistent with the provisions of this subpart.

Subpart L—Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings

§ 2.1201 Scope of subpart.

(a) The general rules of this subpart govern procedure in any adjudication initiated by a request for a hearing in a proceeding for—

(1) The grant, transfer, renewal, or licensee-initiated amendment of a materials license subject to parts 30, 32 through 35, 39, 40, or 70 of this chapter; or

(2) The grant, renewal, or licensee-initiated amendment of an operator or senior operator license subject to part 55 of this chapter.

57 FR 4152

(b) Any adjudication regarding, (1) a materials license subject to parts 30, 32 through 35, 39, 40, or 70, or an operator or senior operator license subject to part 55 that is initiated by a notice of hearing issued under § 2.104, or (2) a notice of proposed action under § 2.105, or a request for hearing under subpart B of 10 CFR part 2 on an order or a civil penalty, is to be conducted in accordance with the procedures set forth in subpart G of 10 CFR part 2.

§ 2.1203 Docket; filing; service.

54 FR 8269

(a) The Secretary shall maintain a docket for each adjudication subject to this subpart, commencing with the filing of a request for a hearing. All papers, including any request for a hearing, petition for leave to intervene, correspondence, exhibits, decisions, and orders, submitted or issued in the proceeding; the hearing file compiled in accordance with § 2.1231; and the transcripts of any oral presentations or oral questioning made in accordance with § 2.1235 or in connection with any appeal under this subpart must be filed with the Office of the Secretary and must be included in the docket. The public availability of official records relating to the proceeding is governed by § 2.790.

(b) Documents are filed with the Office of the Secretary in adjudications subject to this subpart either—

(1) By delivery to the Docketing and Service Branch of the Office of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852; or

(2) By mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

Filing by mail or telegram is complete as of the time of deposit in the mail or with the telegraph company. Filing by other means is complete as of the time of delivery to the Docketing and Service Branch of the Office of the Secretary.

54 FR 8269

(c) Each document submitted for filing in an adjudication subject to this part, other than an exhibit, must be legibly typed, must bear the docket number and the title of the proceeding, and, if it is the first document filed by that participant, must designate the name and address of a person upon whom service can be made. The document also must be signed in accordance with § 2.708(c). A document, other than correspondence, must be filed in an original and two conforming copies. Documents filed by telegram are governed by § 2.708(f). A document that fails to conform to these requirements may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any document tendered but not accepted for filing may not be entered in the docket.

(d) Computation of time and extension and reduction of time limits is done in accordance with §§ 2.710–2.711.

56 FR 29403

(e) A request for a hearing or a petition for leave to intervene must be served in accordance with § 2.712 and § 2.1205(e), (j). All other documents issued by the presiding officer, the Commission or offered for filing are served in accordance with § 2.712.

§ 2.1205 Request for a hearing; petition for leave to intervene.

54 FR 8269

(a) Any person whose interest may be affected by a proceeding for the grant, transfer, renewal, or licensee-initiated amendment of a license subject to this subpart may file a request for a hearing.

55 FR 36801

(b) An applicant for a license, a license amendment, a license transfer, or a license renewal who is issued a notice of proposed denial or a notice of denial and who desires a hearing shall file the request for the hearing within the time specified in § 2.103 in all cases. An applicant may include in the request for hearing a request that the presiding officer recommend to the Commission that procedures other than those authorized under this subpart be used in the proceeding, provided that the applicant identifies the special factual circumstances or issues which support the use of other procedures.

55 FR 36801

(c) A person other than an applicant shall file a request for a hearing within—

(1) Thirty (30) days of the agency's publication of the initial Federal Register notice referring or relating to an application or the licensing action requested by an application, which must include a reference to the opportunity for a hearing under the procedures set forth in this subpart; or

(2) If a Federal Register notice is not published in accordance with paragraph (c)(1), the earlier of—

(i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or

(ii) One hundred and eighty (180) days after agency action granting an application.

54 FR 8269

(d) The request for a hearing filed by a person other than an applicant must describe in detail—

(1) The interest of the requestor in the proceeding;

(2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in paragraph (g) of this section;

(3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and

(4) The circumstances establishing that the request for a hearing is timely in accordance with paragraph (c) of this section.

(e) Each request for a hearing must be served, by delivering it personally or by mail to—

(1) The applicant (unless the requestor is the applicant); and

(2) The NRC staff, by delivery to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, or by mail addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(f) Within ten (10) days of service of a request for a hearing filed under paragraph (c) of this section, the applicant may file an answer. The NRC staff, if it chooses or is ordered to participate as a party in accordance with § 2.1213, may file an answer to a request for a hearing within ten (10) days of the designation of the presiding officer.

(g) In ruling on a request for a hearing filed under paragraph (c) of this section, the presiding officer shall determine that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely. The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors—

(1) The nature of the requestor's right under the Act to be made a party to the proceeding;

(2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and

(3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

(h) If a hearing request filed under paragraph (b) of this section is granted, the applicant and the NRC staff shall be parties to the proceeding. If a hearing request filed under paragraph (c) of this section is granted, the requestor shall be a party to the proceeding along with the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213.

54 FR 8269

(i) If a request for a hearing is granted and a notice of the kind described in paragraph (c)(1) previously has not been published in the Federal Register, a notice of hearing must be published in the Federal Register stating—

(1) The time, place, and nature of the hearing;

(2) The authority under which the hearing is to be held;

(3) The matters of fact and law to be considered;

(4) The time within which any other person whose interest may be affected by the proceeding may petition for leave to intervene, as specified in paragraph (j) of this section; and

(5) The time within which a request to participate under § 2.1211(b) must be filed.

(j) Any petition for leave to intervene must be filed within thirty (30) days of the date of publication of the notice of hearing. The petition must set forth the information required under paragraph (d) of this section.

(1) A petition for leave to intervene must be served upon the applicant. The petition also must be served upon the NRC staff—

(i) By delivery to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852; or

(ii) By mail addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(2) Within ten (10) days of service of a petition for leave to intervene, the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213, may file an answer.

(3) Thereafter, the petition for leave to intervene must be ruled upon by the presiding officer, taking into account the matters set forth in paragraph (g) of this section.

(4) If the petition is granted, the petitioner becomes a party to the proceeding.

(k)(1) A request for a hearing or a petition for leave to intervene found by the presiding officer to be untimely under paragraph (c) or (j) will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that—

(i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; and

(ii) The grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding, including the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213.

(2) If the request for a hearing on the petition for leave to intervene is found to be untimely and the requestor or petitioner fails to establish that it otherwise should be entertained under paragraph (k)(1) of this section, the request or petition will be treated as a petition under § 2.206 and referred for appropriate disposition.

54 FR 8269

(l) The filing or granting of a request for a hearing or petition for leave to intervene need not delay NRC staff action regarding an application for a licensing action covered by this subpart.

(m) An order granting a request for a hearing or a petition for leave to intervene may condition or limit participation in the interest of avoiding repetitive factual presentations and argument.

(n) If the presiding officer denies a request for a hearing or a petition for leave to intervene in its entirety, the action is appealable within ten (10) days of service of the order on the question whether the request for a hearing or the petition for leave to intervene should have been granted in whole or in part. If a request for a hearing or a petition for leave to intervene is granted, parties other than the requestor or petitioner may appeal that action within ten (10) days of service of the order on the question whether the request for a hearing or the petition for leave to intervene should have been denied in its entirety. An appeal may be taken by filing and serving upon all parties a statement that succinctly sets out, with supporting argument, the errors alleged. The appeal may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

§ 2.1207 Designation of presiding officer.

(a) Unless otherwise ordered by the Commission or as provided in paragraph (b) of this section, within ten (10) days of receiving from the Office of the Secretary a request for a hearing relating to a licensing proceeding covered by this subpart, the Chairman of the Atomic Safety and Licensing Board Panel shall issue an order designating a single member of the panel to rule on the request for a hearing and, if necessary, to serve as the presiding officer to conduct the hearing.

(b) For any request for hearing relating to an application under 10 CFR Part 70 to receive and store unirradiated fuel at the site of a production or utilization facility that also is the subject of a proceeding under Subpart G of this Part for the issuance of an operating license, within ten (10) days of receiving from the Office of the Secretary a request for a hearing the Chairman of the Atomic Safety and Licensing Board Panel shall issue an order designating a Licensing Board conducting the operating license proceeding to rule on the request for a hearing and, if necessary, to conduct the hearing in accordance with this Subpart. Upon certification to the Commission by the Licensing Board designated to conduct the hearing that the matters presented for adjudication by the parties with respect to the Part 70 application are substantially the same as those being heard in the pending proceeding under 10 CFR Part 50, the Licensing Board may conduct the hearing in accordance with the procedures in Subpart G.

54 FR 8269

§ 2.1209 Power of presiding officer.

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. The presiding officer has all powers necessary to those ends, including the power to—

(a) Regulate the course of the hearing and the conduct of the participants;

(b) Dispose of procedural requests or similar matters;

(c) Hold conferences before or during the hearing for settlement, simplification of the issues, or any other proper purpose;

58FR29403

(d) Certify questions to the Commission for determination, either in the presiding officer's discretion or on direction of the Commission;

54 FR 8269

(e) Reopen a closed record for the reception of further information at any time prior to initial decision in accordance with § 2.734;

(f) Administer oaths and affirmations;

(g) Issue initial decisions;

(h) Issue subpoenas requiring the attendance and testimony of witnesses at the hearing or the production of documents for the hearing;

(i) Receive written or oral evidence and take official notice of any fact in accordance with § 2.743(i);

(j) Appoint special assistants from the Atomic Safety and Licensing Board Panel in accordance with § 2.722;

(k) Recommend to the Commission that procedures other than those authorized under this subpart be used in a particular proceeding; and

(l) Take any other action consistent with the Act and this chapter.

§ 2.1211 Participation by a person not a party.

(a) The presiding officer may permit a person who is not a party to make a limited appearance in order to state his or her views on the issues. Limited appearances may be in writing or oral, at the discretion of the presiding officer, and are governed by rules adopted by the presiding officer. A limited appearance statement is not to be considered part of the decisional record under § 2.1251(c).

(b) Within thirty days of an order granting a request for a hearing made under § 2.1205(b)–(c) or, in instances when it is published, within thirty days of a notice of hearing issued under § 2.1205(i), the representative of an interested State, county, municipality, or an agency thereof, may request an opportunity to participate in a proceeding under this subpart. The request for an opportunity to participate must state with reasonable specificity the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding. Upon receipt of a request that is filed in accordance with these time limits and that specifies the requestor's areas of concern, the presiding officer shall afford the representative a reasonable opportunity to make written and oral presentations in accordance with §§ 2.1233 and 2.1235, without requiring the representative to take a position with respect to the issues. Participants under this subsection may notice an appeal of an initial decision in accordance with § 2.1253 with respect to any issue on which they participate.

54 FR 8269

§ 2.1213 Role of the NRC staff.

If a hearing request is filed under § 2.1205(b), the NRC staff shall be a party to the proceeding. If a hearing request is filed under § 2.1205(c), within ten (10) days of the designation of a presiding officer pursuant to § 2.1207 the NRC staff shall notify the presiding officer whether or not the staff desires to participate as a party to the adjudication. In addition, upon a determination by the presiding officer that the resolution of any issue in the proceeding would be aided materially by staff's participation in the proceeding as a party, the presiding officer may order or permit the NRC staff to participate as a party with respect to that particular issue.

54 FR 53035

§ 2.1215 Appearance and practice.

(a) An individual may appear in an adjudication under this subpart on his or her own behalf or by an attorney-at-law. Representation by an attorney-at-law is not necessary in order for an organization or a § 2.1211(b) participant to appear in an adjudication conducted under this subpart. If the representative of an organization is not an attorney-at-law, he or she shall be a member or officer of the organization represented. Upon request of the presiding officer, an individual acting as a representative shall provide appropriate information establishing the basis of his or her authority to act in a representational capacity.

(b) Any action to reprimand, censure, or suspend a party, a § 2.1211(b) participant, or the representative of a party or a § 2.1211(b) participant must be in accordance with the procedures in § 2.713(c).

Hearings

§ 2.1231 Hearing file; prohibition on discovery.

(a) Within thirty (30) days of the presiding officer's entry of an order granting a request for a hearing, the NRC staff shall file in the docket, present to the presiding officer, and make available to the applicant and any other party to the proceeding a hearing file. Thereafter, within ten (10) days of the date a petition for leave to intervene or a request to participate under § 2.1211(b) is granted, the NRC staff shall make the hearing file available to the petitioner or the § 2.1211(b) participant.

(1) The hearing file must be made available to the applicant and any other party or § 2.1211(b) participant to the proceeding either by—

(i) Service in accordance with § 2.1203(e); or

(ii) Placing the file in an established local public document room in the vicinity of the principal location where nuclear material that is the subject of a proceeding under this subpart will be possessed, and informing the applicant, party, or § 2.1211(b) participant in writing of its action and the location of the file. If an established local public document room does not exist, the NRC staff will arrange for the documents contained in the hearing file, along with any other material docketed in accordance with § 2.1203, to be made available for public inspection and copying during the course of the adjudication in a library or other facility that is accessible to the general public during regular business hours and is in the vicinity of the principal location where the nuclear material that is the subject of the proceeding will be possessed.

(2) The hearing file also must be made available for public inspection and copying during regular business hours at the NRC Public Document Room in Washington, DC.

(b) The hearing file will consist of the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application. Hearing file documents already in an established local public document room or the NRC Public Document Room when the hearing request is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file.

54 FR 8269

(c) The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials for the docket, the presiding officer, and the applicant or any party or § 2.1211(b) participant in a manner consistent with the way the hearing file was made available initially under paragraph (a).

(d) A party or § 2.1211(b) participant may not seek discovery from any other party, § 2.1211(b) participant, or the NRC or its personnel, whether by document production, deposition, interrogatories, or otherwise.

§ 2.1233 Written presentations; written questions.

(a) After publication of a notice of hearing in accordance with § 2.1205(i) and after the NRC staff has made the hearing file available in accordance with § 2.1231, the parties and § 2.1211(b) participants shall be afforded the opportunity to submit, under oath or affirmation, written presentations of their arguments and documentary data, informational material, and other supporting written evidence at the time

or times and in the sequence the presiding officer establishes by appropriate order. The presiding officer also may, on his or her initiative, submit written questions to the parties to be answered in writing, under oath or affirmation, and supported by appropriate documentary data, informational material, or other written evidence.

(b) In a hearing initiated under § 2.1205(b), the initial written presentation of the applicant that is issued a notice of proposed denial or a notice of denial must describe in detail any deficiency or omission in the agency's denial or proposed denial of its application and what relief is sought with respect to each deficiency or omission.

(c) In a hearing initiated under § 2.1205(c), the initial written presentation of a party that requested a hearing or petitioned for leave to intervene must describe in detail any deficiency or omission in the license application, with references to any particular section or portion of the application considered deficient, give a detailed statement of reasons why any particular section or portion is deficient or why an omission is material, and describe in detail what relief is sought with respect to each deficiency or omission.

(d) A party or § 2.1211(b) participant making an initial written presentation under this section shall submit with its presentation or identify by reference to a generally available publication or source, such as the hearing file, all documentary data, informational material, or other written evidence upon which it relies to support or illustrate each omission or deficiency complained of. Thereafter, additional documentary data, informational material, or other written evidence may be submitted or referenced by any party, other than the NRC staff, or by any § 2.1211(b) participant in a written presentation or in response to a written question only as the presiding officer, in his or her discretion, permits.

(e) Strict rules of evidence do not apply to written submissions under this section, but the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable.

54 FR 8269

§ 2.1235 Oral presentations; oral questions.

(a) Upon a determination that it is necessary to create an adequate record for decision, in his or her discretion the presiding officer may allow or require oral presentations by any party or § 2.1211(b) participant, including testimony by witnesses. Oral presentations are subject to any appropriate time limits the presiding officer imposes. Responsibility for the conduct of the examination of any witness rests with the presiding officer who may allow a party or § 2.1211(b) participant to propose questions for the presiding officer to pose to a witness.

54FR53035

54 FR 53035

(b) Oral presentations and responses to oral questioning to be relied upon as oral evidence must be given under oath or affirmation. All oral presentations or oral questioning must be stenographically reported and, except as requested pursuant to section 181 of the Act, must be public unless otherwise ordered by the Commission.

(c) Strict rules of evidence do not apply to oral submissions under this section, but the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of an oral presentation or a response to oral questioning that is cumulative, irrelevant, immaterial, or unreliable.

§ 2.1237 Motions; burden of proof.

(a) Motions presented in the proceeding must be presented and disposed of in accordance with §§ 2.730 (a)–(g).

54 FR 8269

(b) Unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof.

§ 2.1239 Consideration of Commission rules and regulations in informal adjudications.

(a) Except as provided in paragraph (b) of this section, any regulation of the Commission issued in its program for the licensing and regulation of production and utilization facilities, source material, special nuclear material, or byproduct material may not be challenged in any adjudication subject to this subpart.

(b) A party to an adjudication subject to this subpart may petition that the application of a Commission regulation specified in paragraph (a) of this section be waived or an exception made for the particular proceeding. The sole ground for a request for waiver or exception must be that special circumstances exist so that application of the regulation to the subject matter of the proceeding would not serve the purposes for which the regulation was adopted. In the absence of a prima facie showing of special circumstances, the presiding officer may not further consider the matter. If the presiding officer determines that a prima facie showing has been made, he or she shall certify directly to the Commission itself for determination the matter of whether special circumstances support a waiver or an exception and whether a waiver or an exception should be granted. The Commission's determination shall be made after any further proceeding the Commission deems appropriate.

54 FR 8269

§ 2.1241 Settlement of proceedings.

The fair and reasonable settlement of proceedings subject to this subpart is encouraged. A settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding.

Initial Decision, Commission Review, And Final Decision

§ 2.1251 Initial decision and its effect.

54 FR 8269

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the presiding officer shall render an initial decision after completion of an informal hearing under this subpart. That initial decision constitutes the final action of the Commission thirty (30) days after the date of issuance, unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review of the decision sua sponte.

54 FR 53035

(b) The Commission may direct that the presiding officer certify the record to it without an initial decision and may omit an initial decision and prepare a final decision upon a finding that due and timely execution of its functions so requires.

54 FR 8269

(c) An initial decision must be in writing and must be based only upon information in the record or facts officially noticed. The record must include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice and an opportunity to comment. The initial decision must include—

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) The appropriate ruling, order, or denial of relief with its effective date; and

56 FR 29403

(3) The time within which a petition for review may be filed, the time within which any answer to a petition for review may be filed, and the date when the decision becomes final in the absence of the Commission taking review of the decision.

(d) Matters not put into controversy by the parties may not be examined and decided by the presiding officer

56 FR 29403

If the presiding officer or the Appeal Board believes that a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy, the presiding officer shall advise the Commission promptly of the basis for that view, and the Commission may take appropriate action.

54 FR 8269

(e) Pending review and final decision by the Commission, an initial decision resolving all issues before the presiding officer in favor of authorizing licensing action subject to this subpart is immediately effective upon issuance except—

(1) As provided in any order issued in accordance with § 2.1263 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

56 FR 29403

(f) Following an initial decision resolving all issues in favor of the licensing action as specified in paragraph (e) of this section, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of a petition for review or pendency of any review taken by the Commission pursuant to § 2.786, shall take the appropriate licensing action upon making the appropriate licensing findings promptly, except as may be provided pursuant to paragraph (e)(1) or (2) of this section.

§ 2.1253 Petitions for review of initial decisions.

Parties and § 2.1211(b) participants may petition for review of an initial decision under this subpart in accordance with the procedures set out in § § 2.786 and 2.763 or the Commission may review the decision on its own motion. Commission review will be conducted in accordance with those procedures the Commission deems appropriate. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

§ 2.1255 [Removed]

§ 2.1257 [Removed] 56 FR 29403

54 FR 8269

§ 2.1259 Final decision; petition for reconsideration.

(a) Commission or Atomic Safety and Licensing Appeal Board action to render a final decision must be in accordance with § 2.770.

(b) The provisions of § 2.771 govern the filing of petitions for reconsideration.

§ 2.1261 Authority of the Secretary to rule on procedural matters.

The Secretary or the Assistant Secretary may rule on procedural matters relating to proceedings conducted by the Commission itself under this subpart to the same extent they can do so under § 2.772 for proceedings under Subpart G.

§ 2.1263 Stays of NRC staff licensing actions or of decisions of a presiding officer or the Commission, pending hearing or review.

Applications for a stay of any decision or action of the Commission, a presiding officer, or any action by the NRC staff in issuing a license in accordance with § 2.1205(l) are governed by § 2.788, except that any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing or petition to intervene is filed or within ten (10) days of the staff's action,

54 FR 8269

whichever is later. A request for a stay of a staff licensing action must be filed with the adjudicatory decisionmaker before which the licensing proceeding is pending.

APPENDIX A—STATEMENT OF GENERAL POLICY AND PROCEDURE: CONDUCT OF PROCEEDINGS FOR THE ISSUANCE OF CONSTRUCTION PERMITS AND OPERATING LICENSES FOR PRODUCTION AND UTILIZATION FACILITIES FOR WHICH A HEARING IS REQUIRED UNDER SECTION 189A OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED*

37 FR 15127

The following statement of general policy and procedure explains in detail the procedures which the Atomic Energy Commission expects to be followed by atomic safety and licensing boards in the conduct of proceedings relating to the issuance of construction permits for nuclear power and test reactors and other production or utilization facilities for which a hearing is mandatory under section 189a. of the Atomic Energy Act of 1954, as amended (the Act).[1] The provisions are also applicable to proceedings for the issuance of operating licenses for such facilities, except as the context would otherwise indicate, or except as indicated in section VIII. Section VIII sets out the procedures specifically applicable to operating license proceedings. The Statement reflects the Commission's intent that such proceedings be conducted expeditiously and its concern that its procedures maintain sufficient flexibility to accommodate that objective. This position is founded upon the recognition that fairness to all the parties in such cases and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays. These factors take on added importance in nuclear power reactor licensing proceedings where the growing national need for electric power and the companion need for protecting the quality of the environment call for decision making which is both sound and timely. The Commission expects that its responsibilities under the Atomic Energy Act of 1954, the National Environmental Policy Act of 1969 and other applicable statutes, as set out in the statement which follows, will be carried out in a manner consistent with this position in the overall public interest.

37 FR 15127

Atomic safety and licensing boards are appointed from time to time by the Commission or the Chairman of the Atomic Safety and Licensing Board Panel to conduct hearings in licensing cases under the authority of section 191 of the Act. Section 191 authorizes the Commission to establish one or more atomic safety and licensing boards to conduct public hearings and to make intermediate or final decisions in administrative proceedings relating to granting, suspending, revoking or amending licenses issued by the Commission. It requires that each board consist of one member who is qualified in the conduct of administrative proceedings and two members who have such technical or other qualifications as the Commission deems appropriate to the issues to be decided. Members of each board may be appointed by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel from a panel selected from private life, the staff of the Commission or other Federal agencies.

45 FR 62027

An Atomic Safety and Licensing Board may at its discretion appoint special assistants to the Board from the membership of the Atomic Safety and Licensing Board Panel established by the Commission. These special assistants are to be employed to facilitate the hearing process and improve the quality of the record produced for review. The special assistants may serve as technical interrogators in their individual fields of expertise, alternate Atomic Safety and Licensing Board members to sit with the Board and participate in the evidentiary sessions on the issue for which the alternate members were designated, Special Masters to hear evidentiary presentations by the parties on specific technical matters upon the consent of all parties, or informal consultants to brief the board prior to the hearing on the general technical background of subjects involving complex issues. The term "alternate board member" as a "special assistant" within the meaning of 10 CFR 2.722(a)(3) should not be confused with the use of the term "alternate" in 10 CFR 2.721(b). In the latter situation the "alternate" is a substitute for a member of a Board who becomes unavailable. As a special assistant, the "alternate" sits with the three-member Board and not instead of the Board or any of its members.

45 FR 62027

I. PRELIMINARY MATTERS

49 FR 9352

(a) A public hearing is announced by the issuance of a notice of hearing, published in the Federal Register as soon as practicable after the application has been docketed, signed by the Secretary of the Commission stating the nature of the hearing and the issues to be considered. The time and place of the first prehearing conference pursuant to § 2.751a will ordinarily be stated in the notice of hearing. Unless the initial notice of hearing states the time and place of the hearing, and the Chairman and other members of the Atomic Safety and Licensing Board that will conduct the hearing, those matters will be the subject of further notice in the Federal Register after publication of the initial notice of hearing. It is the Commission's policy and practice to begin the evidentiary hearing in the vicinity of the site of the proposed facility. The notice of hearing also states the procedures whereby persons may seek to intervene or make a limited appearance and explains the differences between those forms of participation in the proceeding, and states the times and places of the availability, in an appropriate office near the site of the proposed facility, of the notice of hearing, an updated copy of the application, the report of the Advisory Committee on Reactor Safeguards (ACRS), the staff safety evaluation, the applicant's environmental report, the Commission's environmental impact statement, the proposed construction permit or operating license and the transcripts of the prehearing conference and the hearing.

56 FR 29403

(b) In fixing the time and place of any conference, including prehearing conferences, or of any adjourned session of the evidentiary hearing, due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as of the Board members, the nature of such conference or adjourned session, and the public interest. Adjourned sessions of hearings may be held in the Washington, DC area if all parties so stipulate. If the parties disagree, and any party considers that there are valid reasons for holding such session in the Washington, DC area, the matter should be referred to the Commission for resolution.

*In the event of any conflict between the provisions of this appendix and any section of this part, the section governs.

[1]Except as the context may otherwise indicate, this statement is also generally applicable to licensing proceedings of the type described in the statement which may be conducted by a hearing examiner as the presiding officer.

(c) (1) The Commission or the Atomic Safety and Licensing Board may consider on their own initiative, or a party may request the Commission or the board to consider, a particular issue or issues separately from, and prior to, other issues relating to the effect of the construction and/or operation of the facility upon the public health and safety, the common defense and security, and the environment or in regard to anti-trust considerations. If the Commission or the board determines that a separate hearing should be held, the notice of hearing or other appropriate notice will state the time and place of the separate hearing on such issue or issues. the board designated to conduct the hearing will issue an initial decision, if deemed appropriate, which will be dispositive of the issue(s) considered at the hearing, in the absence of an appeal or Commission review pursuant to § 2.760 before the hearing on, and consideration of, the remaining issues in the proceeding.

56 FR 29403

(2) In a proceeding relating to the issuance of a construction permit for a facility which is subject to the environmental impact statement requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 and subpart A of Part 51 of this chapter and which is a utilization facility for industrial or commercial purposes or is a testing facility, separate hearings may be held and decisions may be issued on National Environmental Policy Act and site suitability issues and other specified issues as provided by subpart F and § 2.761a.

(d) Prior to a hearing, board members should review and become familiar with: The record of any relevant prior proceedings in the case, including initial decisions and Commission orders, the application, the ARCS report, the staff safety evaluation, the applicant's environmental report, the Commission's environmental impact statement, all other papers filed in the proceeding, the Commission's rules of practice, and other regulations or published statements of policy of the Commission as may be pertinent to the proceeding.

49 FR 9352

(e) At any time when a board is in existence but is not actually in session, the chairman has all the powers of the board to take action on procedural matters. The chairman may have occasion, when the board is not in session, to dispose of preliminary procedural requests including, among other things, motions by parties relating to the conduct of the hearing. He may wish to discuss such requests with the other members of the board before ruling on them. No interlocutory appeal[2] may be taken by a party as a matter of right from a ruling of the chairman or the board. The board should refer the challenged ruling to the Commission for a final decision if, in its judgment, a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. This authority should be exercised sparingly, and only when deemed essential in fairness to the parties or the public.

37 FR 15127

37 FR 15127

II. PREHEARING CONFERENCES

(a) A special prehearing conference will be held, within ninety (90) days after the notice of hearing has been published, or such other time as the Commission or the Board may deem appropriate, in addition to the standard prehearing conference provided by § 2.752. The special prehearing conference, authorized by § 2.751a, should be used to permit identification of key issues; take steps necessary for further identification of the issues; consider all intervention petitions to allow preliminary or final determination as to the parties; and establish a schedule for further actions in the proceeding.

43 FR 17798

(b) Within sixty (60) days after discovery has been completed,[3] or such other time as the presiding officer or the Commission deems appropriate, a second prehearing conference—the prehearing conference provided by § 2.752—is held to consider simplification, clarification, and specification of the issues; consider amendments to the pleadings; obtain stipulations and admissions of facts and of the contents and authenticity of documents to avoid unnecessary proof; identification of witnesses; the setting of a hearing schedule; and such other matters as may aid in the orderly disposition of the hearing.

37 FR 15127

(c) A transcript of each prehearing conference will be prepared. The board will issue an order after the conclusion of the special prehearing conference which recites the action taken at the conference and agreements by the parties, identifies the key issues in controversy, makes a preliminary or final determination as to the parties, and provides for submission of status reports on discovery by the parties. The board will also issue an order after the conclusion of the second prehearing conference that specifies the issues in controversy in the proceeding. Each order shall be served upon all parties to the proceeding. Objections to such order may be filed by a party within five (5) days, or, in the case of the staff, within ten (10) days. The board may revise the order in the light of the objections presented and, as permitted by § 2.718(i), may certify for determination to the Commission such matters raised in the objections as it deems appropriate. As specified in § 2.752, the order shall control the subsequent course of the proceeding unless modified for good cause.

37 FR 15127

(d) Prehearing conferences are open to the public except under exceptional circumstances involving such matters as classified information and certain privileged information not normally a part of the hearing record.

(e) The applicant, the staff and other parties are required to provide each other and the board with copies of prepared testimony in advance of its being offered at the hearing. A schedule may be established at the second prehearing conference for exchange of prepared testimony. Prepared testimony is filed in the Commission's public document room and is available for public inspection. When the staff has reached its conclusions with respect to the application and prepared a safety evaluation, the safety evaluation will be made available—a point of time which may or may not be prior to the hearing.

[2] An interlocutory appeal means an appeal to the Commission from a ruling made by the board during the time between the issuance of a notice of hearing and the issuance of the initial decision.

[3] "Discovery", for this purpose, does not include production of the ACRS report, the staff's safety evaluation, or the detailed statement on environmental considerations prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee.

III. INTERVENTION AND LIMITED APPEARANCES

(a)(1) As required by § 2.714, a person who wishes to intervene must set forth, in a petition for leave to intervene, his interest in the proceeding and how the interest may be affected by Commission action. Petitions for leave to intervene shall, as a basis for enabling the board or the Commission to determine how the petitioner's interest may be affected by the proceeding, set forth (i) the nature of his right under the Act to be made a party to the proceeding, (ii) the nature and extent of the interest that may be affected by the proceeding, and (iii) the effect of any order which may be entered in the proceeding on the petitioner's interest. The petition must identify the specific aspects as to which the petitioner wishes to intervene and set forth with particularity the facts pertaining to his interest. The petitioner must file a supplement to his petition containing his contention(s) and basis therefor not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a. After consideration of any answers to the petition, the board will rule on the petition. If the board finds that the petitioner's interest is limited to one or more of the issues in the proceeding, the intervenor's participation will be limited to those issues.

Petitions and supplements thereto which set forth contentions relating only to matters outside the jurisdiction of the Commission will be denied. In any event, the granting of a petition for leave to intervene does not operate to enlarge the issues, or become a basis for receipt of evidence, with respect to matters beyond the jurisdiction of the Commission.

(2) Petitions for leave to intervene which are not filed within the time specified in the notice of hearing will not be granted unless the board determines that the petition should be granted based upon paragraph (a)(1) of this section and upon a balancing of (i) good cause, if any, for petitioner's failure to file on time, (ii) the availability of other means whereby the petitioner's interest will be protected, (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record, (iv) the extent to which petitioner's interest will be represented by existing parties, and (v) the extent which the petitioner's participation will broaden the issues or delay the proceedings.

(3) Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have all the rights of the applicant to participate fully in the conduct of the hearing, such as the examination and cross-examination of witnesses, with respect to their contentions related to the matters at issue in the proceeding.

(4) If more than one person who has been granted leave to intervene has substantially the same kind of interest that may be affected by the proceeding, and raises the same basic questions, the board or the Commission may order those persons to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact and conclusions of law and argument, unless such consolidation cannot be accomplished without prejudice to the rights of a party.

(b) A person who does not wish to, or is not qualified to become a party may be permitted at the discretion of the board, to make a limited appearance pursuant to § 2.715. Persons permitted to make limited appearances do not become parties, but should be permitted to make statements at such stage of the proceeding as the board may consider appropriate. A person making a limited appearance may only make an oral or written statement on the record, and may not participate in the proceeding in any other way. The board may wish to limit the length of oral statements. A member of the public does not have the right to participate unless he has been granted the right to intervene as a party or the right of limited appearance for the purpose of making a statement.

IV. DISCOVERY

(a) Once the key issues in controversy are identified in the special prehearing conference order (§ 2.751a.(d)), discovery may proceed and will be limited to those matters. In no event should the parties be permitted to use discovery procedures to conduct a "fishing expedition" or to delay the proceeding.

(b) Under the Commission's rules of practice, discovery permitted by §§ 2.720, 2.740, 2.740a, 2.740b, 2.741, 2.742, and 2.744 must be completed by the second prehearing conference, except upon leave for good cause shown.

(c) Depositions, interrogatories and document production between parties other than the staff are obtainable on notice or request to the other party and without leave of the Commission or the board, in line with the Federal rules of Civil Procedure.

(d) In general, staff documents that are relevant to a proceeding will be publicly available as a matter of course unless there is a compelling justification for their nondisclosure. Therefore, document discovery directed at the staff will be restricted, as provided in § 2.744, since most staff documents will be publicly available and should reasonably disclose the basis for the staff's position. Formal discovery of documents against the staff will be limited to cases where it concerns a matter necessary to a proper decision in a case and the information sought is not obtainable elsewhere. Discovery as a legitimate means of obtaining information will not be inhibited, but in view of the comprehensive body of information routinely available without request, there should be minimum need to resort to time consuming discovery procedures. Discovery against the staff (and other NRC personnel, including consultants) by way of deposition is permitted upon a showing of exceptional circumstances. Interrogatories may be addressed to the staff where the information is necessary to proper decision in the case and not obtainable elsewhere.

V. THE HEARING

The board should use its powers under §§ 2.718 and 2.757 to assure that the hearing is focused upon the matters in controversy among the parties and that the hearing process for the resolution of controverted matters is conducted as expeditiously as possible, consistent with the development of an adequate decisional record.

The following procedures should be observed in the conduct of public hearings:

(a) Preliminary:

(1) A verbatim transcript will be made of the hearing.

(2) The Chairman should convene the hearing by stating the title of the proceeding and describing its nature.

(3) He should state the date, time, and place at which the prehearing conferences were held, and identify the persons participating in them. He should summarize the second prehearing conference order.

(4) He should explain the procedures for the conduct of the hearing. He should request that counsel for the parties identify themselves on the record, and provide them with the opportunity to make opening statements of their respective positions.

(5) He should describe, for the benefit of members of the public who may be present, the respective roles of the board, the ACRS and the staff, and the Commission procedures for review of the decision. He should also describe the continuing review and inspection surveillance conducted by the Commission after a construction permit or an operating license has been issued.

(b)(1) The Chairman should call attention to the provisions of § 2.715 for participation by limited appearance. He should briefly explain these provisions and the rights of persons who are permitted to make limited appearances.

(2) The Chairman should inquire of those in attendance whether there are any who wish to participate in the hearing by limited appearance.

(3) Should any person seek leave to intervene when the hearing has been convened, he must set forth, with particularity in a written petition, the reasons why it was not possible to file a petition within the time prescribed in the notice of hearing, as described in Section III, to afford a basis for the board to determine whether or not good cause has been shown for the untimely filing. In granting a petition for leave to intervene which is not timely filed, the board will impose such conditions as are appropriate to minimize any delay in the proceeding.

(4) A person making a limited appearance may want not only to state his position, but to raise questions which he would like to have answered. This should be permitted to the extent the questions are within the scope of the proceeding as defined by the issues set out in the notice of hearing, the prehearing conference order, and any later orders. Usually such persons should be asked to make their statements and raise their questions early in the proceeding so that the board will have an opportunity to be sure that relevant and meritorious questions are properly dealt with during the course of the hearing.

(5) It is the Commission's view that the rules governing intervention and limited appearances are necessary in the interest of orderly proceedings. The Commission also believes that through these two methods of public participation all members of the public are assured of the right to participate by a method appropriate to their interest in the matter. This should be fully explained at the beginning of the hearing. In some cases the board may feel that it must deny an application to intervene but that it can still accommodate the desire of the person involved by allowing him to make a statement and raise questions under the limited appearance rule.

(6) Boards have considerable discretion as to the manner in which they accommodate their conduct of the hearing to local public interest and the desires of local citizens to be heard. Particularly in cases where it is evident that there is local concern as to the safety of the proposed plant, boards should so conduct the hearing as to give appropriate opportunity for local citizens to express their views, while at the same time protecting the legal interests of all parties and the public interest in an orderly and efficient licensing process.

(7) In some cases, argument and further hearing can add nothing to the filings of the parties. In those cases the board is authorized, pursuant to § 2.749, on motion, to render a decision, if the filings in the proceeding and other materials show that there is no genuine issue as to any material fact. However, in proceedings involving construction permits, this procedure may be used only for determining subordinate issues and not the ultimate issues as to whether the construction permit should be issued.

(c) Opening statements:

(1) It is anticipated that the applicant, who has the burden of proof, will, at an appropriate time early in the proceeding, make an oral statement describing in terms that will be readily understood by the public, the principal safety and environmental considerations involved in carrying out the activity sought to be authorized.

(2) Other parties to the proceeding may also make an oral opening statement describing their position on the proposed licensing action.

(d) Evidence:

(1) Pursuant to § 2.732, the applicant has the burden of proof.

(2) The parties are required to submit direct testimony in written form and serve copies of such prepared written testimony on all parties pursuant to the schedule established at the second prehearing conference—in any event, at least 15 days in advance of the session of the hearing at which such testimony is to be presented, as provided by § 2.743(b), unless the board orders otherwise on the basis of objections presented. The staff's position is reflected primarily in the safety evaluation and final environmental impact statement. Consequently, the staff will not present its case until these documents are available. The use of such advance written testimony is expected to expedite the hearing process.

(3) The testimony of all witnesses will be given under oath. These witnesses may be collectively sworn at the opening of the hearing or if additional witnesses are called upon to testify at a subsequent stage they may be sworn at the time of their appearance. There is ordinarily no need for oral recital of prepared testimony unless the Board considers that some useful purpose will be served.

(4) The proceedings should be conducted as expeditiously as practicable, without impairing the development of a clear and adequate record. The order of presenting testimony may be freely varied in the conduct of the hearing. The Board may find it helpful to take expert testimony from witnesses on a roundtable basis after the receipt in evidence of prepared testimony.

(5) To prevent unnecessary delays and an unnecessarily large record, the Board may, pursuant to § 2.757, limit cumulative testimony, strike argumentative, repetitious, cumulative, or irrelevant evidence, take other necessary and proper steps to prevent argumentative, repetitious or cumulative cross examination, and impose appropriate time limitations on arguments.

(6) Documentary evidence may be offered in evidence as provided in § 2.743. Such evidence offered during the course of the hearing should be described by counsel, and furnished to the reporter for marking. Documents offered for marking should be numbered in order of receipt. On identification of a document, it may be offered in evidence.

(7) Objections may be made by counsel to any questions or any line of questioning, and to the admission of any document and should be ruled upon by the board. The board may admit the evidence, may sustain the objection, or may receive the evidence, reserving for later determination the question of admissibility. In passing on objections, the board, while not bound to view proferred evidence according to its admissibility under strict application of the rules of evidence in judicial proceedings, should exclude evidence that is irrelevant to issues in the case as defined in the notice of hearing or the prehearing conference order, or that pertains to matters outside the jurisdiction of the board or the Nuclear Regulatory Commission. Irrelevant material in prepared testimony submitted in advance under § 2.743(b) may be subject to a motion to strike under the procedures provided in § 2.730.

(8) Use of scientifically or technically trained persons who are not attorneys to conduct direct or cross-examination on behalf of a party is provided for in § 2.733. This procedure is a privilege, not a right,

and may be granted to further the conduct of the hearing. Before permitting such a person to conduct examination of witnesses, the board must determine (i) that he has technical or scientific qualifications, (ii) that he has read the written testimony and any documents which are to be the subject of his examination, and (iii) that he has prepared himself to conduct a meaningful and expeditious examination. Permission to cc duct examination will be limited to the areas in which the interrogator is shown to be qualified. The party on whose behalf the interrogator conducts the examination and his attorney are responsible for the interrogator's conduct of examination or cross-examination.

(9) The extent to which challenges to NRC regulations can be made in a licensing proceeding is limited. A party may petition for waiver of or exception to the application of a specified NRC rule or regulation to an aspect of the subject matter of the proceeding. The party must file a petition and an affidavit that identifies the specific aspect of the subject matter of the proceeding as to which application of the rule or regulation would not serve the purpose for which the regulation was adopted and that sets forth with particularity the special circumstances alleged to justify a waiver or exception on that ground (§ 2.758). Upon a finding by the board, based on the petition and affidavits and any material submitted by other parties, that the party has not made a prima facie case, no evidence, discovery, or argument will be allowed on the matter. If the Board finds that such a showing has been made, it will certify the matter, without ruling, directly to the Commission for a determination as to whether the application of the regulation to a particular aspect of the subject matter of the proceeding should be waived or an exception made.

(10) The Commission has recognized the public interest in achieving fair and reasonable settlement of contested proceedings (§ 2.759). Therefore, to the extent not inconsistent with the Act, fair and reasonable settlements are encouraged, either as to particular issues in a proceeding or the entire proceeding.

(11) Unless testimony is being taken on a roundtable basis or there is some occasion for clarification of testimony as rendered, the board may wish to reserve its questions until the parties have completed questioning of the witnesses, since counsel for the respective parties will generally be prepared to develop the various lines of pertinent questions.

(12) Conferences for the clarification of matters between the board and the parties, or the formulation of more meaningful questions, may be used to expedite the hearing and simplify the record. Informal conferences, including telephone conferences, should be encouraged to this end.

(13) The board should ordinarily not adjourn the hearing once it has begun, except as the hearing may be divided into segments to permit consideration of discrete areas, such as (i) radiological health and safety or (ii) environmental impact. To the extent practicable, legal questions should be resolved prior to the hearing. If the board believes that additional information is required in the presentation of the case, it would be expected to request the applicant or other party to supplement the presentation. If a recess should prove necessary to obtain such additional evidence, the recess should ordinarily be postponed until available evidence has been received.

(14) Many of the time limitations prescribed in Part 2 were set to allow the maximum time for the parties to the proceedings to perform various activities. Where the activities covered by the limitations can be performed in less time, the time limits may be reduced by order of the board, if appropriate, where such action would not prejudice a party. Similarly, in any case in which a time limit is not set by Part 2, the board should impose reasonable time limits.

(e) Record:

(1) The transcript of testimony and the exhibits, together with all of the papers and requests filed in a proceeding, constitute the record for decision, except to the extent that official notice is taken.

(2) Generally speaking, a decision by a board must be made on the basis of evidence which is in the record of the proceeding. A board, however, is expected to use its expert knowledge and experience in evaluating and drawing conclusions from the evidence that is in the record. The board may also take account of and rely on certain facts which do not have to be "proved" since they are "officially noticed"; these facts do not have to be "proved" since they are matters of common knowledge. Pursuant to § 2.743(i) "official notice" may be taken of any fact of which judicial notice might be taken by the courts of the United States and of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before the final decision, and each party adversely affected by the decision must be afforded an opportunity to controvert the noticed fact. (For example, a board might take "official notice" of the fact that high level wastes are encountered mainly as liquid residue from fuel reprocessing plants.) Matters which are "officially noticed" by a board furnish the same basis for findings of fact as matters which have been placed in evidence and proved in the usual sense.

(f) Participation by board members:

(1) In contested proceedings, the board will determine controverted matters as well as decide whether the findings required by the Act and the Commission's regulations should be made and whether, in accordance with Subpart A of Part 51, the construction permit should be issued as proposed.

Thus, in such proceedings, the board will determine the matters in controversy and may be called upon to make technical judgments of its own on those matters. As to matters pertaining to radiological health and safety which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the staff and ACRS, and they are authorized to rely upon the testimony of the staff, the applicant, and the conclusions of the ACRS, which are not controverted by any party.

(2) In an uncontested case, boards are neither required nor expected to duplicate the radiological safety review already performed by the staff and the ACRS and they are authorized to rely upon the testimony of the staff and the applicant, and the conclusions of the ACRS. The role of the board is not to conduct a de novo evaluation of the application, but rather to decide whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff, including the environmental review pursuant to the National Environmental Policy Act of 1969, has been adequate, to support the findings proposed to be made by the Director of Regulation and the issuance of the construction permit proposed by the Director of Regulation. In doing so, the board is expected to be mindful of the fact that it is the applicant, not the staff, who is the proponent of the construction permit and who has the burden of proof.

(3) Whether the construction permit proceeding is contested or uncontested, the board will, as to environmental impact matters, (a) determine whether the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act of 1969 and Subpart A of Part 51 of this chapter have been complied with; (b) independently consider the final balance among conflicting factors contained in the record, with a view to determining the appropriate action to be taken; and (c) determine whether the construction permit should be granted, denied, or appropriately conditioned to protect environmental values.

(4) A question may be certified to the Commission for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party. For example, a board may find it appropriate to certify novel questions as to the regulatory jurisdiction of the Commission or the right of persons to intervene.

(g) Close of hearing:

(1) If, at the close of the hearing, the board should have uncertainties with respect to the matters in controversy because of a need for a clearer understanding of the evidence which has already been presented, it is expected that the board would normally invite further argument from the parties—oral or written or both—before issuing its initial decision. If the uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted in writing with opportunity for the other parties to reply or reopen the hearing for the taking of further evidence, as appropriate. If either of such courses is followed, it is expected that the applicant would normally be afforded the opportunity to make the final submission.

(2) A board should give each party the opportunity to make a brief closing statement.

(3) A schedule should be set by the board and recorded, either in the transcript or by written order, of the dates upon which the parties are directed by the board to file proposed findings of fact and conclusions of law. In uncontested cases, the proposed findings will ordinarily be extremely brief. In contested proceedings, proposed findings of fact and conclusions of law submitted by the parties may be more detailed. While brevity in such submissions is encouraged, the proposed findings and conclusions should be such as to reflect the position of parties submitting them, and the technical and factual basis therefor.

(4) The board should dispose of any additional procedural requests.

(5) The chairman should formally close the hearing.

VI. Posthearing Proceedings, Including the Initial Decision

(a) A board, acting through the Chairman, should dispose of procedural requests made after the close of the hearing, including motions of the parties for correction of the transcript. Responses to requests and motions of the parties are made part of the record by issuance of written orders.

(b) On receipt of proposed findings and conclusions from the parties, the board should prepare the initial decision. Under the Administrative Procedure Act and the Commission's regulations, the decision should include:

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on, if any, in making the decision;

(3) The appropriate ruling, order, or denial or relief, with the effective date and time within which a notice of appeal from the initial decision may be filed;

(4) The time when the decision becomes final.

(c) Issues to be decided by the board:

(1) In a contested proceedings for the issuance of a construction permit, the board will determine the following issues:

(i) Whether in accordance with the provisions of, § 50.35(a) of this chapter:

(a) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(b) Such further technical or design information as may be required to complete the safety analysis and which can reasonably be left for later consideration, will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which requires research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features and components; and

(d) On the basis of the foregoing, there is reasonable assurance that

(1) Such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and

(2) Taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public.

(ii) Whether the applicant is technically qualified to design and construct the proposed facility;

(iii) Whether the applicant is financially qualified to design and construct the proposed facility;

(iv) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;

(v) Whether, with respect to the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act, in accordance with Subpart A of Part 51 of this chapter, the construction permit should be issued as proposed.

(2) In an uncontested proceeding for the issuance of a construction permit, the board will, without conducting a de novo evaluation of the application, determine:

(i) Whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate, to support the findings proposed to be made and required by the Act for the issuance, of the construction permit proposed by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and

(ii) Whether the review conducted pursuant to the National Environmental Policy Act of 1969 has been adequate.

(3) Regardless of whether the proceeding is contested or uncontested, the board will, in its initial decision, in accordance with Subpart A of Part 51 of this chapter:

(i) Determine whether the requirements of section 102(2)(A), (C) and (E) of the National Environmental Policy Act and Subpart A of Part 51 of this chapter have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

(d) It is expected that ordinarily a board will render its initial decision within 35 days after its receipt of proposed findings of fact and conclusions of law filed by the parties in a contested case and within 15 days after receipt of such proposed findings and conclusions in an uncontested case.

(e) The initial decision will be transmitted to the Chief, Docketing and Service Section, Office of the Secretary, for issuance.

(f) After the board's initial decision is issued, the entire record of the hearing, including the board's initial decision, will be sent to the Commission for review. In the course of this review, the Commission may allow the board's decision to become the final decision of the Commission, may modify a board decision, or may send the case back to the board for additional testimony on particular points or for further consideration of particular issues.

VII. General

(a) Two members, being a majority of the board, constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings. The vote of a majority controls in any decision by a board, including rulings during the course of a hearing as well as formal orders and the initial decision. A dissenting member is of course, free to express his dissent and the reasons for it in a separate opinion for the record.

(b) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may designate a technically qualified alternate or an alternate qualified in the conduct of administrative proceedings, or both, for a board. The designation of an alternate is discretionary. Alternates may be designated where the Commission (or the Chairman of the Atomic Safety and Licensing Board Panel) in its judgment believes that a proceeding involves factors that warrant the continuing assignment and presence of an alternate. If any alternates are designated before the hearing, they will receive copies and become familiar with the application and other documents filed by the parties prior to the start of the hearing. It is expected that an alternate will be constituted or appointed by the Commission or the Chairman of the Atomic Safety and Licensing Board Panel as a member of the board in situations where a technically qualified member of the board, or the member qualified in the conduct of administrative proceedings, becomes unavailable.

(c) Section 2.781 specifies when consultation between Commissioners or boards, on the one hand, and the staff, on the other hand, is permitted in licensing proceedings conducted under Subpart G. Section 2.781 also permits a board, in the same type of proceeding, to consult with members of the panel from which the members of the board are drawn.

VIII. Procedures Applicable to Operating License Proceedings

(a) This section sets out certain differences in procedure from those described in sections I-VII above, which are required by the fact that the proceeding is for the issuance of an operating license rather than a construction permit. Otherwise, the provisions of sections I through VII of this statement of general policy also apply to an operating license proceeding, except as the context requires otherwise.

44 FR 61088

(b) In an operating license proceeding the board will determine the matters in controversy among the parties, and where the board determines that a serious safety, environmental, or common defense and security matter was not raised by the parties, the board will determine such matter as being among the issues to be decided. Those issues will be specified in the notice of a hearing issued by the Commission, or in a prehearing conference order issued by the board in the exercise of its discretion during the hearing.

40 FR 2973

The issues will be the matters in controversy among the parties or raised by the board within the purview of the following:

37 FR 15127

(1) Whether there is reasonable assurance that construction of the facility will be substantially completed, on a timely basis, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission;

(2) Whether the facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission;

(3) Whether there is reasonable assurance (i) that the activities to be authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;

49 FR 35747

(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the Commission's regulations, except that the issue of financial qualification shall not be considered by the board if the applicant is an electric utility seeking a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22.

37 FR 15127

(5) Whether the applicable provisions of 10 CFR Part 140 have been satisfied;

(6) Whether issuance of the license will be inimical to the common defense and security or to the health and safety of the public; and

49 FR 9352

(7) Whether, with respect to the requirements of section 102(2) (A), (C), and (E) of the National Environmental Policy Act, in accordance with Subpart A of Part 51, the operating license should be issued as proposed.

40 FR 2973

(c) The board, in operating license proceedings, will make findings on the matters in controversy among the parties and any matter not raised by the parties but examined by the board in its discretion in accordance with paragraph (b) of this section and § 2.760a. Depending on the resolution of those matters, the Director of Regulation would issue, deny, or appropriately condition the operating license.

37 FR 15127

(d) In operating license proceedings, the procedure for summary disposition of the proceeding on the pleadings described in § 2.749 may be used to determine the ultimate issue of whether the operating license should be issued.

X. Proceedings for the Consideration of Antitrust Aspects of Facility License Applications

(a) Under the Atomic Energy Act of 1954, as amended, the Commission is required, with respect to applications for construction permits or operating licenses for production and utilization facilities for industrial or commercial purposes licensed under section 103, which include power reactors subject to the mandatory hearing requirements of section 189a of the Act, to follow procedures for antitrust review in section 105c of the Act. This section outlines the procedures used by the Commission to implement that section.

47 FR 9983

(b)(1) When the antitrust information portion of an application is received and docketed for a facility construction permit under section 103 of the Act which is subject to antitrust review under section 105c, the notice of receipt of the antitrust information published in the Federal Register shall state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration shall submit such views to the Commission within sixty (60) days after publication of the notice.

(2) Upon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility operating license under section 103 of the Act, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall publish in the Federal Register and in appropriate trade journals a "Notice of Receipt of Operating License Antitrust Information." The notice shall invite persons to submit, within thirty (30) days after publication of the notice, comments or information concerning antitrust aspects of the application to assist the Director in determining, pursuant to section 105c of the Act, whether significant changes in the licensee's activities or proposed activities have occurred since completion of the previous antitrust review in connection with the construction permit application. The notice shall also state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within thirty (30) days after publication of the notice to: U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Antitrust and Economic Analysis Branch.

47 FR 9983

(3) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, after reviewing any comments or information received in response to the published notice and any comments or information regarding the applicant received from the Attorney General, concludes that there have been no significant changes since the completion of the previous antitrust review in connection with the construction permit, a finding of no significant changes shall be published in the Federal Register, together with a notice stating that any request for reevaluation of such finding should be submitted within thirty (30) days of publication of the notice. If no requests for reevaluation are received within that time, the finding shall become the NRC's final determination. Requests for a reevaluation of the no significant changes determination shall be accepted after the date when the Director's finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

(4) If, as a result of the reevaluation of the finding described above, it is determined that there have been no significant changes, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, shall deny the request and shall publish a notice of finding of no significant changes in the Federal Register. The notice and finding become the final NRC decision thirty (30) days after being made and only in the event that the Commission has not exercised sua sponte review.

(5) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, concludes that significant changes have occurred since the completion of the previous antitrust review in connection with the construction permit, then the provisions of § 2.102(d) shall apply.

(c)(1) Except as provided in paragraph (c)(2) below, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall refer and transmit a copy of each application for a construction permit or an operating license for a utilization or production facility under section 103 of the Act, to the Attorney General as required by section 105c of the Act. Under that section, the Attorney General will, within a reasonable time, but in no event to exceed 180 days after receipt, render such advice to the Commission as is determined to be appropriate in regard to the finding to be made by the Commission as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in subsection 105a of the Act.

47 FR 9983

(2) The review by the Attorney General described in paragraph (c)(1) above is not required for applications for operating licenses for production or utilization facilities under section 103 of the Act for which the construction permit was also issued under section 103, unless the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, determines, after consultation with the Attorney General and in accordance with § 2.101(e), that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and by the Commission under section 105c of the Act in connection with the construction permit.

(d) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will publish the Attorney General's advice in the FEDERAL REGISTER promptly upon receipt, and will make such advice a part of the record in any proceeding on antitrust matters conducted in accordance with subsection 105c(5) and section 189a of the Act. The Director of Regulation will also publish in the FEDERAL REGISTER a notice that the Attorney General has not rendered any such advice. The notice published in the FEDERAL REGISTER will also include a notice of hearing, if appropriate, or, if the Attorney General has not recommended a hearing, will state that any person whose interest may be affected by the proceeding may, pursuant to and in accordance with § 2.714, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. The notice will state that petitions for leave to intervene and requests for hearing shall be filed within 30 days after publication of the notice.

37 FR 15127

(e) If a hearing on antitrust aspects of the application is requested, or is recommended by the Attorney General, it will generally be held separately from the hearing held on matters of radiological health and safety and common defense and security described in sections I-VIII of this appendix. The notice of hearing will fix a time for the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with section 189a of the Act and other provisions of this part. However, as permitted by subsection 105c(8) of the Act, with respect to proceedings in which an application for a construction permit was filed prior to December 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust consideration or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER of notice of filing of the applica-

tion for an operating license or December 19, 1970, whichever is later, the Commission may issue a construction permit or operating license, provided that the permit or license so issued contains the condition specified in § 50.55b of this chapter.

(f) Hearings on antitrust aspects will be conducted by a presiding officer, either an Administrative Law Judge or an atomic safety and licensing board comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom will have such technical or other qualifications as the Commission deems appropriate to the issues to be decided.

(g) When the Attorney General has advised that there may be adverse antitrust aspects and recommends that a hearing be held, the Attorney General or his designee may participate as a party in the proceedings.

(h) At the hearing, the presiding officer will give due consideration to the advice received from the Attorney General and to evidence pertaining to antitrust aspects received at the hearing.

(i) The presiding officer will, in the initial decision, make a finding as to whether the activities under the proposed license would create or maintain a situation inconsistent with the antitrust laws as specified in section 105a of the Act. If the presiding officer finds that such a situation would be created or maintained, it will consider, in determining whether the permit or license should be issued or continued, such other factors as it deems necessary to protect the public interest, including the need for power in the affected area. The certainty of contravening the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. The finding will be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. The presiding officer will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

(j) On the basis of the findings in the proceeding on the antitrust aspect of the application, the presiding officer may (i) authorize the issuance of the permit or license after favorable consideration of matters of radiological health and safety and common defense and security, and matters raised under the National Environmental Policy Act of 1969, at the hearing described in sections I–VIII of this appendix; (ii) authorize the continuation of a permit or license already issued; (iii) direct the denial of the application for the permit or license, or the rescission of a permit or license already issued; or (iv) authorize the issuance of a permit or license subject to appropriate conditions, and subject to favorable consideration of matters of radiological health and safety and common defense matters raised under the National Environmental Policy Act of 1969 at the hearing described in sections I–VIII of this appendix.

Appendix B to Part 2—General Statement of Policy and Procedures Concerning Petitions Pursuant to § 2.802 for Disposal of Radioactive Waste Streams Below Regulatory Concern:

I. Introduction and Purpose
II. Standards and Procedures
III. Agreement States
IV. Future Action

I. Introduction and Purpose

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Act) (42 U.S.C. 2021b et seq.) was enacted January 15, 1986. Section 10 of the Act addresses disposal of wastes termed "below regulatory concern" that would not need to be subject to regulatory control to assure adequate protection of the public health and safety because of their radioactive content. The goal of this section of the Act is for the Commission to make practical and timely decisions to determine when wastes need not go to a licensed low-level waste disposal site. These decisions will be expressed through rulemaking. Alternative disposal would conserve space in the existing sites while new sites are established and reduce the costs of disposal. Rulemaking petitions may play a role in the national low-level waste strategy outlined by the Act. The Act provides that the Commission establish procedures for acting expeditiously on petitions to exempt specific radioactive waste streams from the Commission's regulations.

The purpose of this statement and accompanying implementation plan is to establish the standards and procedures that will permit the Commission to act upon rulemaking petitions in an expeditious manner as called for in the Act. This policy statement does not require petitioners to present all the information outlined or demonstrate that the decision criteria for expedited handling can be met, if such expedited handling is not wanted. For example, petitions requesting exemption of concentrations of radionuclides that might result in individual exposures higher than those recommended in the decision criteria may be submitted, but expedited handling cannot be assured.

Finally, this policy statement and accompanying implementation plan are intended to facilitate handling of rulemaking petitions for streams from multiple producers and do not apply to individual licensing actions on single producer waste. Individual licensees who seek approval for disposal of their uniques wastes may continue to submit their disposal plans under 10 CFR 20.302(a).

II. Standards and Procedures

The standards and procedures needed to handle petitions expeditiously fall into the following three categories: (1) Information petitioners should file in support of the petitions, (2) standards for assessing the adequacy of the proposals and providing petitioners insight on the decision criteria the Commission intends to use so that all relevant informational issues will be addressed in the petition, and (3) the internal NRC administrative procedures for handling the petitions. These three categories are addressed in the attached staff implementation plan. The staff plan was developed in response to Commission direction to provide detailed guidance on implementing the general approach outlined in this policy statement. Although staff may revise it from time to time as experience is gained in processing petitions, the plan outlines a reasonable basis for accomplishing the approach. Staff is to publish revisions as NUREG documents and notice the availability of the revisions in the Federal Register.

As a practical matter, the primary information for justifying and supporting petitions must be supplied by the petitioner if the Commission is to act in an expedited manner. If the petitioner wishes to assure expedited action, the supporting information should be complete enough so that Commission action is primarily limited to independent evaluation and administrative processing.

Decision criteria for judging whether to grant a petition involve the overall impacts of the proposed action, waste properties, and implementation of the proposed exemption. The following criteria address these areas. Petitions which demonstrate that these criteria are met should be suitable for expedited action.

1. Disposal and treatment of the wastes as specified in the petition will result in no significant impact on the quality of the human environment.
2. The maximum expected effective dose equivalent to an individual member of the public does not exceed a few millirem per year for normal operations and anticipated events.
3. The collective doses to the critical population and general population are small.
4. The potential radiological consequences of accidents or equipment malfunction involving the wastes and intrusion into disposal sites after loss of normal institutional controls are not significant.
5. The exemption will result in a significant reduction in societal costs.
6. The waste is compatible with the proposed treatment and disposal options.
7. The exemption is useful on a national scale, i.e., it is likely to be used by a category of licensees or at least a significant portion of a category.
8. The radiological properties of the waste stream have been characterized on a national basis, the variability has been projected, and the range of variation will not invalidate supporting analyses.
9. The waste characterization is based on data on real wastes.
10. The disposed form of the waste has negligible potential for recycle.
11. Licensees can establish effective, licensable, and inspectable programs for the waste prior to transfer to demonstrate compliance.
12. The offsite treatment or disposal medium (e.g., sanitary landfill) does not need to be controlled or monitored for radiation protection purposes.
13. The methods and procedures used to manage the wastes and to assess the impacts are no different from those that would be applied to the corresponding uncontaminated materials.
14. There are no regulatory or legal obstacles to use of the proposed treatment or disposal methods.

III. Agreement States

The Low-Level Radioactive Waste Policy Amendments Act of 1985 establishes a

national system for dealing with low-level waste disposal. The system assigns to the States responsiblity for disposal capacity for low-level wastes not exceeding Class C wastes as defined in 10 CFR 61.55. Section 10 of the Act encourages a reduction in volume of such wastes subject to State responsiblitiy for disposal through the option of determining that certain wastes need not go to existing licensed disposal facilities or new sites licensed under 10 CFR Part 61 or equivalent State regulations. If radiological safety can be assured, such disposal would conserve space in the existing sites while new sites are developed, and would serve as an important adjunct to volume reduction efforts in meeting the waste volume allocation limits set forth in the Act. Thus, these rulemakings should aid the States in fulfilling their responsibilities under the Act. Equity also suggests that all waste generators be able to take advantage of below regulatory concern options as part of their waste management strategies. Generators in both Agreeement and non-Agreement States will be competing for space in the existing sites and the concept should be applicable nationwide.

Agreement States will play an important role in ensuring that the system works on a national basis and that it remains equitable. States have been encouraging findings that certain wastes are below regulatory concern and do not have to go to low-level waste sites. The States have been voicing this view for a number of years through forums such as the Conference of Radiation Control Program Directors. Rulemakings granting petitons will be made a matter of compatibility for Agreement States. Consequently, rulemaking will be coordinated with the States.

51 FR 30839

IV. Future Action

The Commission will conduct a generic rulemaking on waste streams below regulatory concern based on a number of factors. The factors include public comments received on the statement, the number and types of petitons for rulemaking received, and how effective the statement is in enabling timely processing of petitions. A generic rulemaking is warranted to provide a more efficient and effective means of accomplishing the goals reflected in Section 10 of the Act. An advance notice of proposed rulemaking will be published within 90 days. Furthermore, the Commission may periodically review all rulemakings in order to assure that the relevant parameters have not changed significantly and may ask the petitioner to submit updated information to assist in the review. The Commission would also have to confirm that approved exemptions are consistent with any general standards issued by EPA.

Dated at Washington, DC this 25th day of August, 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary to the Commission.

Editorial Note: The staff implementation plan will not appear in the Code of Federal Regulation.

Nuclear Regulatory Commission Staff Implementation of Nuclear Regulatory Commission Policy on Radioactive Waste Below Regulatory Concern

I. Introduction
II. Information to Support Petitions
A. General
1. 10 CFR Part 2 Requirements
2. Environmental Impacts
3. Economic Impact on Small Entities
4. Computer Program
5. Scope
B. Waste Characterization
1. Radiological Properties
2. Other Considerations
3. Totals
4. Basis
5. As Low as Reasonably Achievable (ALARA)
C. Waste Management Options
D. Analyses
1. Radiological Impacts
2. Other Impacts
3. Regulatory Analysis
E. Recordkeeping and Reporting
1. Surveys
2. Reports
F. Proposed Rule
III. Decision Criteria
IV. Administrative Handling

I. Introduction

Section 10 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 requires the Nuclear Regulatory Commission (NRC) to develop standards and procedures for expeditious handling of petitions for rulemaking to exempt disposal of radioactive waste determined to be below regulatory concern. The Act also requires NRC to identify information petitioners should file. The Commission Policy Statement provides general guidance on how to meet the requirements of section 10 of the Act, outlines the overall approach to be followed, and lists decision criteria to be used. Implementation of the general approach and decision criteria of the Commission Policy Statement involves developing more detailed guidance and procedures. In accordance with Commission direction, the NRC staff has developed more detailed guidance and procedures for implementation of the Commission Policy Statement. This staff guidance and procedures cover: (1) Information petitioners should file in support of petitions to enable expedited processing, (2) discussion of the decision criteria, and (3) administrative procedures to be followed.

51 FR 30839

II. Information to Support Petitions

A. General

1. *10 CFR Part 2 requirements.* The codified information requirements for petitions for rulemaking are outlined in the Commission's regulations in 10 CFR 2.802(c). These regulations require the petitioner to identify the problem and propose solutions, to state the petitioner's grounds for and interest in the action, and to provide supporting information and rationale. As a practical matter, the information demonstrating that the radiological health and safety impacts are so low as to be below regulatory concern must be provided by the petitioner if the Commission is to act in an expedited manner. Petitions for rulemaking should therefore be submitted following the staff's supplemental guidance and procedures to assure expedited action.

2. *Environmental impacts.* Petitions must enable the Commission to make a finding of no significant impact on the quality of the human environment. Such Commission findings must be based on an Environmental Assessment that complies with 10 CFR 51.30 and must meet the requirements of 10 CFR 51.32. These requirements include addressing the need for the proposed action, identifying alternatives, and assessing the potential environmental impacts of the proposed action and alternatives. Consistent with 10 CFR 51.41, the petitioner should submit the information needed to meet these requirements and do so in a manner that permits independent evaluation by the Commission of the data and methodology used and the conclusions reached.

3. *Economic impact on small entities.* When a rulemaking action is likely to have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires that the impacts on these small entities must be specifically addressed. (The Commission's size standard for identifying a small entity is $3.5 million or less in annual receipts except for private practice physicians and educational institutions where the standard is $1 million or less in annual receipts for private practice physicians and 500 employees for educational institutions. See 50 FR 50214, December 9, 1985.) For any rulemaking, the Commission must either certify that the rule will not economically impact or will have no significant economic impacts on small entities, or present an analysis of alternatives to minimize the impacts. Because rulemakings on below regulatory concern should provide relief from requirements for all affected entities, satisfaction of this requirement should be straightforward but it must be addressed in any rulemaking. To facilitate expeditious preparation of the proposed rule responding to the petition, the petitioner should submit an evaluation of the estimated economic impacts on small entities. The evaluation should include estimates of the costs for small entities in terms of staff time and dollar costs. Any alternatives that could accomplish the objective of the petitioner's proposed rule while minimizing the economic impact on small entities should be presented. The evaluation should include an assessment of the incremental recordkeeping and reporting costs that would be associated with the petitioned rule change.

51 FR 30839

4. *Computer program.* The computer program (IMPACT–BRC) the Commission intends to use to independently evaluate petitioners' assessments of impacts is based on "De Minimis Waste Impacts Analysis Methodology" (NUREG/CR–3585) published February 1984.[1] Petitioners are encouraged to consult NUREG/CR–3585 in order to better understand the Commission's information needs. The IMPACTS–BRC program will be distributed by the National Energy Software Center on floppy diskettes for use on IBM–PC and compatible computers. The Center's address is 9700 South Cass Avenue, Argonne National Laboratory, Argonne, Illinois 60439. The users guide for IMPACTS–BRC will be published as a draft Volume II of NUREG/CR–3585. Petitioners may evaluate the impacts of the proposed activity using NRC's code, if desired. When alternate calculational methodologies are used, the petitioner should provide all the specific input needed to analyze the waste stream in the petition using IMPACTS–BRC and provide a rationale for all parameter selections. The Commission may clarify or modify the computer code from time to time. Petitioners choosing to use NRC's code should be sure to use the current revision. The National Energy Software Center will provide changes to persons obtaining the program from the Center. Users are encouraged to comment on the code so that their experience can be factored into future revisions.

5. *Scope.* The petitioner should define the geographic area to which the proposed rule should apply and the reasons supporting any area less than national in scope. It might be possible to justify limiting the scope to a low-level waste regional compact or a state but implementation issues such as import or export of wastes outside the compact or state should be addressed in the rationale.

B. Waste Characterization

1. *Radiological properties.* The minimum radiological properties that should be described are the concentration or contamination levels and the half-lives, total quantity, and identities of the radionuclides present. The chemical and physical form of the radionuclides should be addressed. All radionuclides present or potentially present should be specified, including radionuclides identified as trace constituents. The distribution of the radionuclides within the wastes should be noted (e.g., surface or volume distribution). Mass and volume average concentrations should also be presented. For incineration, the radioactive content of the ash and noncombustible fraction should be described. The variability as a function of process variation and variation among licensees should be addressed and bounded.

2. *Other considerations.* An understanding of nonradiological properties of the waste stream is needed to assure that they are consistent with the proposed disposal method and to evaluate the adequacy of the analysis of the radiological impacts. (NRC's deregulation of the radioactive content would not relieve licensees from the applicable rules of other agencies which cover the nonradiological properties.) The petitioner should provide a detailed description of the waste materials, including their origin, chemical composition, physical state, volume, and mass.

The term "stream" only means wastes produced from a common set of circumstances and possessing common characteristics. It does not mean "liquid" although the stream may be in a liquid form (e.g., waste oil). The wastes may be resin beads, laboratory glassware, or any other form. Waste form includes packages or containers used to manage (i.e., store, handle, ship, or dispose) the wastes. The variability and potential changes in the waste form as a function of process variation should be addressed. The variation among licensees should be described and bounded.

Compatibility with requirements associated with the proposed management options should be carefully presented. For example, if the petitioner proposes that the wastes be incinerated, the waste form should be shown to be compatible with the temperatures, flow rates, feed rates, and other operating parameters of typical incinerators that may be used. The petitioner should identify the minimum requirements an incinerator must meet to assure adequate combustion. The form and volume of the ash and other residue from incineration should be described. Similar consideration for disposal at sanitary landfills or hazardous waste sites should be addressed. For example, wastes that include components or properties that would qualify the waste as a "hazardous waste" under EPA rules in 40 CFR Parts 260 through 265 should not be proposed for disposal at a municipal landfill.

The potential for recycle should be presented. Possible treatment, such as shredding, the would reduce the recycle potential should be described. Both the resource value (e.g., salvageable metals) and the functional usefulness (e.g., usable tools) should be addressed. Both short- and long-term potentials for recycle are of significant concern to the Commission.

3. *Totals.* A subsequent rulemaking based upon an accepted petition is generic, and the exemption will likely be used nationwide. Therefore, to the extent possible, the petitioner should estimate the number of NRC and Agreement State licensees that produce the waste, the annual volumes and mass, and the total annual quantities of each radionuclide that would be disposed of. The estimates should include the current situation and the likely variability over the reasonably foreseeable future. If the petition is for a proposed rule that will be limited to less than national scope (e.g., a state or compact region), the totals should be estimated for the petitioned scope. A concentration distribution would be a helpful tool in characterizing the waste stream. For example, the petitioner could indicate that 10% of the wastes fall in the range of 1–10 picocuries per gram, 60% fall in the 10–100 range, and 30% in the 100–1,000 range. Such distribution would permit more realistic assessment of impacts in addition to conservative bounding estimates using maximum values. In any case, the typical quantities produced per generator and an estimate of the geographic distribution of the generators should be described.

4. *Basis.* The basis for the waste stream characterization should be provided. The basis for characterization of the wastes and the total quantities produced should be described. Monitoring, analytical data, and calculations should be specified. Actual measurements or values that can be related to measurements to confirm calculations are important. The description of the bases should include quality assurance aspects. For example, the petitioner should describe the number of samples measured, the representativeness of the samples, and the appropriateness of the instruments used. The statistical confidence in the estimates should be evaluated. If the petitioner conducted any surveys of licensees or relied on surveys by others to help quantify the amount and content of wastes, they should be described. Market information might be useful in characterizing waste generation on a national basis. Designation as a "trace concentration" should be related to specified detection limits, but detection limits themselves are not sufficient reason to dismiss trace concentrations when methods exist to infer concentrations.

For estimates of the radionuclide content of the waste stream, the petitioner may take advantage of licensee experience in classifying wastes for disposal at low-level waste sites. For example, the transuranic radionuclide content of the wastes would likely be below detection limits, but licensees have already established scaling factors for estimating the transuranic content of wastes as part of

[1] Footnotes at end of article.

complying with 10 CFR Part 61 waste classification requirements. Waste generators use generic scaling factors and factors established for their specific wastes through sophisticated analyses. The scaling factors are used to infer the presence and concentrations of many radionuclides based on measurement of only a few nuclides. The classification scheme in 10 CFR Part 61 has been in effect since December 1983. Considerable data and experience should be available to allow characterizing the radiological content and composition of the waste stream being addressed in the petition. The same principles outlined in 10 CFR 61.55(a)(8) may be applied, i.e., values based on direct measurements, indirect methods related to measurements, or material accountability.

5. *As low as is reasonably achievable (ALARA).* The Commission's ALARA requirement in 10 CFR 20.1(c) applies to efforts by licensees to maintain radiation exposures and releases of radioactive materials in effluents to unrestricted areas as low is reasonably achievable. 10 CFR Part 50, Appendix I, describes ALARA for radioactive materials in light water reactor effluents. Licensee compliance with 10 CFR 20.1(c) is a precondition to acceptance by NRC of any waste stream as exempt. Therefore, a description should be provided of reasonable procedures that waste generators would be expected to use to minimize radiation exposures resulting from the disposal of the exempt waste, e.g., removal of surface contamination. These procedures are assumed to apply prior to characterizing the waste to be exempted.

C. Waste Management Options

The management options that the Commission can deal with expeditiously are those described in NUREG/CR-3585. Onsite options include incineration and burial. Offsite options are municipal waste disposal facilities (sanitary landfills), municipal waste incinerators, hazardous disposal facilities, and hazardous waste incinerators. Pretreatment, e.g., shredding of otherwise potentially recyclable materials, is a potential adjunct to either onsite or offsite options. Combinations of these options can also be evaluated. For example, wastes may be incinerated on site and the ash shipped to a sanitary landfill. The favored disposal options should be identified and fully described. The petitioner should evaluate a full range of options. The practicality of the proposed option(s) should be presented. Waste compatibility discussed earlier is one aspect. The national availability and distribution of the option is another. Updates on national regulations and laws pertaining to the proposed option should be described and might have to be considered in selecting acceptable options.

D. Analyses

To support and justify the submittal, each petitioner should include analyses of the radiological impacts associated with handling, transport, and disposal of the specific wastes. Any incremental nonradiological impacts should be assessed. Also the petitioner should use the analyses to prepare and submit a detailed regulatory analysis with the petition.

1. *Radiological impacts.* The evaluation of radiological impacts should distinguish between expected and potential exposures and events. Impacts should be assessed for the expected concentrations and quantities of radionuclides. The petitioner should quantitatively evaluate the impacts from the proposed waste for each option requested. The petitioner should clearly relate the analytical findings to specific provisions in the recommended rule changes. For example, the basis for each recommended radionuclide limit should be clearly explained.

The radiological impacts included in NUREG/CR-3585 and in NRC's computer program (IMPACTS-BRC) cover exposures to workers and individual members of the public and cumulative population exposures. The program calculates both external direct gamma exposures and exposures from ingested or inhaled radionuclides. NRC's computer program can be used to calculate the expected radiological impacts from generator activities, transportation, treatment, disposal operations, and post-disposal inputs. The program can analyze a wide range of management options including onsite treatment and disposal by the generator, shipment to municipal waste management facilities, and shipment to hazardous waste management facilities. The program covers impacts beginning with initial handling and treatment by the generator through final disposal of all the radionuclides contained in the waste stream. Sequential treatment, sorting, and incineration onsite and at municipal and hazardous facilities can be assessed. Disposal of resulting ash and residue is included. Post-disposal impacts that can be calculated include releases due to intrusion, ground-water migration, erosion, and leachate accumulation. The program thus addresses both expected and potential post-disposal impacts.

The petitioner's analysis of transport impacts should be based on a reasonably expected spacial distribution of licensees and waste treatment and disposal facilities which will accept the wastes. The petitioner should address parameters such as average and extreme transport distances. The petitioner's analysis should address the basis for parameter selection and characterize the expected patterns (e.g., indicate how likely the extreme case may be). In addition, the petitioner's analysis should also address potential exposures from handling and transport accidents. The petitioner's analysis of accidents should include all assumptions, data, and results to facilitate review. The potential for shipment of the entire waste stream to one or a few facilities should be assessed. This scenario currently exists for 10 CFR 20.306 exempted liquid scintillation wastes and might result from very limited numbers of treatment facilities or decontamination services. The analysis of impacts for transport, handling, and disposal should include evaluation of this potential circumstance unless it can be clearly ruled out.

As suggested in Paragraph 89 on page 20 of ICRP Publication 46 [2]:

> Exception from regulation and requirements on these bases should not be used to make it possible to dispose of large quantities of radioactive material in diluted form, or in divided portions, causing widespread pollution which would eventually build up high dose levels by the addition of many small doses to individuals. Nor should they be used to exempt activities that, by isolation or treatment, have been made temporarily harmless but that imply large potential for release and could give rise to high individual doses or high collective doses.

The analysis of expected radiological impacts should clearly address:

—The maximum individual exposures.
—The critical group exposures
—The cumulative population exposures.

The maximum individual exposure evaluation should include exposures to all members of the public who may be exposed beginning with the initial handling at the generator's facility through post-closure. Both internal uptake and external exposures should be included. The individual may be a member of the general population (e.g., consumer of contaminated ground water) or a person receiving the exposure from his or her occupation. Anyone who may be exposed and is not a radiation worker should be considered a member of the public. For example, a worker at a sanitary landfill or a commercial trash truck driver would not be a radiation worker. However, occupational exposures to radiation workers should be evaluated and considered in the cost/benefit analysis of the incremental impacts between disposal at a licensed facility and the requested disposal options.

The total population exposures can be estimated and summed in two parts. One part is the smaller critical group (usually the occupationally exposed population) where potential exposures

may be higher on an individual basis but the exposures and the number of exposed individuals are more predictable and the exposures are short-term. The critical group should be the segment of the population most highly exposed exclusive of radiation workers. The other part is the general population where the expected exposures and size of the exposed population are less predictable, potential individual exposyres are probably much smaller, and exposures may extend over longer timeframes. Presentation of the population exposures in these two parts should contribute to a more meaningful cost/benefit analysis.

2. *Other impacts.* The NRC action to exempt the radiological content of the wastes would not relieve persons handling, processing, or disposing of the wastes from requirements applicable to the nonradiological properties. The petition should demonstrate that the nonradiological properties of the radioactive waste are the same as the nonradioactive materials normally handled and disposed of by the proposed methods. If the nonradiological properties are similar and the volumes of exempted waste would not impact the normal operations, there should be no incremental impacts. If the petitioner is aware of other impacts which should be considered for the specific wastes in the petition, the petitioner should also address the additional impacts.

3. *Regulatory analysis.* In order to expedite subsequent rulemaking if the petition is granted, the analysis should also address the topics NRC must address in a Regulatory Analysis (e.g., see NUREG/BR-0058, Revision 1, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission").[1] Following the Regulatory Analysis format will structure the analytical findings, present the bases for decisions, and address the environmental assessment requirements. The topics are:

(1) *A statement of the problem.* This topic is the need for determining which wastes may be safely disposed of by means other than shipment to licensed low-level waste sites.

(2) *Alternatives.* All reasonable alternatives to the proposed action should be described. The no action or status quo alternative should always be included.

(3) *Consequences.* This topic calls for an analysis of the impacts of each alternative described. The factors the petitioner should address include costs and benefits and practical or legal constraints. Cost/benefit considerations and constraints are discussed more fully after this listing of topics.

(4) *Decision rationale.* This topic is a conclusions statement that explains why the preferred alternative(s) should be adopted.

(5) *Implementation.* This topic covers the steps and schedules for actual implementation of the proposed rule. The petitioner should address the topic from the waste generator's perspective and include surveys discussed under Topic III.A.5. Recordkeeping and Reporting.

A cost/benefit discussion is an essential part of both environmental and regulatory impact considerations and is, therefore, essential to expedited handling. The discussion should focus on expected exposures and realistic concentrations or quantities of radionuclides. The cost/benefit discussion should include the differential exposure and economic costs between disposal at a licensed low-level waste disposal site and the proposed option(s). It may also include qualitative benefits. Reduced hazards from not storing hazardous or combustible materials might be a benefit. Elimination or reduction of the hazardous properties (e.g., by incineration) could be another. Detrimental costs might also be qualitative such as loss of space in municipal or hazardous waste sites. The economic impact on the licensed site operations (i.e., loss of income from diverted wastes) and its potential effect on the availability of economic and safe disposal should be addressed. Costs of surveys and verifying compliance discussed under Topic II.E. Recordkeeping and Reporting should also be covered. The cost/benefit should also reflect ALARA considerations. Radiation worker exposure, public exposure, and environmental releases might be appropriate in ALARA considerations. In weighing the exposure costs and economic costs for light-water-cooled nuclear reactor wastes, the petitioner could use, for perspective, the $1,000 per person-rem guideline in 10 CFR Part 50, Appendix I, for effluent releases from these facilities.

The petitioner should identify any legal or regulatory constraints that might impact implementation of the petitioned change. The compatibility of the waste with the proposed method of disposal was discussed under Topic II.B.2. Other constraints might stem from Department of Transportation (DOT) labeling, placarding, and manifesting requirements for radioactive materials. Since the receiving facility will not be licensed to receive radioactive materials, this could be an impediment to implementation. For most radioactive materials, the general DOT threshold limits of 0.002 microcuries per gram apply. However, the DOT issued a final rule on June 6, 1985 (50 FR 23811) that amended 49 CFR Part 173 to exempt low specific activity wastes as described in NRC's rules in 10 CFR 20.306. (Note that DOT emphasized that the wastes remain subject to the provisions related to other hazards; see 49 CFR 173.425(d).)

E. Recordkeeping and Reporting.

1. *Surveys.* Existing regulations in § 10 CFR 20.201 establish general NRC requirements for performing surveys as necessary to comply with Part 20. Licensees would have to conduct surveys of the waste properties prior to release for exempt disposal to verify that the waste meets the prescribed limits. Such survey programs might consist of (1) fairly comprehensive initial sampling and analysis to confirm that the licensee's wastes will fall below the limits, (2) periodic analysis as part of a process or quality control program to confirm the initial findings, and (3) a routine survey program prior to release of wastes to monitor for gross irregularities. To show that licensees can be expected to conduct compliance surveys prior to waste transfer, the petitioner should describe a sample survey program. The three components just discussed should be included, if appropriate, for the waste stream. Records of the surveys would be maintained for inspection.

2. *Reports.* The petitioner should assume that annual reports on disposals will be required and that associated recordkeeping to generate the reports will be imposed. Minimum information in the annual reports initially might include the type of waste, its volume, its estimated curie content, and the place and manner of disposal. Increased recordkeeping and reporting requirements would address uncertainties in projecting future volumes or amounts of wastes and NRC's responsibility to consider the cumulative impacts of multiple exemptions. When these requirements are proposed, Office of Management and Budget (OMB) approval is required. To facilitate NRC filing for OMB approval, the petitioner should include any duplicating or overlapping reporting requirements, the number and type of expected respondents, suggestions for minimizing the burden, estimates of the staff hours and costs to prepare the reports and keep the records, and a brief description of the basis for the estimates. The petitioner should also

address whether changes in technical specifications or licenses may be needed.

F. Proposed Rule

The petition should include the text for the proposed rule (see 10 CFR 2.802(c)(1)). The proposed text should cover at least the following:

(1) The quantity and/or concentration limit for each radionuclide present (trace radionuclides could be lumped together with a total limit);

(2) A method to deal with radionuclide mixtures;

(3) The nonradiological specifications necessary to adequately define the waste; and

(4) The specific method(s) of exempt disposal.

If practicable, and if the supporting information indicates the need, the text should also address other features such as annual limits on each generator in terms of volume, mass, or total radioactivity, and administrative or procedural requirements including process controls, surveys, etc., that have been discussed. The text should not include the various dose limits used to justify the proposed radionuclide limits.

51 FR 30839

III. Decision Criteria

The Commission policy statement establishes that the following criteria should be used by staff as guidelines for acting on a petition. Each criterion is repeated and staff views on implementation are discussed.

1. Disposal and treatment of the wastes as specified in the petition will result in no significant impact on the quality of the human environment.

Discussion: Unless this finding can be made during information submitted by the petitioner, the Commission must prepare an Environmental Impact Statement to more fully examine the proposed action, alternatives to the proposed action, and associated potential impacts of alternatives. Preparation would likely involve contractual support and would likely take 2 years or more to complete. The Commission could not act in the petition in an expedited manner.

2. The maximum expected effective dose equivalent to an individual member of the public does not exceed a few millirem per year for normal operations and anticipated events.

Discussion: The effective dose equivalent means the ICRP Publication 26 and 30 [3] sum of the dose from external exposure and the dose incurred from that year's intake of radionuclides. While a range of 1–10 millirem per year might be acceptable, a one millirem dose would facilitate expedited processing. Higher doses may require more extensive justification. Based on a mortality risk coefficient for induced cancer and hereditary effects of $2x10^{-4}$ per rem (ICRP Publication 26), radiation exposure at a level of millirem per year would result in an annual mortality risk of $2x10^{-7}$ (i.e., $2x^{-4}$ effects/remx^{-3} rem/year).

The EPA is developing criteria for identifying low-level radioactive waste that may be below regulatory concern as part of that agency's development of general environmental standards for low-level waste disposal. The EPA published an Advance Notice of Proposed Rulemaking on August 31, 1983 (48 FR 39563) and currently hopes to publish proposed standards in early 1987. Other EPA standards that the doses can be compared to are the Clean Air Act radioactive release standard of 25 millirems per year in 40 CFR Part 61 and the uranium fuel cycle annual whole body limit of 25 millirems in 40 CFR 190.

51 FR 30839

One millirem is very small when compared to naturally occurring background doses from cosmic and terrestrial sources. Background doses in the United States are typically in the 100–120 millirems per year range exclusive of the lung doses from radon. One millirem is also small when compared to the annual 500 millirem dose limit for individual members of the general public in Federal Radiation Council guidance.

An important feature is that doses of up to 1 millirem from the individual petition should minimize concerns over exposure to multiple exempted waste streams. ICRP Publication 46 addressed individual dose limits and other issues related to exemptions and stated, in paragraphs 83 and 84 on page 19:

> Many radiation exposures routinely encountered in radiation protection, particularly those received by members of the public, are very small by comparison with dose limits or natural background, and are well below dose levels at which the appearance of deleterious health effects has been demonstrated. In individual-related assessments, it is widely recognized that there are radiation doses that are so small that they involve risks that would be regarded as negligable by the exposed individuals. Studies of comparative risks experienced by the population in various activities appear to indicate that an annual probability of death of the order of 10^{-6} per year or less is not taken into account by individuals in their decisions as to actions that could influence their risks. Using rounded dose response factors for induced health effects, this level of risk corresponds to an annual dose of the order of 0.1 mSv [10 millirem].
>
> However, in most practical cases, the need for exemption rules arises in source-related assessment, to decide whether a source or waste stream should be subject to control. Consideration should be given to the need for any optimization of radiation protection and to the possibility that many practices and sources of the same kind could combine now or in the future so that their total effect may be significant, even though each source causes an annual individual dose equivalent below 0.1 mSv [10 millirem] to individuals in the critical group. This may involve assessments of dose commitments and of the collective dose per unit practice or source, in order to ensure that the individual dose requirement will not be exceeded now or in the future. It seems almost certain that the total annual dose to a single individual from exempted sources will be less than ten times the contribution from the exempted source giving the highest individual dose. This aspect could, therefore, be allowed for by reducing the annual individual dose exemption criterion from 0.1 to 0.01 mSv [10 to 1 millirem].

51 FR 30839

The NRC staff recognizes that at times, human reactions are not so strictly governed by quantative considerations as the ICRP excerpt suggests. Nevertheless, the 10^{-6} per year value seems about as low as practicable, seems too low to justify significant concern, and so seems acceptable.

The United Kingdom's National Radiological Protection Board has issued generic guidance on de minimis dose levels (ASP–7, January 1985) [4] that has status similar to Federal Radiation Guidance issued by the President in this country. The Board identified effective dose equivalents of 5 millirem per year as insignificant when members of the public make their decisions. The 5 millirem limit represents the total dose contribution from all exempted practices. For individual practices, the Board divided by 10 (i.e., 0.5 millirem per year) to account for exposures from multiple practices. These limits are applied generically. Less conservatism under the well defined circumstances associated with specific waste streams and disposal options envisaged in this NRC statement seems justified. In a proposed policy statement dated May 6, 1985,[5] the Canadian Atomic Energy Control Board specifically addressed disposal of specific wastes that are of no regulatory concern. An individual does limit of 5 millirems per year was proposd for this limited application.

A maximum individual exposure of 1 millirem per year is also consistent with Appendix I to 10 CFR Part 50. Appendix I specifies design objective doses for operational light-water-cooled nuclear power reactor effluents. These design

objectives include annual total body doses of 3 millirems for liquid effluents and 5 millirems for gaseous effluents. If onsite incineration at reactors is petitioned for as a specified disposal option, the petitioner should address how the proposed activity, combined with all other effluents from the sites, would not exceed the design objective doses in Appendix I to 10 CFR Part 50.

3. The collective doses to the critical population and general population are small.

Discussion: An additional advantage when individual doses are no more than 1 millirem per year is that the collective doses are then summations over very small exposures. The collective dose evaluation is primarily for information purposes, cost/benefit considerations, and to confirm the finding of no significant impact on the quality of the human environment. This determination will be made based on information available during the review of each petition in concert with criterion 5. Staff notes that the United Kingdom policy on individual dose limits includes an associated collective dose criterion. (The collective dose criterion must be met in addition to the individual limits). In ICRP Publication 46, a similar criterion is stated.

4. The potential radiological consequences of accidents or equipment malfunction involving the wastes and intrusion into disposal sites after loss of normal institutional controls are not significant.

Discussion: Potential doses from accidents or intrusion should be well within public exposure limits and take into account the probability or possibility of such events. In a statement dated April 26, 1986,[6] the International Commission on Radiological Protection (ICRP) stated that the ICRP's present view is that the principal dose limit for members of the public is 100 millirems in a year. The ICRP further stated that the 500 millirem limit from ICRP Publication 26 could be used as a subsidiary limit provided the lifetime average does not exceed the principal limit. Consequently, potential exposures from accidents or unexpected events would be more easily justified if they are well below 100 millirem per year principal limit.

5. The exemption will result in a significant reduction in societal costs.

Discussion: When the economic and exposure costs associated with the exemption are compared to disposal at a licensed low-level waste site there should be a significant reduction in costs.

6. The waste is compatible with the proposed treatment and disposal options.

Discussion: This criterion relates to the nonradiological properties of the wastes. For example, disposal of radioactive wastes that also qualify as a nonradiological hazardous material should be proposed for disposal methods in accord with EPA regulations (e.g., incineration or disposal at a hazardous waste facility). Also, wastes proposed for incineration should be combustible and wastes proposed for landfills should be appropriate for disposal in typical landfills anywhere in the nation.

7. The exemption is useful on a national scale, i.e., it is likely to be used by a category of licensees or at least a significant portion of a category.

Discussion: Rulemaking is usually not warranted for wastes involving a single licensee, whether a continuing disposal activity or a one-time disposal. Such proposals by individual licensees are normally processed as licensing actions under 10 CFR 20.302(a).

8. The radiological properties of the waste stream have been characterized on a national basis, the variability has been projected, and the range of variation will not invalidate supporting analyses.

Discussion: One of the merits of dealing with specific waste streams is that the actual properties of the waste stream can be relied upon in estimating impacts rather than conservative bounding parameters. The specific pathways that must be considered can be limited to manageable numbers. The expected fate can be credibly limited based on the properties.

9. The waste characterization is based on data on real wastes.

Discussion: Actual data on real waste provide reasonable assurance that the waste characterization is accurate.

10. The disposed form of the waste has negligible potential for recycle.

Discussion: Eliminating the uncertainties associated with recycle is necessary to expeditious handling. Specifying specific wastes and specific methods of disposal narrows the pathways and timeframes to manageable numbers.

11. Licensees can establish effective, licensable, and inspectable programs for the waste prior to transfer to demonstrate compliance.

Discussion: Survey programs and quality control programs will be needed to provide reasonable assurance that actual wastes disposed of under an exemption rule meet the specified parameters. Since disposal would be exempted based on both established and projected waste characteristics, reporting on the wastes actually transferred for below regulatory concern disposal will be important and should be practical.

12. The offsite treatment or disposal medium (e.g., sanitary landfill) does not need to be controlled or monitored for radiation protection purposes.

Discussion: The evaluation of expected exposures should provide the basis for meeting this criterion. However, this is an area where NRC will have a continuing responsibility as multiple petitions are processed. Reporting on actual disposals will help NRC address this responsibility and monitor the adequacy of the limits included in the exempted disposals.

13. The methods and procedures used to manage the wastes and to assess the impacts are no different from those that would be applied to the corresponding uncontaminated materials.

Discussion: Since the receiving facility will not be licensed for radioactive materials, special handling or measures should not be required at the processing or disposal sites because of the radioactive content of the wastes. This criterion also means that realistic assumptions about the disposal methods have been made in estimating exposures.

14. There are no regulatory or legal obstacles to use of the proposed treatment or disposal methods.

Discussion: To have practical use, the disposal option must be available. For example, if all hazardous waste facilities that accept offsite wastes are closed or are not reasonably distributed, the practicality of an exemption to allow disposal at such sites is questionable. Since the receiving facility will not be licensed for radioactive materials, shipments to landfills or hazardous waste facilities should not require identification as radioactive materials.

IV. Administrative Handling

Agency procedures for expeditious handling of petitions for rulemaking were initially published in 1982 in NUREG/BR-0053, "Regulations Handbook."[1] The procedures are contained in Part 11 of the Handbook and were most recently revised in September 1985. Because of resource limitations and other factors, these procedures have not been fully implemented. Petitions for rulemaking submitted in accordance with the Commission's policy statement and this staff implementation plan will be processed in full compliance with these procedures. These procedures coupled with agency policy to complete all rulemaking within 2 years will provide

expeditious action on the petitions. In addition, the Handbook notes general scheduling advice that proposed rules to grant petitions should be published in 6–12 months after acceptance and publication for comment. Proposed rules will be forwarded to the Commission on a 6-month schedule to the extent permitted by resource limits, the nature and extent of public comments, and internal Control of Rulemakings procedures. Rulemakings involving power reactors must be reviewed by the Committee on Review of Generic Requirements prior to publication. Proposed rules involving reactors will therefore be forwarded to the Commission on a 7-month schedule to the extent permitted by resources, comments, and approval procedures. In both cases, every effort will be made to publish proposed rules no later than 12 months after noticing for public comment.

Although the procedures in Part 11 of NUREG/BR-0053 include fast track processing, the nature of the anticipated petitions do not fully comply with the decision criteria to follow this alternative.

Some of the key features of the handling procedures include the following steps for complete and fully supported petitions.

1. Petitioners may confer on procedural matters with the staff before filing a petition for rulemaking. Requests to confer on procedural matters should be addressed to: The Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Rules and Procedures Branch.

2. Petitions should be addressed to: The Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. In keeping with 10 CFR 2.802(f), petitioners will be promptly informed if the petition meets the threshold requirements for a petition for rulemaking in 10 CFR 2.802(c) and can be processed in accordance with this implementation plan. Ordinarily this determination will be made within 30 days after receipt of the petition.

3. Following this determination, the petition will be noticed in the Federal Register for a public comment period of at least 60 days.

4. The petitioner will be provided copies of all comments received, scheduling information, and periodic status reports.

The procedures in NUREG/BR-0053 also include the process for denial and withdrawal of petitions.

51 FR 30839

Footnotes:

[1] Copies of NUREG/BR-0053, NUREG/BR-0058 and NUREG/CR-3585 may be purchased through the U.S. Government Printing Office by calling (202) 275-2060 or by writing to the U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies may also be purchased from the National Technical Information Service, U.S. Department of Commerce, 5185 Port Royal Road, Springfield, VA 22161. Copies are available for inspection and/or copying for a fee in the NRC Public Document Room, 1717 H Street, NW, Washington, DC 20555.

[2] ICRP Publication 46, "Radiation Protection Principles for the Disposal of Solid Radioactive Waste," adopted July 1985.

[3] ICRP Publication 28, "Recommendations of the International Commission on Radiological Protection," adopted January 17, 1977. ICRP Publication 30, "Limits for Intake of Radionuclides by Workers," adopted July 1978.

[4] Copies of the United Kingdom's document are available for inspection as enclosures to SECY-85-147A (relating to 10 CFR Part 20) dated July 25, 1985 in the Commission's Public Document Room, 1717 H Street NW, Washington, DC 20555. The United Kingdom documents are available for sale from: Her Majesty's Stationery Office, P.O. Box 569, London SE1 9NH, United Kingdom, as Advice document ASP-7 and a related technical report, "The Significance of Small Doses of Radiation to Members of the Public," NRPB-R175.

[5] Copies of the Canadian document are available for inspection as an enclosure to SECY-85-147A (relating to 10 CFR Part 20) dated July 25, 1985 in the Commission's Public Document Room, 1717 H Street NW, Washington, DC 20555. The Canadian document was issued as Consultative Document C-85, "The Basis for Exempting the Disposal of Certain Radioactive Materials from Licensing" by the Atomic Energy Control Board, P.O. Box 1046, Ottawa, Ontario, Canada, KIP 5S9.

[6] ICRP/85/G-03, "Statement from the 1985 Paris Meeting of the International Commission on Radiological Protect," 1985-04-28.

Appendix C—General Statement of Policy and Procedure for NRC Enforcement Actions

58 FR 14308

Table of Contents

Preface
I. Introduction and Purpose
II. Statutory Authority
A. Statutory Authority
B. Procedural Framework
III. Responsibilities
IV. Severity of Violations
A. Aggregation of Violations
B. Repetitive Violations
C. Willful Violations
D. Violations of Reporting Requirements
V. Enforcement Conferences
VI. Enforcement Actions
A. Notice of Violation
B. Civil Penalty
1. Base Civil Penalty
2. Civil Penalty Adjustment Factors
(a) Identification
(b) Corrective Action
(c) Licensee Performance
(d) Prior Opportunity to Identify
(e) Multiple Occurrences
(f) Duration
C. Orders
D. Related Administrative Actions
VII. Exercise of Discretion
A. Escalation of Enforcement Sanctions
(1) Civil Penalties
(2) Orders
(3) Daily Civil Penalties
B. Mitigation of Enforcement Sanctions
(1) Severity Level V Violations
(2) Licensee Identified Severity Level V & IV Violations
(3) Violations Identified During Extended Shutdowns or Work Stoppages
(4) Violations Involving Old Design Issues
(5) Violations Identified Due to Previous Escalated Enforcement Action
(6) Violations Involving Special Circumstances
C. Exercise of Discretion for an Operating Facility
VIII. Enforcement Actions Involving Individuals
IX. Inaccurate and Incomplete Information
X. Enforcement Action Against Nonlicensees
XI. Referrals to the Department of Justice
XII. Public Disclosure of Enforcement Actions
XIII. Reopening Closed Enforcement Actions
Supplements

Preface

The following statement of general policy and procedure explains the enforcement policy and procedures of the U.S. Nuclear Regulatory Commission and its staff in initiating enforcement actions, and of the presiding officers and the Commission in reviewing these actions. This statement is applicable to enforcement in matters involving the public health and safety, the common defense and security, and the environment.[1] This statement of general policy and procedure is published in the Code of Federal Regulations to provide widespread dissemination of the Commission's Enforcement Policy. However, this is a policy statement and not a regulation. The Commission may deviate from this statement of policy and procedure as appropriate under the circumstances of a particular case.

I. Introduction and Purpose

57 FR 5791

The purpose of the NRC enforcement program is to promote and protect the radiological health and safety of the public, including employees' health and safety, the common defense and security, and the environment by:

- Ensuring compliance with NRC regulations and license conditions;
- Obtaining prompt correction of violations and adverse quality conditions which may affect safety;
- Deterring future violations and occurrences of conditions adverse to quality; and
- Encouraging improvement of licensee and vendor [2] performance, and by example, that of industry, including the prompt identification and reporting of potential safety problems.

Consistent with the purpose of this program, prompt and vigorous enforcement action will be taken when dealing with licensees, vendors, contractors, and employees of any of them, who do not achieve the necessary meticulous attention to detail and the high standard of compliance which the NRC expects.[3] Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures. In no case, however, will licensees who cannot achieve and maintain adequate levels of protection be permitted to conduct licensed activities.

II. Statutory Authority and Procedural Framework

A. Statutory Authority

The NRC's enforcement jurisdiction is drawn from the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act (ERA) of 1974, as amended.

Section 161 of the Atomic Energy Act authorizes NRC to conduct inspections and investigations and to issue orders as may be necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. Section 186 authorizes NRC to revoke licenses under certain circumstances (e.g., for material false statements, in response to conditions that would have warranted refusal of a license on an original application, for a licensee's failure to build or operate a facility in accordance with the terms of the permit or license, and for violation of an NRC regulation). Section 234 authorizes NRC to impose civil penalties not to exceed $100,000 per violation per day for the violation of certain specified licensing provisions of the Act, rules, orders, and license terms implementing these provisions, and for violations for which licenses can be revoked. In addition to the enumerated provisions in section 234, sections 84 and 147 authorize the imposition of civil penalties for violations of regulations implementing those provisions. Section 232 authorizes NRC to seek injunctive or other equitable relief for violation of regulatory requirements.

57 FR 5791

Section 206 of the Energy Reorganization Act authorizes NRC to impose civil penalties for knowing and conscious failures to provide certain safety information to the NRC.

Chapter 18 of the Atomic Energy Act provides for varying levels of criminal penalties (i.e., monetary fines and imprisonment) for willful violations of the Act and regulations or orders issued under sections 65, 161(b), 161(i), or 161(o) of the Act. Section 223 provides that criminal penalties may be imposed on certain individuals employed by firms constructing or supplying basic components of any utilization facility if the individual knowingly and willfully violates NRC requirements such that a basic component could be significantly impaired. Section 235 provides that criminal penalties may be imposed on persons who interfere with inspectors. Section 236 provides that criminal penalties may be imposed on persons who attempt to or cause sabotage at a nuclear facility or to nuclear fuel. Alleged or suspected criminal violations of the Atomic Energy Act are referred to the Department of Justice for appropriate action.

57 FR 5791

[1] Antitrust enforcement matters will be dealt with on a case-by-case basis.

[2] The term "vendor" as used in this policy means a supplier of products or services to be used in an NRC-licensed facility or activity.

[3] This policy primarily addresses the activities of NRC licensees. Therefore, the term "licensee" is used throughout the policy. However, in those cases where the NRC determines that it is appropriate to take enforcement action against a non-licensee or individual, the guidance in this policy will be used, as applicable. Specific guidance regarding enforcement action against individuals and non-licensees is addressed in Sections VIII and X respectively.

B. Procedural Framework

Subpart B of 10 CFR part 2 of NRC's regulations sets forth the procedures the NRC uses in exercising its enforcement authority. 10 CFR 2.201 sets forth the procedures for issuing notices of violation.

The procedure to be used in assessing civil penalties is set forth in 10 CFR 2.205. This regulation provides that the civil penalty process is initiated by issuing a Notice of Violation and Proposed Imposition of a Civil Penalty. The licensee or other person is provided an opportunity to contest in writing the proposed imposition of a civil penalty. After evaluation of the response, the civil penalty may be mitigated, remitted, or imposed. An opportunity is provided for a hearing if a civil penalty is imposed. If a civil penalty is not paid following a hearing or if a hearing is not requested, the matter may be referred to the U.S. Department of Justice to institute a civil action in District Court.

The procedure for issuing an order to institute a proceeding to modify, suspend, or revoke a license or to take other action against a licensee or other person subject to the jurisdiction of the Commission is set forth in 10 CFR 2.202. The licensee or any other person adversely affected by the order may request a hearing. The NRC is authorized to make orders immediately effective if required to protect the public health, safety, or interest, or if the violation is willful. Section 2.204 sets out the procedures for issuing a Demand for Information (Demand) to a licensee or other person subject to the Commissioner's jurisdiction for the purpose of determining whether an order or other enforcement action should be issued. The Demand does not provide hearing rights, as only information is being sought. A licensee must answer a Demand. An unlicensed person may answer a Demand by either providing the requested information or explaining why the Demand should not have been issued.

57 FR 5791

III. Responsibilities

The Executive Director for Operations (EDO) and the principal enforcement officers of the NRC, the Deputy Executive Director for Nuclear Material Safety Safeguards and Operations Support (DEDS) and the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations, and Research (DEDR), have been delegated the authority to approve or issue all escalated enforcement actions.[4] The DEDS is responsible to the EDO for the NRC enforcement programs. The Office of Enforcement (OE) exercises oversight of and implements the NRC enforcement programs. The Director, OE, acts for the Deputy Executive Directors in enforcement matters in their absence or as delegated. Subject to the oversight and direction of OE, and with the approval of the appropriate Deputy Executive Director, where necessary, the regional offices normally issue Notices of Violation and proposed civil penalties. However, subject to the same oversight as the regional offices, the Office of Nuclear Reactor Regulation (NRR) issues Notices of Violation and proposed civil penalties to vendors and suppliers and the Office of Nuclear Material Safety and Safeguards (NMSS) issues Notices of Violation and proposed civil penalties to certificate holders and to fuel cycle facilities for violations involving material control and accounting. Escalated enforcement actions are normally coordinated with the appropriate offices by the OE. Enforcement orders are normally issued by a Deputy Executive Director or the Director, OE. However, orders may also be issued by the EDO, especially those involving the more significant matters. The Directors of NRR and NMSS have also been delegated authority to issue orders, but it is expected that normal use of this authority by NRR and NMSS will be confined to actions not associated with compliance issues. The Director, Office of the Controller, has been delegated the authority to issue orders where licensees violate Commission regulations by nonpayment of license and inspection fees.

[4] The term "escalated enforcement action" as used in this policy means a Notice of Violation for any Severity Level I, II, or III violation; a civil penalty for any Severity Level I, II, III, or IV violation and any order based upon a violation.

57 FR 5791

In recognition that the regulation of nuclear activities in many cases does not lend itself to a mechanistic treatment, judgment and discretion must be exercised in determining the severity levels of the violations and the appropriate enforcement sanctions, including the decision to issue a Notice of Violation, or to propose or impose a civil penalty and the amount of this penalty, after considering the general principles of this statement of policy and the technical significance of the violations and the surrounding circumstances.

Unless Commission consultation or notification is required by this policy, the staff may depart, where warranted in the public's interest, from this policy with the approval of the appropriate Deputy Executive Director and consultation with the EDO as warranted. (See also Section VII, "Exercise of Discretion.")

The Commission will be provided written notification of all enforcement actions involving civil penalties or orders. The Commission will also be provided notice in those cases where discretion is exercised and discussed in Section VII.B.6. In addition, the Commission will be consulted prior to taking action in the following situations (unless the urgency of the situation dictates immediate action):

(1) An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;

(2) Proposals to impose civil penalties in amounts greater than 3 times the Severity Level I values shown in Table 1A;

(3) Any proposed enforcement action that involves a Severity Level I violation;

(4) Any enforcement action that involves a finding of a material false statement;

(5) Exercising discretión for matters meeting the criteria of Section VII.A.1 for Commission consultation;

(6) Refraining from taking enforcement action for matters meeting the criteria of Section VII.B.3;

(7) Any proposed enforcement action that involves the issuance of a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator;

(8) Any action the EDO believes warrants Commission involvement;

(9) Any enforcement case involving an Office of Investigation (OI) report where NRC staff (other than OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent.

(10) Any proposed enforcement action on which the Commission asks to be consulted.

IV. Severity of Violations

Regulatory requirements [5] have varying degrees of safety, safeguards, or environmental significance. Therefore, the relative importance of each violation, including both the technical significance and the regulatory significance is evaluated as the first step in the enforcement process.

Consequently, violations are normally categorized in terms of five levels of severity to show their relative importance within each of the following eight activity areas:

I. Reactor Operations;
II. Facility Construction;
III. Safeguards;
IV. Health Physics;
V. Transportation;
VI. Fuel Cycle and Materials Operations;
VII. Miscellaneous Matters; and
VIII. Emergency Preparedness.

Licensed activities will be placed in the activity area most suitable in light of the particular violation involved including activities not directly covered by one of the above listed areas, e.g., export license activities. Within each activity area, Severity Level I has been assigned to violations that are the most significant and Severity Level V violations are the least significant. Severity Level I and II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential impact on the public. Severity Level III violations are cause for significant regulatory concern. Severity Level IV violations are less serious but are of more than minor concern; i.e., if left uncorrected, they could lead to a more serious concern. Severity Level V violations are of minor safety or environmental concern.

Comparisons of significance between activity areas are inappropriate. For example, the immediacy of any hazard to the public associated with Severity Level I violations in Reactor Operations is not directly comparable to that associated with Severity Level I violations in Facility Construction.

Supplements I through VIII provide examples and serve as guidance in determining the appropriate severity level for violations in each of the eight activity areas. However, the examples are neither exhaustive nor controlling. In addition, these examples do not create new requirements. Each is designed to illustrate the significance that the NRC places on a particular type of violation of NRC requirements. Each of the examples in the supplements is predicated on a violation of a regulatory requirement.

The NRC reviews each case being considered for enforcement action on its own merits to ensure that the severity of a violation is characterized at the level best suited to the significance of the particular violation. In some cases, special circumstances may warrant an adjustment to the severity level categorization.

A. Aggregation of Violations

A group of violations may be evaluated in the aggregate and assigned a single, increased severity level, thereby resulting in a Severity Level III problem, if the violations have the same underlying cause or programmatic deficiencies, or the violations contributed to or were unavoidable consequences of the underlying problem. Normally, Severity Level I and II violations are not aggregated into a higher severity level.

The purpose of aggregating violations is to focus the licensee's attention on the fundamental underlying causes for which enforcement action appears warranted and to reflect the fact that several violations with a common cause may be more significant collectively than individually and may therefore, warrant a more substantial enforcement action. In addition, a civil penalty for multiple occurrences of a violation with the same root cause may be subject to escalation of the base civil penalty. (See Section VI.B.2.(e))

B. Repetitive Violations

The severity level of a Severity Level V or IV violation may be increased to Severity Level IV or III respectively, if the violation can be considered a repetitive violation.[6] The purpose of escalating the severity level of a repetitive violation is to acknowledge the added significance of the situation based on the licensee's failure to implement effective corrective action for the previous violation. The decision to escalate the severity level of a repetitive violation will depend on the circumstances, such as, but not limited to, the number of times the violation has occurred, the similarity of the violations and their root causes, the adequacy of previous corrective actions, the period of time between the violations, and the significance of the violations. (Civil penalties may also be proposed for repetitive Severity Level IV violations as discussed in Section VI.B.)

C. Willful Violations

Willful violations are by definition of particular concern to the Commission because its regulatory program is based on licensees and their contractors, employees, and agents acting with integrity and communicating with candor. Willful violations cannot be tolerated by either the Commission or a licensee. Licensees are expected to take significant remedial action in responding to willful violations commensurate with the circumstances such that it demonstrates the seriousness of the violation thereby creating a deterrent effect within the licensee's organization. While removal of the person is not necessarily required, substantial disciplinary action is expected.

[5] The term "requirement" as used in this policy means a legally binding requirement such as a statute, regulation, license condition, technical specification, or order.

[6] The term "repetitive violation" or "similar violation" as used in this policy statement means a violation that reasonably could have been prevented by a licensee's corrective action for a previous violation normally occurring (1) within the past two years of the inspection at issue, or (2) the period within the last two inspections, whichever is longer.

Therefore, the severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard of requirements, deception, or other indications of willfulness. The term "willfulness" as used in this policy embraces a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements. Willfulness does not include acts which do not rise to the level of careless disregard, e.g., inadvertent clerical errors in a document submitted to the NRC. In determining the specific severity level of a violation involving willfulness, consideration will be given to such factors as the position and responsibilities of the person involved in the violation (e.g., licensee official [7] or non-supervisory employee), the significance of any underlying violation, the intent of the violator (i.e., careless disregard or deliberateness), and the economic or other advantage, if any, gained as a result of the violation. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of the violation. However, the severity level of a willful severity level V violation will be increased to at least a severity level IV.

D. Violations of Reporting Requirements

The NRC expects licensees to provide complete, accurate, and timely information and reports. Accordingly, unless otherwise categorized in the Supplements, the severity level of a violation involving the failure to make a required report to the NRC will be based upon the significance of and the circumstances surrounding the matter that should have been reported. However, the severity level of an untimely report, in contrast to no report, may be reduced depending on the circumstances surrounding the matter. A licensee will not normally be cited for a failure to report a condition or event unless the licensee was actually aware of the condition or event that it failed to report. A licensee will, on the other hand, normally be cited for a failure to report a condition or event if the licensee knew of the information to be reported, but did not recognize that it was required to make a report.

V. Enforcement Conferences

Whenever the NRC has learned of the existence of a potential violation for which escalated enforcement action may be warranted, or recurring nonconformance on the part of a vendor, the NRC will normally provide an opportunity for an enforcement conference with the licensee, vendor, or other person prior to taking enforcement action. Although enforcement conferences are not normally held for Severity Level IV violations, they may be scheduled if increased management attention is warranted e.g., if the violations are repetitive. The purpose of the enforcement conference is to (1) discuss the violations or nonconformances, their significance, the reason for their occurrence, including the apparent root causes, and the licensee's or vendor's corrective actions, (2) determine whether there were any aggravating or mitigating circumstances, and (3) obtain other information that will help the NRC determine the appropriate enforcement action.

During the enforcement conference, the licensee, vendor, or other person will be given an opportunity to provide information consistent with the purpose of the conference, including an explanation to the NRC of the immediate corrective actions (if any) that were taken following identification of the potential violation or nonconformance and the long term comprehensive actions that were taken or will be taken to prevent recurrence. Licensees, vendors, or other persons will be told when a meeting is an enforcement conference. Enforcement conferences will not normally be open to the public.

When needed to protect the public health and safety or common defense and security, escalated enforcement action, such as the issuance of an immediately effective order modifying, suspending, or revoking a license, will be taken prior to the enforcement conference. In these cases, an enforcement conference may be held after the escalated enforcement action is taken.

VI. Enforcement Actions

This section describes the enforcement sanctions available to the NRC and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation, civil penalties, and orders of various types. As discussed further in Section VI.D, related administrative mechanisms such as Notices of Nonconformance, Notices of Deviation, Confirmatory Action Letters, letters of reprimand, and Demands for Information are used to supplement the enforcement program. In selecting the enforcement sanctions to be applied, the NRC will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, such as in transportation matters. Usually, whenever a violation of NRC requirements is identified, enforcement action is taken. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations, a Notice of Violation or a Notice of Nonconformance is the normal enforcement action.

[7] The term "licensee official" as used in this policy statement means a first-line supervisor or above, a licensed individual, a radiation safety officer, or an authorized user of licensed material whether or not listed on a license. Notwithstanding an individual's job title, severity level categorization for willful acts involving individuals who can be considered licensee officials will consider several factors, including the position of the individual relative to the licensee's organizational structure and the individual's responsibilities relative to the oversight of licensed activities and to the use of licensed material.

A. Notice of Violation

A Notice of Violation is a written notice setting forth one or more violations of a legally binding requirement. The Notice of Violation normally requires the recipient to provide a written statement describing (1) the reasons for the violation or, if contested, the basis for disputing the violation; (2) corrective steps that have been taken and the results achieved; (3) corrective steps that will be taken to prevent recurrence; and (4) the date when full compliance will be achieved. The NRC may require responses to Notices of Violation to be under oath. Normally, responses under oath will be required only in connection with civil penalties and orders.

The NRC uses the Notice of Violation as the usual method for formalizing the existence of a violation. Issuance of a Notice of Violation is normally the only enforcement action taken, except in cases where the criteria for issuance of civil penalties and orders, as set forth in Sections VI.B and VI.C, respectively, are met. However, special circumstances regarding the violation findings may warrant discretion being exercised such that the NRC refrains from issuing a Notice of Violation. (See Section VII.B, "Mitigation of Enforcement Sanctions.") In addition, licensees are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable licensee quality assurance measures or management controls. Generally, however, licensees are held responsible for the acts of their employees. Accordingly, this policy should not be construed to excuse personnel errors.

57 FR 5791

B. Civil Penalty

A civil penalty is a monetary penalty that may be imposed for violation of (1) certain specified licensing provisions of the Atomic Energy Act or supplementary NRC rules or orders; (2) any requirement for which a license may be revoked; or (3) reporting requirements under section 206 of the Energy Reorganization Act. Civil penalties are designed to emphasize the need for lasting remedial action and to deter future violations both by the involved licensee as well as by other licensees conducting similar activities.

Civil penalties are proposed (absent mitigating circumstances) for Severity Level I, II, and III violations, and may be proposed for repetitive Severity Level IV violations or for any willful violation. In addition, civil penalties will normally be assessed for knowing and conscious violations of the reporting requirements of section 206 of the Energy Reorganization Act.

1. Base Civil Penalty

The NRC imposes different levels of penalties for different severity level violations and different classes of licensees, vendors, and other persons. Tables 1A and 1B show the base civil penalties for various reactor, fuel cycle, materials, and vendor programs. (Civil penalties issued to individuals are determined on a case-by-case basis.) The structure of these tables generally takes into account the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration. Generally, operations involving greater nuclear material inventories and greater potential consequences to the public and licensee employees receive higher civil penalties. Regarding the secondary factor of ability of various classes of licensees to pay the civil penalties, it is not the NRC's intention that the economic impact of a civil penalty be so severe that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to suspend or terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities. The deterrent effect of civil penalties is best served when the amounts of the penalties take into account a licensee's "ability to pay." In determining the amount of civil penalties for licensees for whom the tables do not reflect the ability to pay, the NRC will consider as necessary an increase or decrease on a case-by-case basis. Normally, if a licensee can demonstrate financial hardship, the NRC will consider payments over time, including interest, rather than reducing the amount of the civil penalty. However, where a licensee claims financial hardship, the licensee will normally be required to address why it has sufficient resources to safely conduct licensed activities and pay license and inspection fees.

57 FR 5791

2. Civil Penalty Adjustment Factors

In an effort to recognize and encourage good performance, deter poor performance, and emphasize violations of particular regulatory concern, the NRC reviews each proposed civil penalty on its own merits and, after considering all relevant circumstances, may adjust the base civil penalities shown in Table 1A and 1B for Severity Level I, II, and III violations based on an assessment of the following civil penalty adjustment factors. Civil penalties for Severity Level IV violations are normally proposed at the base values identified in the tables without assessing the civil penalty adjustment factors.

While management involvement, direct or indirect, in a violation may lead to an increase in the civil penalty, the lack of management involvement may not be used to mitigate a civil penalty. Allowing mitigation in the latter case could encourage lack of managment involvement in licensed activities and a decrease in protection of the public health and safety.

57 FR 5791

(a) *Identification.* The purposes of this factor is to encourage licensees to monitor, supervise, and audit activities in order to assure safety and compliance. Therefore, the base civil penalty shown in Tables 1A and 1B may be mitigated up to 50% when a licensee identifies a violation and escalated up to 50% if the NRC identifies a violation. The base civil penalty may also be mitigated up to 25% when a licensee identifies a violation resulting from a self-disclosing event [8] where the licensee demonstrates initiative in identifying the root cause of the violation. In addition, the base civil penalty may also be mitigated where warranted if a licensee identifies a violation as a result of its review of a generic notification. While mitigation under this factor is appropriate for a licensee identified violation that was not reported to the NRC, a separate enforcement action will normally be issued for the licensee's failure to make the required report.

[8] The term "self-disclosing event" as used in this policy statement means an event that is readily obvious by human observation or mechanical instrumentation such as a spill of liquid, an open door (required to be closed), an overexposure documented in a dosimetry report, an annunciator alarm, or a reactor trip.

57 FR 5791

(b) *Corrective action.* The purposes of this factor is to encourage licensees to (1) take the immediate actions necessary upon discovery of a violation that will restore safety and compliance with the license, regulation(s), or other requirement(s); and (2) devleop and implement (in a timely manner) the lasting actions that will not only prevent recurrence of the violation at issue, but will be appropriately comprehensive, given the significance and complexity of the violation, to prevent occurrence of similar violations. Therefore, the base civil penalty shown in Tables 1A and 1B may be either mitigated or escalated by as much as 50% depending on the promptness and extensiveness of the licensee's corrective action. In assessing this factor, consideration will be given to, among other things, the timeliness of the corrective action (including the promptness in developing the schedule for long term corrective action), the degree of licensee initiative (i.e., whether NRC involvement was required before acceptable action was taken), the adequacy of the licensee's root cause analysis for the violation, and, given the significance and complexity of the issue, the comprehensiveness of the corrective action (i.e., whether the action is focused narrowly to the specific violation or broadly to the general area of concern). Notwithstanding good comprehensive corrective action, if immediate corrective action was not taken to restore safety and compliance once the violation was identified, mitigation of the civil penalty based on this factor will not normally be considered and escalation may be considered to address the licensee's failure.

(c) *Licensee performance.* The purpose of this factor is to recognize and encourage good or improving licensee performance and to recognize and deter poor or declining performance. Therefore, the base civil penalty shown in Tables 1A and 1B may be mitigated by as much as 100% if the current violation is an isolated failure that is inconsistent with a licensee's outstandingly good prior performance. The base civil penalty may also be escalated by as much as 100% if the current violation is reflective of the licensee's poor or declining prior performance. Neither mitigation nor escalation may be appropriate based on this factor where a licensee's poor prior performance appears to clearly be improving. Prior performance, as used in this policy statement, refers to the licensee's performance normally (1) within the last two years of the inspection at issue, or (2) the period within the last two inspections, whichever is longer. In assessing the licensee's prior performance, consideration will be given to, among other things, the effectiveness of previous corrective action for similar problems, overall performance such as Systematic Assessment of Licensee Performance (SALP) evaluations for power reactors, and the licensee's prior enforcement history overall and in the area of concern, including escalated and non-escalated enforcement actions and any enforcement actions that the NRC exercised discretion and refrained from issuing in accordance with Section VII.B. Notwithstanding good prior performance, mitigation of the civil penalty based on this factor is not normally warranted where the current violation reflects a substantial decline in performance that has occurred over the time since the last NRC inspection. In addition, this factor should not be applied for those cases where the licensee has not been in existence long enough to establish a prior performance or inspection history. Similarly, mitigation based on this factor is not normally appropriate where the area of concern has not been previously inspected, unless overall performance is good.

(d) *Prior opportunity to identify.* The purpose of this factor is to encourage licensees to take effective action in response to opportunities to identify or prevent problems or violations. Therefore, the base civil penalty shown in Tables 1A and 1B may be escalated by as much as 100% for cases where the licensee should have identified the violation sooner as a result of prior opportunities, such as (1) through normal surveillances, audits, or quality assurance (QA) activities; (2) through prior notice i.e., specific NRC or industry notification; or (3) through other reasonable indication of a potential problem or violation, such as observations of employees and contractors, and had failed to take effective corrective steps. Prior notification may include findings of the NRC, the licensee, or industry made at other facilities operated by the licensee where it is reasonable to expect the licensee to take action to identify or prevent similar problems at the facility subject to the enforcement action at issue. In assessing this factor, consideration will be given to, among other things, the opportunities available to discover the violation, the ease of discovery, the similarity between the violation and the notification, the period of time between when the violation occurred and when the notification was issued, the action taken (or planned) by the licensee in response to the notification, and the level of management review that the notification received (or should have received). Escalation of the civil penalty based solely on prior notification is normally not warranted where the licensee appropriately reviewed the notification for application to its activities and reasonable action was either taken or planned to be taken within a reasonable time.

(e) *Multiple occurrences.* The purpose of this factor is to reflect the added significance resulting from multiple occurrences of the violation. Therefore, the base civil penalty shown in Tables 1A and 1B may be escalated by as much as 100% where multiple examples of a particular violation are identified during the inspection period. Escalation of the civil penalty based on this factor will normally be considered only when there are multiple examples of Severity Level I, II, or III violations with the same root causes. Alternatively, separate civil penalties may be imposed for each violation.

(f) *Duration.* The purpose of this factor is to recognize the added significance associated with those violations (or the impact of those violations) that continue

or remain uncorrected for more than one day. Therefore, whether or not a licensee is aware or clearly should have been aware of a violation, the base civil penalty shown in Tables 1A and 1B may be escalated by as much as 100% to reflect the added technical and/or regulatory significance resulting from the violation or the impact of it remaining uncorrected for more than one day. This factor should normally be applied in cases involving particularly safety significant violations or where a significant regulatory message is warranted. In lieu of escalating the civil penalty based on this factor, the NRC may impose daily civil penalties for violations that continue for more than one day. (See Section VII.A.3, "Daily Civil Penalties.")

The civil penalty adjustment factors presented in paragraphs (a) through (f) are additive. However, in no instance will a civil penalty for any one violation exceed $100,000 per day.

Notwithstanding the application of the civil penalty adjustment factors, a civil penalty will normally be proposed in an amount of at least 50% of the base value in Tables 1A and 1B for Severity Level I and II violations involving overexposures, release of radioactive material, or loss of radioactive material to emphasize to the licensee the seriousness with which the NRC views these events and the importance of conducting licensed activities in a manner to avoid these violations. In considering mitigation for these cases, normally the only adjustment factors that will be considered to lower a base civil penalty will be identification and corrective action factors. In addition, as provided in Section VII, "Exercise of Discretion," discretion may be exercised by either escalating or mitigating the amount of the civil penalty arrived at after applying the civil penalty adjustment factors to ensure that the proposed civil penalty reflects the NRC's concern regarding the violation at issue and that it conveys the appropriate message to the licensee.

57 FR 5791

TABLE 1A—BASE CIVIL PENALTIES

	Plant operations, construction, health physics and EP	Safeguards	Transportation	
			Greater than Type A quantity [1]	Type A quantity or less [2]
a. Power reactors	$100,000	$100,000	$100,000	$5,000
b. Test reactors	10,000	10,000	10,000	2,000
c. Research reactors and critical facilities	5,000	5,000	5,000	1,000
d. Fuel fabricators and industrial processors [3]	25,000	100,000	25,000	5,000
e. Mills and Uranium conversion facilities	10,000	—	5,000	2,000
f. Industrial users of materials [5], and contractors and vendors	10,000	—	5,000	2,000
g. Waste disposal licensees	10,000	—	5,000	2,000
h. Academic or medical institutions [6]	5,000	—	2,500	1,000
i. Independent spent fuel and monitored retrievable storage installations	25,000	100,000	25,000	5,000
j. Other material licensees	1,000	—	2,500	1,000

[1] Includes irradiated fuel, high level waste, unirradiated fissile material, and any other quantities requiring Type B packaging.
[2] Includes low specific activity waste (LSA), low level waste, Type A packages, and excepted quantities and articles.
[3] Large firms engaged in manufacturing or distribution of byproduct, source, or special nuclear material.
[4] This amount refers to Category 1 licensees (as defined in 10 CFR 73.2). Licensed fuel fabricators not authorized to possess Category 1 material have a base penalty amount of $50,000.
[5] Includes industrial radiographers, nuclear pharmacies, and other industrial users.
[6] This applies to nonprofit institutions not otherwise categorized under sections "a" through "g" in this table and mobile nuclear services.

TABLE 1 B—BASE CIVIL PENALTIES

Severity Level	Base Civil Penalty Amount (Percent of amount listed in Table 1A)
I	100
II	80
III	50
IV	15

C. Orders

An order is a written NRC directive to modify, suspend, or revoke a license; to cease and desist from a given practice or activity; or to take such other action as may be proper (see 10 CFR 2.202). Orders may also be issued in lieu of, or in addition to, civil penalties, as appropriate for Severity Level I, II, or III violations. Orders may be issued as follows:

(1) License Modification orders are issued when some change in licensee equipment, procedures, personnel, or management controls is necessary.

(2) Suspension Orders may be used:

(a) To remove a threat to the public health and safety, common defense and security, or the environment;

(b) To stop facility construction when,

(i) Further work could preclude or significantly hinder the identification or correction of an improperly constructed safety-related system or component; or

(ii) The licensee's quality assurance program implementation is not adequate to provide confidence that construction activities are being properly carried out;

(c) When the licensee has not responded adequately to other enforcement action;

(d) When the licensee interferes with the conduct of an inspection or investigation; or

(e) For any reason not mentioned above for which license revocation is legally authorized.

Suspensions may apply to all or part of the licensed activity. Ordinarily, a licensed activity is not suspended (nor is a suspension prolonged) for failure to comply with requirements where such failure is not willful and adequate corrective action has been taken.

(3) Revocation Orders may be used:

(a) When a licensee is unable or unwilling to comply with NRC requirements;

(b) When a licensee refuses to correct a violation;

(c) When licensee does not respond to a Notice of Violation where a response was required;

(d) When a licensee refuses to pay an applicable fee under the Commission's regulations; or

(e) For any other reason for which revocation is authorized under section 186 of the Atomic Energy Act (e.g., any condition which would warrant refusal of a license on an original application).

(4) Cease and Desist Orders may be used to stop an unauthorized activity that has continued after notification by NRC that the activity is unauthorized.

(5) Orders to unlicensed persons, including vendors and contractors, and employees of any of them, are used when the NRC has identified deliberate misconduct that may cause a licensee to be in violation of an NRC requirement or where incomplete or inaccurate information is deliberately submitted or where the NRC loses its reasonable assurance that the licensee will meet NRC requirements with that person involved in licensed activities.

Unless a separate response is warranted pursuant to 10 CFR 2.201, a Notice of Violation need not be issued where an order is based on violations described in the order. The violations described in an order need not be categorized by severity level.

Orders are made effective immediately, without prior opportunity for hearing, whenever it is determined that the public health, interest, or safety so requires, or when the order is responding to a violation involving willfulness. Otherwise, a prior opportunity for a hearing on the order is afforded. For cases in which the NRC believes a basis could reasonably exist for not taking the action as proposed, the licensee will ordinarily be afforded an opportunity to show why the order should not be issued in the proposed manner by way of a Demand for Information. (See 10 CFR 2.204)

D. Related Administrative Actions

In addition to the formal enforcement mechanisms of Notices of Violation, civil penalties, and orders, the NRC also uses administrative mechanisms, such as Notices of Deviation, Notices of Nonconformance, Confirmatory Action Letters, letters of reprimand, and Demands for Information to supplement its enforcement program. The NRC expects licensees and vendors to adhere to any obligations and commitments resulting from these processes and will not hesitate to issue appropriate orders to ensure that these obligations and commitments are met.

(1) Notices of Deviation are written notices describing a licensee's failure to satisfy a commitment where the commitment involved has not been made a legally binding requirement. A Notice of Deviation requests a licensee to provide a written explanation or statement describing corrective steps taken (or planned), the results achieved, and the date when corrective action will be completed.

(2) Notices of Nonconformance are written notices describing vendor's failures to meet commitments which have not been made legally binding requirements by NRC. An example is a commitment made in a procurement contract with a licensee as required by 10 CFR part 50, appendix B. Notices of Nonconformances request non-licensees to provide written explanations or statements describing corrective steps (taken or planned), the results achieved, the dates when corrective actions will be completed, and measures taken to preclude recurrence.

(3) Confirmatory Action Letters (CALs) are letters confirming a licensee's or vendor's agreement to take

certain actions to remove significant concerns about health and safety, safeguards, or the environment.

(4) Letters of reprimand are letters addressed to individuals subject to Commission jurisdiction identifying a significant deficiency in their performance of licensed activities.

(5) Demands for Information are demands for information from licensees or other persons for the purpose of enabling NRC to determine whether an order or other enforcement action should be issued.

VII. Exercise of Discretion

Notwithstanding the normal guidance contained in this policy, the NRC may choose to exercise discretion and either escalate or mitigate enforcement sanctions within the Commission's statutory authority to ensure that the resulting enforcement action appropriately reflects the level of NRC concern regarding the violation at issue and conveys the appropriate message to the licensee.

57 FR 5791

A. Escalation of Enforcement Sanctions

The NRC considers violations categorized at Severity Level I, II, or III to be of significant regulatory concern. If the application of the normal guidance in this policy does not provide an appropriate sanction, or if particularly serious violations occur, such as in cases involving willfulness, repeated poor performance in an area of concern, or serious breakdowns in management controls, the NRC may apply its full enforcement authority where the action is warranted. NRC action may include (1) escalating civil penalties, (2) issuing appropriate orders, and (3) assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $100,000 per violation, per day.

57 FR 5791

(1) *Civil penalties.* Notwithstanding the outcome of the normal civil penalty assessment process (i.e., base civil penalty adjusted based on application of the civil penalty adjustment factors addressed in Section VI.B), with the approval of the appropriate Deputy Executive Director and consultation with the EDO as warranted, the NRC may exercise discretion by either proposing a civil penalty where application of the factors would otherwise result in zero penalty or by further escalating the amount of the adjusted civil penalty to ensure that the proposed civil penalty reflects the NRC's concern regarding the violation at issue and that it conveys the appropriate message to the licensee. In addition to the approval of the appropriate Deputy Executive Director, consultation with the Commission is required if the deviation in the amount of the civil penalty proposed under this discretion from the amount of the civil penalty assessed under the normal process is more than two times the base civil penalty shown in Tables 1A and 1B.

57 FR 5791

(2) *Orders.* The NRC will, where necessary issues orders in conjunction with civil penalties to achieve or formalize corrective actions and to deter further recurrence of serious violations. Examples of enforcement actions that could be taken for similar Severity Level I, II, or III violations are set forth in Table 2. The actual progression to be used in a particular case will depend on the circumstances. Enforcement sanctions will normally escalate for recurring similar violations.

TABLE 2.—EXAMPLES OF PROGRESSION OF ESCALATED ENFORCEMENT ACTIONS FOR SIMILAR VIOLATIONS IN THE SAME ACTIVITY AREA UNDER THE SAME LICENSE

Severity of Violation	Number of similar violations from the date of the last inspection or within the previous two years (whichever period is greater)		
	1st	2nd	3rd
I	a+c	a+b+c	d
II	a	a+b+c	a+b+c
III	a	a+c	a+b

Notes:
a. Civil penalty.
b. Suspension of affected operations until the Office Director is satisfied that there is reasonable assurance that the licensee can operate in compliance with the applicable requirements, or modification of the license, as appropriate.
c. Consider issuing an order for modification, suspension, or revocation of the license, as appropriate, through use of a Demand for Information.
d. Further action, as appropriate.

(3) *Daily civil penalties.* In order to recognize the added technical safety significance or regulatory significance for those cases where a very strong message is warranted for a significant violation that continues for more than one day, the NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit of $100,000 for each day the violation continues. The NRC may exercise this discretion if a licensee was aware or clearly should have been aware of a violation, or if the licensee had an opportunity to identify and correct the violation but failed to do so.

B. Mitigation of Enforcement Sanctions

Because the NRC wants to encourage and support licensee initiative for self identification and correction of problems, the NRC may exercise discretion and refrain from issuing a civil penalty and/or issuing a Notice of Violation under certain circumstances. In addition, while the NRC may exercise this discretion for violations meeting the required criteria where the licensee failed to make a required report to the NRC, a separate enforcement action will normally be issued for the licensee's failure to make a required report. The circumstances under which this discretion may be exercised are as follows:

57 FR 5791

(1) Severity Level V Violations. The NRC may refrain from issuing a Notice of Violation for a Severity Level V violation that is documented in an inspection report (or official field notes for some material cases) provided that the inspection report includes a brief description of the corrective action and that the violation meets all of the following criteria:

(a) It was not a violation that could reasonably be expected to have been prevented by the licensee's corrective action for a previous violation or a previous licensee finding that occurred within the past two years of the inspection at issue, or the period within the last two inspections, whichever is longer;

(b) It was or will be corrected within a reasonable time, by specific corrective action committed to by the licensee by the end of the inspection, including immediate corrective action and comprehensive corrective action to prevent recurrence;

(c) It was not a willful violation.

(2) Licensee Identified Severity Level IV and V Violations. The NRC may refrain from issuing a Notice of Violation for a Severity Level IV or V violation that is documented in an inspection report (or official field notes for some material cases) provided that the inspection report includes a brief description of the corrective action and that the violation meets all of the following criteria:

(a) It was identified by the licensee, including as a result of a self-disclosing event;

(b) It was not a violation that could reasonably be expected to have been prevented by the licensee's corrective action for a previous violation or a previous licensee finding that occurred within the past two years of the inspection at issue, or the period within the last two inspections, whichever is longer;

57 FR 5791

(c) It was or will be corrected within a reasonable time, by specific corrective action committed to by the licensee by the end of the inspection, including immediate corrective action and comprehensive corrective action to prevent recurrence;

(d) It was not a willful violation or if it was a willful violation;

(i) The information concerning the violation, if not required to be reported, was promptly provided to appropriate NRC personnel, such as a resident inspector or regional section or branch chief;

(ii) The violation involved the acts of a low level individual (and not a licensee official as defined in section IV.C);

(iii) The violation appears to be the isolated action of the employee without management involvement and the violation was not caused by lack of management oversight as evidenced by either a history of isolated willful violations or a lack of adequate audits or supervision of employees; and

(iv) Significant remedial action commensurate with the circumstances was taken by the licensee such that it demonstrated the seriousness of the violation to other employees and contractors, thereby creating a deterrent effect within the licensee's organization. While removal of the employee from licensed activities is not necessarily required, substantial disciplinary action is expected.

57 FR 5791

(3) Violations Identified During Extended Shutdowns or Work Stoppages. The NRC may refrain from issuing a Notice of Violation or a proposed civil penalty for a violation that is identified after (i) the NRC has taken significant enforcement action based upon a major safety event contributing to an extended shutdown of an operating reactor or a material licensee (or a work stoppage at a construction site), or (ii) the licensee enters an extended shutdown or work stoppage related to generally poor performance over a long period of time, provided that the violation is documented in an inspection report (or official field notes for some material cases) and that it meets all of the following criteria:

(a) It was either licensee identified as a result of a comprehensive program for problem identification and correction that was developed in response to the shutdown or identified as a result of an employee allegation to the licensee; (If the NRC identifies the violation and all of the other criteria are met, the NRC should determine whether enforcement action is necessary to achieve remedial action, or if discretion may still be appropriate.)

(b) It is based upon activities of the licensee prior to the events leading to the shutdown;

(c) It would not be categorized at a severity level higher than Severity Level II;

(d) It was not willful; and

(e) The licensee's decision to restart the plant requires NRC concurrence.

(4) Violations Involving Old Design Issues. The NRC may refrain from proposing a civil penalty for a Severity Level II or III violation involving a past problem, such as in engineering, design, or installation, provided that the violation is documented in an inspection report (or official field notes for some material cases) that includes a description of the corrective action and that it meets all of the following criteria:

(a) It was a licensee identified as a result of a licensee's voluntary formal initiative, such as a Safety System Functional Inspection, Design Reconstitution Program, or other program that has a defined scope and timetable and is being aggressively implemented;

(b) It was or will be corrected, including immediate corrective action and long term comprehensive corrective action to prevent recurrence, within a reasonable time following identification (this action should involve expanding the initiative, as necessary, to identify other failures caused by similar root causes); and

(c) It was not likely to be identified (after the violation occurred) by routine licensee efforts such as normal surveillance or quality assurance (QA) activities.

In addition, the NRC may refrain from issuing a Notice of Violation for cases that meet the above criteria provided the violation was caused by conduct that is not reasonably linked to present performance (normally, violations that are at least three years old or violations occurring during plant construction) and there had not been prior notice so that the licensee should have reasonably identified the violation earlier. This exercise of discretion is to place a premium on licensees initiating efforts to identify and correct subtle violations that are not likely to be identified by routine efforts before degraded safety systems are called upon to work.

(5) Violations Identified Due to Previous Escalated Enforcement Action. The NRC may refrain from issuing a Notice of Violation or a proposed civil penalty for a violation that is identified after the NRC has taken escalated enforcement action for a Severity Level II or III violation, provided that the violation is documented in an inspection report (or official field notes for some material cases) that includes a description of the corrective action and that it meets all of the following criteria: 57 FR 5791

(a) It was a licensee identified as part of the corrective action for the previous escalated enforcement action;

(b) It has the same or similar root cause as the violation for which escalated enforcement action was issued;

(c) It does not substantially change the safety significance or the character of the regulatory concern arising out of the initial violation; and

(d) It was or will be corrected, including immediate corrective action and long term comprehensive corrective action to prevent recurrence, within a reasonable time following identification.

(6) Violations Involving Special Circumstances. Notwithstanding the outcome of the normal civil penalty assessment process (i.e., base civil penalty adjusted based on application of the civil penalty adjustment factors addressed in Section VI.B), as provided in Section III, "Responsibilities," the appropriate Deputy Executive Director may reduce or refrain from issuing a civil penalty or a Notice of Violation for a Severity Level II or III violation based on the merits of the case after considering the guidance in this statement of policy and such factors as the age of the violation, the safety significance of the violation, the overall performance of the licensee, and other relevant circumstances, including any that may have changed since the violation, provided prior notice has been given the Commission. This discretion is expected to be exercised only where application of the normal guidance in the policy is unwarranted. 57 FR 5791

C. Exercise of Discretion for an Operating Facility

On occasion, circumstances may arise where a licensee's compliance with a Technical Specification (TS) Limiting Condition for Operation or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions, or unnecessary delays in plant startup without a corresponding health and safety benefit. In these circumstances, the NRC staff may choose not to enforce the applicable TS or other license condition. This enforcement discretion will only be exercised if the NRC staff is clearly satisfied that the action is consistent with protecting the public health and safety. A licensee seeking the exercise of enforcement discretion must provide a written justification, or in circumstances where good cause is shown, oral justification followed as soon as possible by written justification, which documents the safety basis for the request and provides whatever other information the NRC staff deems necessary in making a decision on whether or not to exercise enforcement discretion. 58 FR 14308

The appropriate Regional Administrator, or his designee, may exercise discretion where the noncompliance is temporary and nonrecurring when an amendment is not practical. The Director, Office of Nuclear Reactor Regulation, or his designee, may exercise discretion if the expected noncompliance will occur during the brief period of time it requires the NRC staff to process an emergency or exigent license amendment under the provisions of 10 CFR 50.91(a)(5) or (6). The person exercising enforcement discretion will document the decision.

For an operating plant, this exercise of enforcement discretion is intended to minimize the potential safety consequences of unnecessary plant transients with the accompanying operational risks and impacts or to eliminate testing, inspection, or system realignment which is inappropriate for the particular plant conditions. For plants in a shutdown condition, exercising enforcement discretion is intended to reduce shutdown risk by, again, avoiding testing, inspection or system realignment which is inappropriate for the particular plant conditions, in that, it does not provide a safety benefit or may, in fact, be detrimental to safety in the particular plant condition. Exercising enforcement discretion for plants attempting to startup is less likely than exercising it for an operating plant, as simply delaying startup does not usually leave the plant in a condition in which it could experience undesirable transients. In such cases, the Commission would expect that discretion would be exercised with respect to equipment or systems only when it has at least concluded that, notwithstanding the conditions of the license: (1) The equipment or system does not perform a safety function in the mode in which operation is to occur; (2) the safety function performed by the equipment or system is of only marginal safety benefit, provided remaining in the current mode increases the likelihood of an unnecessary plant transient; or (3) the TS or other license condition requires a test, inspection or system realignment that is inappropriate for the particular plant conditions, in that it does not provide a safety benefit, or may, in fact, be detrimental to safety in the particular plant condition. 58 FR 14308

The decision to exercise enforcement discretion does not change the fact that a violation will occur nor does it imply that enforcement discretion is being exercised for any violation that may have led to the violation at issue. In each case where the NRC staff has chosen to exercise enforcement discretion, enforcement action will normally be taken for the root causes, to the extent violations were involved, that led to the noncompliance for which enforcement discretion was used. The enforcement action is intended to emphasize that licensees should not rely on the NRC's authority to exercise enforcement discretion as a routine substitute for compliance or for requesting a license amendment.

Finally, it is expected that the NRC staff will exercise enforcement discretion in this area infrequently. Although a plant must shut down, refueling activities may be suspended, or plant startup may be delayed, absent the exercise of enforcement discretion, the NRC staff is under no obligation to take such a step merely because it has been requested. The decision to forego enforcement is discretionary. Where enforcement discretion is to be exercised, it is to be exercised only if the NRC staff is clearly satisfied that such action is warranted from a health and safety perspective.

57 FR 5791

VIII. Enforcement Actions Involving Individuals

Enforcement actions involving individuals, including licensed operators, are significant personnel actions, which will be closely controlled and judiciously applied. An enforcement action involving an individual will normally be taken only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance. Most transgressions of individuals at the level of Severity Level III, IV, or V violations will be handled by citing only the facility licensee.

More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual as well as against the facility licensee. Action against the individual, however, will not be taken if the improper action by the individual was caused by management failures. The following examples of situations illustrate this concept:

- Inadvertant individual mistakes resulting from inadequate training or guidance provided by the facility licensee.
- Inadvertently missing an insignificant procedural requirement when the action is routine, fairly uncomplicated, and there is no unusual circumstance indicating that the procedures should be referred to and followed step-by-step.
- Compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation unless the individual did not express his or her concern or objection to the direction.
- Individual error directly resulting from following the technical advice of an expert unless the advise was clearly unreasonable and the licensed individual should have recognized it as such.
- Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected.

57 FR 5791

Listed below are examples of situations which could result in enforcement actions involving individuals, licensed or unlicensed. If the actions described in these examples are taken by a licensed operator or taken deliberately by an unlicensed individual, enforcement action may be taken directly against the individual. However, violations involving willful conduct not amounting to deliberate action by an unlicensed individual in these situations may result in enforcement action against a licensee that may impact an individual. The situations include, but are not limited to, violations that involve:

- Willfully causing a licensee to be in violation of NRC requirements.
- Willfully taking action that would have caused a licensee to be in violation of NRC requirements but the action did not do so because it was detected and corrective action was taken.
- Recognizing a violation of procedural requirements and willfully not taking corrective action.
- Willfully defeating alarms which have safety significance.
- Unauthorized abandoning of reactor controls.
- Dereliction of duty.
- Falsifying records required by NRC regulations or by the facility license.
- Willfully providing, or causing a licensee to provide, an NRC inspector or investigator with inaccurate or incomplete information on a matter material to the NRC.
- Willfully withholding safety significant information rather than making such information known to appropriate supervisory or technical personnel in the licensee's organization.
- Submitting false information and as a result gaining unescorted access to a nuclear power plant.
- Willfully providing false data to a licensee by a contractor or other person who provides test or other services, when the data affects the licensee's compliance with 10 CFR part 50, appendix B, or other regulatory requirement.
- Willfully providing false certification that components meet the requirements of their intended use, such as ASME Code.
- Willfully supplying, by vendors of equipment for transportation of radioactive material, casks that do not comply with their certificates of compliance.
- Willfully performing unauthorized bypassing of required reactor or other facility safety systems.

57 FR 5791

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- Willfully taking actions that violate Technical Specification Limiting Conditions for Operation or other license conditions (enforcement action for a willful violation will not be taken if that violation is the result of action taken following the NRC's decision to forego enforcement of the Technical Specification or other license condition or if the operator meets the requirements of 10 CFR 50.54 (x), i.e., unless the operator acted unreasonably considering all the relevant circumstances surrounding the emergency.)

58 FR 14308

57 FR 5791

In deciding whether to issue an enforcement action to an unlicensed person rather than to the licensee, the NRC recognizes that judgments will have to be made on a case by case basis. In making these decisions, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, e.g., personal or corporate gain.
5. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
6. The employer's response, e.g., disciplinary action taken.
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

57 FR 5791

Any proposed enforcement action involving individuals must be issued with the concurrence of the appropriate Deputy Executive Director. The Commission will be consulted prior to issuing a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator. Prior notice will be given to the Commission on Notices of Violation without civil penalties that are issued to unlicensed individuals and enforcement actions taken against other unlicensed persons, such as corporations or partnerships. The particular sanction to be used should be determined on a case-by-case basis.[8]

Examples of sanctions that may be appropriate against individuals are:

- Issuance of a letter of reprimand,
- Issuance of a Notice of Violation, and
- Issuance of Orders.

Orders to NRC-licensed reactor operators may involve suspension for a specified period, modification, or revocation of their individual licenses. Orders to unlicensed individuals might include provisions that would:

- Prohibit involvement in NRC licensed activities for a specified period of time (normally the period of suspension would not exceed five years) or until certain conditions are satisfied, e.g., completing specified training or meeting certain qualifications.
- Require notification to the NRC before resuming work in licensed activities.
- Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

57 FR 5791

In the case of a licensed operator's failure to meet applicable fitness-for-duty requirements (10 CFR 55.53(j)), the NRC may issue a Notice of Violation or a civil penalty to the Part 55 licensee, or an order to suspend, modify, or revoke the Part 55 license. These actions may be taken the first time a licensed operator fails a drug or alcohol test, that is, receives a confirmed positive test that exceeds the cutoff levels of 10 CFR part 26 or the facility licensee's cutoff levels, if lower. However, normally only a Notice of Violation will be issued for the first confirmed positive test in the absence of aggravating circumstances such as errors in the performance of licensed duties or evidence of prolonged use. In addition, the NRC intends to issue an order to suspend the Part 55 license for up to three years the second time a licensed operator exceeds those cutoff levels. In the event there are less than three years remaining in the term of the individual's license, the NRC may consider not renewing the individual's license or not issuing a new license after the three year period is completed. The NRC intends to issue an order to revoke the Part 55 license the third time a licensed operator exceeds those cutoff levels. A licensed operator or applicant who refuses to participate in the drug and alcohol testing programs established by the facility licensee or

[8] Except for individuals subject to civil penalties under section 206 of the Energy Reorganization Act of 1974, as amended, NRC will not normally impose a civil penalty against an individual. However, section 234 of the Atomic Energy Act (AEA) gives the Commission authority to impose civil penalties on "any person." "Person" is broadly defined in Section 11s of the AEA to include individuals, a variety of organizations, and any representatives or agents. This gives the Commission authority to impose civil penalties on employees of licensees or on separate entities when a violation of a requirement directly imposed on them is committed.

who is involved in the sale, use, or possession of an illegal drug is also subject to license suspension, revocation, or denial.

In addition, the NRC may take enforcement action against a licensee that may impact an individual, where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted. The NRC may take enforcement action for reasons that would warrant refusal to issue a license on an original application. Accordingly, appropriate enforcement actions may be taken regarding matters that raise issues of integrity, competence, fitness for duty, or other matters that may not necessarily be a violation of specific Commission requirements.

In the case of an unlicensed person, whether a firm or an individual, an order modifying the facility license may be issued to require (1) the removal of the person from all licensed activities for a specified period of time or indefinitely, (2) prior notice to the NRC before utilizing the person in licensed activities, or (3) the licensee to provide notice of the issuance of such an order to other persons involved in licensed activities making reference inquiries. In addition, orders to employers might require retraining, additional oversight, or independent verification of activities performed by the person, if the person is to be involved in licensed activities.

57 FR 5791

IX. Inaccurate and Incomplete Information

A violation of the regulations involving submittal of incomplete and/or inaccurate information, whether or not considered a material false statement, can result in the full range of enforcement sanctions. The labeling of a communication failure as a material false statement will be made on a case-by-case basis and will be reserved for egregious violations. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a licensee normally will be categorized based on the guidance herein, in Section IV "Severity of Violations," and in Supplement VII.

The Commission recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, the Commission must be able to rely on oral communications from licensee officials concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement, consideration may be given to such factors as (1) the degree of knowledge that the communicator should have had, regarding the matter, in view of his or her position, training, and experience, (2) the opportunity and time available prior to the communication to assure the accuracy or completeness of the information, (3) the degree of intent or negligence, if any, involved, (4) the formality of the communication, (5) the reasonableness of NRC reliance on the information, (6) the importance of the information which was wrong or not provided, and (7) the reasonableness of the explanation for not providing complete and accurate information.

57 FR 5791

Absent at least careless disregard, an incomplete or inaccurate unsworn oral statement normally will not be subject to enforcement action unless it involves significant information provided by a licensee official. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to the NRC by a licensee official or others on behalf of a licensee, if a record was made of the oral information and provided to the licensee thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the licensee and was not subsequently corrected in a timely manner.

When a licensee has corrected inaccurate or incomplete information, the decision to issue a Notice of Violation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether the NRC or the licensee identified the problem with the communication, and whether the NRC relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the licensee prior to reliance by the NRC, or before the NRC raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after the NRC relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected. However, if the initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or advance in technology, a citation normally would not be appropriate if, when the new information became available or the advancement in technology was made, the initial submittal was corrected.

57 FR 5791

The failure to correct inaccurate or incomplete information which the licensee does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if the licensee later determines that the initial submittal was in error and does not correct it or if there were clear opportunities to identify the error. If information not corrected was recognized by a licensee as significant, a separate citation may be made for the failure to provide significant information. In any event, in serious cases where the licensee's actions is not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness, the Commission may exercise its authority to issue orders modifying, suspending, or revoking the license. The Commission recognizes that enforcement determinations must be made on a case-by-case basis, taking into consideration the issues described in this section.

57 FR 5791

X. Enforcement Action Against Non-Licensees

The Commission's enforcement policy is also applicable to non-licensees, including employees of licensees, to contractors and subcontractors, and to employees of contractors and subcontractors, who knowingly provide components, equipment, or other goods or services that relate to a licensee's activities subject to NRC regulation. The prohibitions and sanctions for any of these persons who engage in deliberate misconduct or submission of incomplete or inaccurate information are provided in the rule on deliberate misconduct, e.g., 10 CFR 30.10 and 50.5.

Vendors of products or services provided for use in nuclear activities are subject to certain requirements designed to ensure that the products or services supplied that could affect safety are of high quality. Through procurement contracts with reactor licensees, vendors may be required to have quality assurance programs that meet applicable requirements including 10 CFR part 50, appendix B, and 10 CFR part 71, subpart H. Vendors supplying products or services to reactor, materials, and 10 CFR part 71 licensees are subject to the requirements of 10 CFR part 21 regarding reporting of defects in basic components.

When inspections determine that violations of NRC requirements have occurred, or that vendors have failed to fulfill contractual commitments (e.g., 10 CFR part 50, appendix B) that could adversely affect the quality of a safety significant product or service, enforcement action will be taken. Notices of Violation and civil penalties will be used, as appropriate, for licensee failures to ensure that their vendors have programs that meet applicable requirements. Notices of Violation will be issued for vendors that violate 10 CFR part 21. Civil penalties will be imposed against individual directors or responsible officers of a vendor organization who knowingly and consciously fail to provide the notice required by 10 CFR 21.21(b)(1). Notices of Nonconformance will be used for vendors which fail to meet commitments related to NRC activities.

57 FR 5791

XI. Referrals to the Department of Justice

Alleged or suspected criminal violations of the Atomic Energy Act (and of other relevant Federal laws) are referred to the Department of Justice (DOJ) for investigation. Referral to the DOJ does not preclude the NRC from taking other enforcement action under this policy. However, enforcement actions will be coordinated with the DOJ in accordance with the Memorandum of Understanding between the NRC and the DOJ, 53 FR 50317 (December 14, 1988).

XII. Public Disclosure of Enforcement Actions

Enforcement actions and licensees' responses, in accordance with 10 CFR 2.790, are publicly available for inspection. In addition, press releases are generally issued for orders and civil penalties and are issued at the same time the order or proposed imposition of the civil penalty is issued. In addition, press releases are usually issued when a proposed civil penalty is withdrawn or substantially mitigated by some amount. Press releases are not normally issued for Notices of Violation that are not accompanied by orders or proposed civil penalties.

XIII. Reopening Closed Enforcement Actions

If significant new information is received or obtained by NRC which indicates that an enforcement sanction was incorrectly applied, consideration may be given, dependent on the circumstances, to reopening a closed enforcement action to increase or decrease the severity of a sanction or to correct the record. Reopening decisions will be made on a case-by-case basis, are expected to occur rarely, and require the specific approval of the appropriate Deputy Executive Director.

57 FR 5791

Supplement I—Reactor Operations

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of reactor operations.

A. Severity Level I—Violations involving for example:

1. A Safety Limit, as defined in 10 CFR 50.36 and the Technical Specifications being exceeded;
2. A system [9] designed to prevent or mitigate a serious safety event not being able to perform its intended safety function [10] when actually called upon to work;
3. An accidental criticality; or
4. A licensed operator at the controls of a nuclear reactor, or a senior operator directing licensed activities, involved in procedural errors which result in, or exacerbate the consequences of, an alert or higher level emergency and who, as a result of subsequent testing, receives a confirmed positive test result for drugs or alcohol.

B. Severity Level II—Violations involving for example:

1. A system designed to prevent or mitigate serious safety events not being able to perform its intended safety function;
2. A licensed operator involved in the use, sale, or possession of illegal drugs or the consumption of alcoholic beverages, within the protected area; or
3. A licensed operator at the control of a nuclear reactor, or a senior operator directing licensed activities, involved in procedural errors and who, as a result of subsequent testing, receives a confirmed positive test result for drugs or alcohol.

C. Severity Level III—Violations involving for example:

1. A significant failure to comply with the Action Statement for a Technical Specification Limiting Condition for Operation where the appropriate action was not taken within the required time, such as:

(a) In a pressurized water reactor, in the applicable modes, having one high-

[9] The term "system" as used in these supplements, includes administrative and managerial control systems, as well as physical systems.

[10] "Intended safety function" means the total safety function, and is not directed toward a loss of redundancy. A loss of one subsystem does not defeat the intended safety function as long as the other subsystem is operable.

pressure safety injection pump inoperable for a period in excess of that allowed by the action statement; or

(b) In a boiling water reactor, one primary containment isolation valve inoperable for a period in excess of that allowed by the action statement.

2. A system designed to prevent or mitigate a serious safety event:

(a) Not being able to perform its intended function under certain conditions (e.g., safety system not operable unless offsite power is available; materials or components not environmentally qualified); or

(b) Being degraded to the extent that a detailed evaluation would be required to determine its operability (e.g., component parameters outside approved limits such as pump flow rates, heat exchanger transfer characteristics, safety valve lift setpoints, or valve stroke times);

3. Inattentiveness to duty on the part of licensed personnel;

4. Changes in reactor parameters that cause unanticipated reductions in margins of safety;

5. A significant failure to meet the requirements of 10 CFR 50.59, including a failure such that a required license amendment was not sought;

6. A licensee failure to conduct adequate oversight of vendors resulting in the use of products or services that are of defective or indeterminate quality and that have safety significance;

7. A breakdown in the control of licensed activities involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities; or

8. A licensed operator's confirmed positive test for drugs or alcohol that does not result in a Severity Level I or II violation.

9. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient.

D. Severity Level IV—Violations involving for example:

1. A less significant failure to comply with the Action Statement for a Technical Specification Limiting Condition for Operation where the appropriate action was not taken within the required time, such as:

(a) In a pressurized water reactor, a 5% deficiency in the required volume of the condensate storage tank; or

(b) In a boiling water reactor, one subsystem of the two independent MSIV leakage control subsystems inoperable;

2. A failure to meet the requirements of 10 CFR 50.59 that does not result in a Severity Level I, II, or III violation;

3. A failure to meet regulatory requirements that have more than minor safety or environmental significance; or

4. A failure to make a required Licensee Event Report.

E. Severity Level V—Violations that have minor safety or environmental significance.

Supplement II—Part 50 Facility Construction

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of part 50 facility construction.

A. Severity Level I—Violations involving structures or systems that are completed [11] in such a manner that they would not have satisfied their intended safety related purpose.

B. Severity Level II—Violations involving for example:

1. A breakdown in the Quality Assurance (QA) program as exemplified by deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations). These deficiencies normally involve the licensee's failure to conduct adequate audits or to take prompt corrective action on the basis of such audits and normally involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation; or

2. A structure or system that is completed in such a manner that it could have an adverse effect on the safety of operations.

C. Severity Level III—Violations involving for example:

1. A deficiency in a licensee QA program for construction related to a single work activity (e.g., structural, piping, electrical or foundations). This significant deficiency normally involves the licensee's failure to conduct adequate audits or to take prompt corrective action on the basis of such audits, and normally involves multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation;

2. A failure to confirm the design safety requirements of a structure or system as a result of inadequate preoperational test program implementation; or

[11] The term "completed" as used in this supplement means completion of construction including review and acceptance by the construction QA organization.

3. A failure to make a required 10 CFR 50.55(e) report.

D. Severity Level IV—Violations involving failure to meet regulatory requirements including one or more Quality Assurance Criterion not amounting to Severity Level I, II, or III violations that have more than minor safety or environmental significance.

E. Severity Level V—Violations that have minor safety or environmental significance.

Supplement III—Safeguards

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of safeguards.

A. Severity Level I—Violations involving for example:

1. An act of radiological sabotage in which the security system did not function as required and, as a result of the failure, there was a significant event, such as:

(a) A Safety Limit, as defined in 10 CFR 50.36 and the Technical Specifications, was exceeded;

(b) A system designed to prevent or mitigate a serious safety event was not able to perform its intended safety function when actually called upon to work; or

(c) An accidental criticality occurred;

2. The theft, loss, or diversion of a formula quantity [12] of special nuclear material (SNM); or

3. Actual unauthorized production of a formula quantity of SNM

B. Severity Level II—Violations involving for example:

1. The entry of an unauthorized individual [13] who represents a threat into a vital area [14] from outside the protected area; or

2. The theft, loss or diversion of SNM of moderate strategic significance [15] in which the security system did not function as required; or

3. Actual unauthorized production of SNM.

C. Severity Level III—Violations involving for example:

1. A failure or inability to control access through established systems or procedures, such that an unauthorized individual (i.e., not authorized unescorted access to protected area) could easily gain undetected access [16] into a vital area from outside the protected area;

2. A failure to conduct any search at the access control point or conducting an inadequate search that resulted in the introduction to the protected area of firearms, explosives, or incendiary devices and reasonable facsimiles thereof that could significantly assist radiological sabotage or theft of strategic SNM;

3. A failure, degradation, or other deficiency of the protected area intrusion detection or alarm assessment systems such that an unauthorized individual who represents a threat could predictably circumvent the system or defeat a specific zone with a high degree of confidence without insider knowledge, or other significant degradation of overall system capability;

4. A significant failure of the safeguards systems designed or used to prevent or detect the theft, loss, or diversion of strategic SNM;

5. A failure to protect or control classified or safeguards information considered to be significant while the information is outside the protected area and accessible to those not authorized access to the protected area;

6. A significant failure to respond to an event either in sufficient time to provide protection to vital equipment or strategic SNM, or with an adequate response force;

7. A failure to perform an appropriate evaluation or background investigation so that information relevant to the access determination was not obtained or considered and as a result a person, who would likely not have been granted access by the licensee, if the required investigation or evaluation had been performed, was granted access; or

8. A breakdown in the security program involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively reflect a potentially significant lack of attention or carelessness toward licensed responsibilities.

D. Severity Level IV—Violations involving for example:

1. A failure or inability to control access such that an unauthorized individual (i.e., authorized to protected area but not to vital area) could easily gain undetected access into a vital area from inside the protected area or into a controlled access area;

2. A failure to respond to a suspected event in either a timely manner or with an adequate response force;

3. A failure to implement 10 CFR parts 25 and 95 with respect to the information addressed under section 142 of the Act, and the NRC approved security plan relevant to those parts;

4. A failure to make, maintain, or provide log entries in accordance with 10 CFR 73.71 (c) and (d), where the omitted information (i) is not otherwise available in easily retrievable records, and (ii) significantly contributes to the ability of either the NRC or the licensee to identify a programmatic breakdown;

5. A failure to conduct a proper search at the access control point;

6. A failure to properly secure or protect classified or safeguards information inside the protected area which could assist an individual in an act of radiological sabotage or theft of strategic SNM where the information was not removed from the protected area;

7. A failure to control access such that an opportunity exists that could allow unauthorized and undetected access into the protected area but which was neither easily or likely to be exploitable;

8. A failure to conduct an adequate search at the exit from a material access area;

9. A theft or loss of SNM of low strategic significance that was not detected within the time period specified in the security plan, other relevant document, or regulation; or

10. Other violations that have more than minor safeguards significance.

E. Severity Level V—Violations that have minor safeguards significance.

[12] See 10 CFR 73.2 for the definition of "formula quantity."

[13] The term "unauthorized individual" as used in this supplement means someone who was not authorized for entrance into the area in question, or not authorized to enter in the manner entered.

[14] The phrase "vital area" as used in this supplement includes vital areas and material access areas.

[15] See 10 CFR 73.2 for the definition of "special nuclear material of moderate strategic significance."

[16] In determining whether access can be easily gained, factors such as predictability, identifiability, and ease of passage should be considered.

Supplement IV—Health Physics (10 CFR Part 20)

This supplement provides examples of violations in each of the five severity levels as guidance in detemining the appropriate severity level for violations in the area of health physics, 10 CFR part 20 [17]. Examples A through E are provided to accompany §§ 20.1–20.601. Examples F through J are provided to accompany §§ 20.1001–20.2401.

Sections 20.1–20.601

A. Severity Level I—Violations involving for example:

1. A single exposure of a worker in excess of 25 rems of radiation to the whole body, 150 rads to the skin of the whole body, or 375 rads to the feet, ankles, hands, or forearms;
2. An annual whole body exposure of a member of the public in excess of 2.5 rems of radiation;
3. A release of radioactive material to an unrestricted area in excess of ten times the limits of 10 CFR 20.106 [18];
4. Disposal of licensed material in quantities or concentrations in excess of ten times the limits of 10 CFR 20.303; or
5. An exposure of a worker in restricted areas of ten times the limits of 10 CFR 20.103.

B. Severity Level II—Violations involving for example:

1. A single exposure of a worker in excess of 5 rems of radiation to the whole body, 30 rems to the skin of the whole body, or 75 rems to the feet, ankles, hands or forearms;
2. An annual whole body exposure of a member of the public in excess of 0.5 rems of radiation;
3. A release of radioactive material to an unrestricted area in excess of five times the limits of 10 CFR 20.106;
4. A failure to make an immediate notification as required by 10 CFR 20.403 (a)(1) and (a)(2);
5. A disposal of licensed material in quantities or concentrations in excess of five times the limits of 10 CFR 20.303; or
6. An exposure of a worker in restricted areas in excess of five times the limits of 10 CFR 20.103.

C. Severity Level III—Violations involving for example:

1. A single exposure of a worker in excess of 3 rems of radiation to the whole body, 7.5 rems to the skin of the whole body, or 18.75 rems to the feet, ankles, hands or forearms;
2. A radiation level in an unrestricted area such that an individual could receive greater than 100 millirem in a one hour period or 500 millirem in any seven consecutive days;
3. A failure to make a 24-hour notification as required by 10 CFR 20.403(b), or an immediate notification required by 10 CFR 20.402(a);
4. A substantial potential for an exposure or release in excess of 10 CFR part 20 whether or not such exposure or release occurs;
5. A release of radioactive material to an unrestricted area in excess of the limits of 10 CFR 20.106;
6. An improper disposal of licensed material not covered in Severity Levels I or II;
7. An exposure of a worker in restricted areas in excess of the limits of 10 CFR 20.103;
8. A release for unrestricted use of contaminated or radioactive material or equipment that poses a realistic potential for significant exposure to members of the public, or that reflects a programmatic (rather than isolated) weakness in the radiation control program;
9. A cumulative worker exposure above regulatory limits when such cumulative exposure reflects a programmatic, rather than an isolated weakness in radiation protection;
10. Conduct of licensee activities by a technically unqualified person;
11. A significant failure to control licensed material; or
12. A breakdown in the radiation safety program involving a number of violations that are related (or, if isolated, that are recurring) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

D. Severity Level IV—Violations involving for example:

1. Exposures in excess of the limits of 10 CFR 20.101 not constituting Severity Level I, II, or III violations;
2. A radiation level in an unrestricted area such that an individual could receive greater than 2 millirem in a one-hour period or 100 millirem in any seven consecutive days;
3. A failure to make a 30-day notification required by 10 CFR 20.405;
4. A failure to make a follow-up written report as required by 10 CFR 20.402(b), 20.408, and 20.409; or
5. Any other matter that has more than minor safety or environmental significance.

E. Severity Level V—Violations that have minor safety or environmental significance.

Sections 20.1001—20.2401

F. Severity Level I—Violations involving for example:

1. A radiation exposure during any year of a worker in excess of 25 rems total effective dose equivalent, 75 rems to the lens of the eye, or 250 rads to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;
2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 2.5 rems total effective dose equivalent;
3. A radiation exposure during any year of a minor in excess of 2.5 rems total effective dose equivalent, 7.5 rems to the lens of the eye, or 25 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;
4. An annual exposure of a member of the public in excess of 1.0 rem total effective dose equivalent;
5. A release of radioactive material to an unrestricted area at concentrations in excess of 50 times the limits for members of the public as described in 10 CFR 20.1302(b)(2)(i); or
6. Disposal of licensed material in quantities or concentrations in excess of 10 times the limits of 10 CFR 20.2003.

G. Severity Level II—Violations involving for example:

1. A radiation exposure during any year of a worker in excess of 10 rems total effective dose equivalent, 30 rems to the lens of the eye, or 100 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;
2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 1.0 rem total effective dose equivalent;

57 FR 5791

[17] Personnel overexposures and associated violations incurred during a life-saving or other emergency response effort will be treated on a case-by-case basis.

[18] The reference to the limits of 10 CFR 20.106 as used in this supplement (Items A.3, B.3, and C.5) does not apply to the EPA generally applicable environmental radiation standards mentioned in § 20.106(g).

3. A radiation exposure during any year of a minor in excess of 1 rem total effective dose equivalent; 3.0 rems to the lens of the eye, or 10 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;

4. An annual exposure of a member of the public in excess of 0.5 rem total effective dose equivalent;

5. A release of radioactive material to an unrestricted area at concentrations in excess of 10 times the limits for members of the public as described in 10 CFR 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under § 20.1301(c));

6. Disposal of licensed material in quantities or concentrations in excess of five times the limits of 10 CFR 20.2003; or

7. A failure to make an immediate notification as required by 10 CFR 20.2202 (a)(1) or (a)(2).

H. Severity Level III—Violations involving for example:

1. A radiation exposure during any year of a worker in excess of 5 rems total effective dose equivalent, 15 rems to the lens of the eye, or 50 rems to the skin of the whole body or to the feet, ankles, hands or forearms, or to any other organ or tissue;

2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 0.5 rem total effective dose equivalent (except when doses are in accordance with the provisions of § 20.1208(d));

3. A radiation exposure during any year of a minor in excess of 0.5 rem total effective dose equivalent; 1.5 rems to the lens of the eye, or 5 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;

4. A worker exposure above regulatory limits when such exposure reflects a programmatic (rather than an isolated) weakness in the radiation control program;

5. An annual exposure of a member of the public in excess of 0.1 rem total effective dose equivalent (except when operation up to 0.5 rem a year has been approved by the Commission under § 20.1301(c));

6. A release of radioactive material to an unrestricted area at concentrations in excess of two times the effluent concentration limits referenced in 10 CFR 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under § 20.1301(c));

7. A failure to make a 24-hour notification required by 10 CFR 20.2202(b) or an immediate notification required by 10 CFR 20.2201(a)(1)(i);

8. A substantial potential for exposures or releases in excess of the applicable limits in 10 CFR part 20 §§ 20.1001–20.2401 whether or not an exposure or release occurs;

9. Disposal of licensed material not covered in Severity Levels I or II;

10. A release for unrestricted use of contaminated or radioactive material or equipment that poses a realistic potential for exposure of the public to levels or doses exceeding the annual dose limits for members of the public, or that reflects a programmatic (rather than an isolated) weakness in the radiation control program;

11. Conduct of licensee activities by a technically unqualified person;

12. A significant failure to control licensed material; or

13. A breakdown in the radiation safety program involving a number of violations that are related (or, if isolated, that are recurring) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

I. Severity Level IV—Violations involving for example:

1. Exposures in excess of the limits of 10 CFR 20.1201, 20.1207, or 20.1208 not constituting Severity Level I, II, or III violations;

2. A release of radioactive material to an unrestricted area at concentrations in excess of the limits for members of the public as referenced in 10 CFR 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under § 20.1301(c));

3. A radiation dose rate in an unrestricted or controlled area in excess of 0.002 rem in any 1 hour (2 millirem/hour) or 50 millirems in a year;

4. Failure to maintain and implement radiation programs to keep radiation exposures as low as is reasonably achievable;

5. Doses to a member of the public in excess of any EPA generally applicable environmental radiation standards, such as 40 CFR part 190;

6. A failure to make the 30-day notification required by 10 CFR 20.2201(a)(1)(ii) or 20.2203(a);

7. A failure to make a timely written report as required by 10 CFR 20.2201(b), 20.2204, or 20.2206; or

8. Any other matter that has more than a minor safety, health, or environmental significance.

J. Severity Level V—Violations that are of a minor safety, health, or environmental significance.

Supplement V—Transportation

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of NRC transportation requirements [19].

A. Severity Level I—Violations involving for example:

1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that the material caused a radiation exposure to a member of the public and there was clear potential for the public to receive more than .1 rem to the whole body;

2. Surface contamination in excess of 50 times the NRC limit; or

3. External radiation levels in excess of 10 times the NRC limit.

B. Severity Level II—Violations involving for example:

1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that there was a clear potential for the member of the public to receive more than .1 rem to the whole body;

2. Surface contamination in excess of 10, but not more than 50 times the NRC limit;

3. External radiation levels in excess of five, but not more than 10 times the NRC limit; or

[19] Some transportation requirements are applied to more than one licensee involved in the same activity such as a shipper and a carrier. When a violation of such a requirement occurs, enforcement action will be directed against the responsible licensee which, under the circumstances of the case, may be one or more of the licensees involved.

4. A failure to make required initial notifications associated with Severity Level I or II violations.

C. Severity Level III—Violations involving for example:

1. Surface contamination in excess of five but not more than 10 times the NRC limit;

2. External radiation in excess of one but not more than five times the NRC limit;

3. Any noncompliance with labeling, placarding, shipping paper, packaging, loading, or other requirements that could reasonably result in the following:

(a) A significant failure to identify the type, quantity, or form of material;

(b) A failure of the carrier or recipient to exercise adequate controls; or

(c) A substantial potential for either personnel exposure or contamination above regulatory limits or improper transfer of material;

4. A failure to make required initial notification associated with Severity Level III violations; or

5. A breakdown in the licensee's program for the transportation of licensed material involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively reflect a potentially significant lack of attention or carelessness toward licensed responsibilities.

57 FR 5791

D. Severity Level IV—Violations involving for example:

1. A breach of package integrity without external radiation levels exceeding the NRC limit or without contamination levels exceeding five times the NRC limits;

2. Surface contamination in excess of but not more than five times the NRC limit;

3. A failure to register as an authorized user of an NRC-Certified Transport package;

4. A noncompliance with shipping papers, marking, labeling, placarding packaging or loading not amounting to a Severity Level I, II, or III violation;

5. A failure to demonstrate that packages for special form radioactive material meets applicable regulatory requirements;

6. A failure to demonstrate that packages meet DOT Specifications for 7A Type A packages; or

7. Other violations that have more than minor safety or environmental significance.

E. Severity Level V—Violations that have minor safety or environmental significance.

Supplement VI—Fuel Cycle and Materials Operations

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of fuel cycle and materials operations.

A. Severity Level I—Violations involving for example:

1. Radiation levels, contamination levels, or releases that exceed 10 times the limits specified in the license;

2. A system designed to prevent or mitigate a serious safety event not being operable when actually required to perform its design function;

3. A nuclear criticality accident; or

4. A failure to follow the procedures of the quality management program, required by § 35.32, that results in a death or serious injury (e.g., substantial organ impairment) to a patient.

57 FR 5791

B. Severity Level II—Violations involving for example:

1. Radiation levels, contamination levels, or releases that exceed five times the limits specified in the license;

2. A system designed to prevent or mitigate a serious safety event being inoperable; or

3. A substantial programmatic failure in the implementation of the quality management program required by 10 CFR 35.32 that results in a misadministration.

58 FR 17321

C. Severity Level III—Violations involving for example:

1. A failure to control access to licensed materials for radiation purposes as specified by NRC requirements;

2. Possession or use of unauthorized equipment or materials in the conduct of licensee activities which degrades safety;

3. Use of radioactive material on humans where such use is not authorized;

4. Conduct of licensed activities by a technically unqualified person;

5. Radiation levels, contamination levels, or releases that exceed the limits specified in the license;

57 FR 5791

6. Substantial failure to implement the quality management program as required by § 35.32 that does not result in a misadministration; failure to report a misadministration; or programmatic weakness in the implementation of the quality management program that results in a misadministration.

58 PR 17321

7. A breakdown in the control of licensed activities involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities;

8. A failure, during radiographic operations, to have present or to use radiographic equipment, radiation survey instruments, and/or personnel monitoring devices as required by 10 CFR part 34;

9. A failure to submit an NRC Form 241 in accordance with the requirements in § 150.20 of 10 CFR part 150; or

10. A failure to receive required NRC approval prior to the implementation of a change in licensed activities that has radiological or programmatic significance, such as, a change in ownership; lack of an RSO or replacement of an RSO with an unqualified individual; a change in the location where licensed activities are being conducted, or where licensed material is being stored where the new facilities do not meet safety guidelines; or a change in the quantity or type of radioactive material being processed or used that has radiological significance.

57 FR 5791

D. Severity Level IV—Violations involving for example:

1. A failure to maintain patients hospitalized who have cobalt-60, cesium-137, or iridium-192 implants or to conduct required leakage or contamination tests, or to use properly calibrated equipment;

2. Other violations that have more than minor safety or environmental significance; or

3. Failure to follow the quality management program, including procedures, whether or not a misadministration occurs, provided the failures are isolated, do not demonstrate a programmatic weakness in the implementation of the QM program, and have limited consequences if a misadministration is involved; failure to conduct the required program review; or failure to take corrective actions as required by § 35.32; or

58 FR 17321

4. A failure to keep the records required by §§ 35.32 or 35.33.

57 FR 5791

E. Severity Level V—Violations that have minor safety or environmental significance.

Supplement VII—Miscellaneous Matters

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations involving miscellaneous matters.

A. Severity Level I—Violations involving for example:

1. Inaccurate or incomplete information [20] that is provided to the NRC (a) deliberately with the knowledge of a licensee official that the information is incomplete or inaccurate, or (b) if the information, had it been complete and accurate at the time provided, likely would have resulted in regulatory action such as an immediate order required by the public health and safety.

57 FR 5791

2. Incomplete or inaccurate information that the NRC requires be kept by a licensee that is (a) incomplete or inaccurate because of falsification by or with the knowledge of a licensee official, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in regulatory action such as an immediate order required by public health and safety considerations;

3. Information that the licensee has identified as having significant implications for public health and safety or the common defense and security ("significant information identified by a licensee") and is deliberately withheld from the Commission;

4. Action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee;

5. A knowing and intentional failure to provide the notice required by 10 CFR part 21; or

6. A failure to substantially implement the required fitness-for-duty program.[21]

B. Severity Level II—Violations involving for example:

1. Inaccurate or incomplete information that is provided to the NRC (a) by a licensee official because of careless disregard for the completeness or accuracy of the information, or (b) if the information, had it been complete and accurate at the time provided, likely would have resulted in regulatory action such as a show cause order or a different regulatory position;

2. Incomplete or inaccurate information that the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of careless disregard for the accuracy of the information on the part of a licensee official, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in regulatory action such as a show cause order or a different regulatory position;

57 FR 5791

3. "Significant information identified by a licensee" and not provided to the Commission because of careless disregard on the part of a licensee official;

4. An action by plant management above first-line supervision in violation of 10 CFR 50.7 or similar regulations against an employee;

5. A failure to provide the notice required by 10 CFR part 21;

6. A failure to remove an individual from unescorted access who has been involved in the sale, use, or possession of illegal drugs within the protected area or take action for on duty misuse of alcohol, prescription drugs, or over-the-counter drugs;

7. A failure to take reasonable action when observed behavior within the protected area or credible information concerning activities within the protected area indicates possible unfitness for duty based on drug or alcohol use; or

8. A deliberate failure of the licensee's Employee Assistance Program (EAP) to notify licensee's management when EAP's staff is aware that an individual's condition may adversely affect safety related activities.

C. Severity Level III—Violations involving for example:

1. Incomplete or inaccurate information that is provided to the NRC (a) because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation, or (b) if the information, had it been complete and accurate at the time provided, likely would have resulted in a reconsideration of a regulatory position or substantial further inquiry such as an additional inspection or a formal request for information;

2. Incomplete or inaccurate information that the NRC requires be kept by a licensee that is (a) incomplete or inaccurate because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in a reconsideration of a regulatory position or substantial further inquiry such as an additional inspection or a formal request for information;

57 FR 5791

3. A failure to provide "significant information identified by a licensee" to the Commission and not amounting to a Severity Level I or II violation;

4. An action by first-line supervision in violation of 10 CFR 50.7 or similar regulations against an employee;

5. An inadequate review or failure to review such that, if an appropriate review had been made as required, a 10 CFR part 21 report would have been made;

6. A failure to complete a suitable inquiry on the basis of 10 CFR part 26, keep records concerning the denial of access, or respond to inquiries concerning denials of access so that, as a result of the failure, a person previously denied access for fitness-for-duty reasons was improperly granted access;

7. A failure to take the required action for a person confirmed to have been tested positive for illegal drug use or take action for onsite alcohol use; not amounting to a Severity Level II violation;

8. A failure to assure, as required, that contractors or vendors have an effective fitness-for-duty program; or

9. A breakdown in the fitness-for-duty program involving a number of violations of the basic elements of the fitness-for-duty program that collectively reflect a significant lack of attention or carelessness towards meeting the objectives of 10 CFR 26.10.

[20] In applying the examples in this supplement regarding inaccurate or incomplete information and records, reference should also be made to the guidance in Section IX, "Inaccurate and Incomplete Information," and to the definition of "licensee official" contained in Section IV.C.

[21] The example for violations for fitness-for-duty relate to violations of 10 CFR part 26.

D. Severity Level IV—Violations involving for example:

1. Incomplete or inaccurate information of more than minor significance that is provided to the NRC but not amounting to a Severity Level I, II, or III violation;

2. Information that the NRC requires be kept by a licensee and that is incomplete or inaccurate and of more than minor significance but not amounting to a Severity Level I, II, or III violation;

3. An inadequate review or failure to review under 10 CFR part 21 or other procedural violations associated with 10 CFR part 21 with more than minor safety significance;

4. Isolated failures to meet basic elements of the fitness-for-duty program not involving a Severity Level I, II, or III violation; or

5. A failure to report acts of licensed operators or supervisors pursuant to 10 CFR 26.73.

E. Severity Level V—Violations involving for example:

1. Incomplete or inaccurate information that is provided to the Commission and the incompleteness or inaccuracy is of minor significance;

2. Information that the NRC requires be kept by a licensee that is incomplete or inaccurate and the incompleteness or inaccuracy is of minor significance;

3. Minor procedural requirements of 10 CFR part 21; or

4. Minor violations of fitness-for-duty requirements.

Supplement VIII—Emergency Preparedness

This supplement provides examples of violations in each of the five severity levels as guidance in determining the appropriate severity level for violations in the area of emergency preparedness. It should be noted that citations are not normally made for violations involving emergency preparedness occurring during emergency exercises. However, where exercises reveal (i) training, procedural, or repetitive failures for which corrective actions have not been taken, (ii) an overall concern regarding the licensee's ability to implement its plan in a manner that adequately protects public health and safety, or (iii) poor self critiques of the licensee's exercises, enforcement action may be appropriate.

57 FR 5791

A. Severity Level I—Violations involving for example:

In a general emergency, licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff.)

B. Severity Level II—Violations involving for example:

In a site emergency, licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff); or

2. A licensee failure to meet or implement one emergency planning standard involving assessment or notification; or

C. Severity Level III—Violations involving for example:

In an alert, licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff);

2. A licensee failure to meet or implement more than one emergency planning standard involving assessment or notification.

3. A breakdown in the control of licensed activities involving a number of violations that are related (or, if isolated, that are recurring violations) that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.

D. Severity Level IV—Violations involving for example:

A licensee failure to meet or implement any emergency planning standard or requirement not directly related to assessment and notification.

E. Severity Level V—Violations that have minor safety or environmental significance.

56 FR 14151

Appendix D to Part 2—Schedule for the Proceeding on Application for a License To Receive and Process High-Level Radioactive Waste at a Geologic Repository Operations Area

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5)	Federal Register Notice of Hearing.
30	2.1014(a)(1)	Petition to intervene/request for hearing, w/contentions.
	2.715(c)	Petition for status as interested government participant & interested government participant petitions.
50	2.1014(b)	Answers to intervention & interested government participant petitions.
70	2.1021	1st Prehearing Conference.
100		1st Prehearing Conference Order; identifies participants in proceeding, admits contentions, and sets discovery and other schedules.
	2.1018(b)(1), 2.1019	Deposition discovery begins.
110	2.1015(b)	Appeals from 1st Prehearing Conference Order, w/briefs.
120	2.1015(b)	Briefs in opposition to appeals.
150		Commission order ruling on appeals from 1st Prehearing Conference Order.
548		NRC staff issues SER.
578	2.1022	2nd Prehearing Conference.
608		2nd Prehearing Conference Order; finalizes issues for hearing and sets schedule for pre-filed testimony and hearing.
618	2.1015(b)	Appeals from 2nd Prehearing Conference Order, w/briefs.
628	2.1015(b)	Briefs in opposition to appeals.
658		Commission order ruling on appeals from 2nd Prehearing Conference Order.
660		Last practicable date for motions for summary disposition.
680		Replies to last practicable motions for summary disposition.
690	Supp. info	Discovery complete.
700		Presiding Officer order on last practicable motions for summary disposition.
710	2.1015(b)	Appeals from last practicable summary disposition order w/briefs.
720		Evidentiary hearing begins.
	2.1015(b)	Briefs in opposition to appeals from last practicable summary disposition orders.
810		Evidentiary hearing ends.
840	2.754(a)(1)	Applicant's proposed findings.
850	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings.
830	2.754(a)(2)	NRC staff's proposed findings.
865	2.754(a)(3)	Applicant's reply to proposed findings.
955	2.760	Initial Decision.
965	2.788(a), 2.762(a), 2.1015(c)	Stay motions to Commission Notices of Appeals.
975	2.788(d)	Replies to stay motions.
995		Commission ruling on stay motion.
	2.762(b)	Appellant's briefs.
1005	2.788(a)	Stay motions to Commission.
1015	2.788(d)	Replies to stay motions.
1025	2.762(c)	Appellee's brief.
1035	2.762(c)	NRC staff brief.
1055	2.1023 Supp. info	Completion of NMSS and Commission supervisory review; Commission ruling on any stay motions; issuance of construction authorization; NWPA 3-year period tolled.
1065	2.763	Oral argument on appeals.
1125		Commission decision.

PART 2

RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

PROPOSED RULE MAKING

46 FR 53189
Published 10/28/81
Comment period expires 11/27/81.
Comments received after this date will be considered if practical to do so but assurance of consideration cannot be given except to comments received on or before this date.

10 CFR Parts 1 and 2

Procedures Involving the Equal Access to Justice Act: Implementation

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to amend its rules of practice to add new provisions designed to implement the recently enacted Equal Access to Justice Act, Pub. L. No. 96-481. That Act provides for the award of fees and expenses to certain individuals and businesses that prevail in agency adjudications in which the agency's position is determined not to have been substantially justified. The basis for these proposed regulations is a set of model rules issued by the Administrative Conference of the United States, which have been modified to conform to the Nuclear Regulatory Commission's established rules of practice.

DATE: Comment period expires November 27, 1981. Comments received after this date will be considered if practical to do so but assurance of consideration cannot be given except to comments received on or before this date.

ADDRESSES: Written comments should be submitted to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attn: Docketing and Service Branch. Copies of all comments received may be examined and copied for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Esq., Office of the General Counsel, (202) 634-3224, U.S. Nuclear Regulatory Commission, Washington, DC, 20555.

SUPPLEMENTARY INFORMATION:

I. Background

On October 21, 1980, President Carter signed into law Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, 94 Stat. 2325, 5 U.S.C. § 504. Under its terms, which become effective October 1, 1981, individuals and business entities meeting certain net worth and other requirements may be awarded fees and expenses incurred in connection with agency "adversary adjudications" if they prevail over the agency unless the presiding adjudicatory official determines that the agency's position was substantially justified or that special circumstances preclude an award as unjust. 5 U.S.C. 504(a). The Act also provides that each agency, after consultation with the Administrative Conference of the United States (ACUS), is to establish uniform procedures for the submission and consideration of applications for awards of fees and expenses. *Id.* § 504(c)(1). To facilitate this statutory requirement, ACUS developed and issued model rules for consideration and utilization by those agencies affected by the EAJA's requirements. 46 FR 15895 (March 10, 1981) and 46 FR 32900 (June 25, 1981). The basis for the rules now proposed by the Nuclear Regulatory Commission (NRC) are those ACUS model rules, except to the extent, as more fully explained herein, they are deemed unnecessary or not consistent with present NRC procedure. The proposed rules, if adopted, will be added to the Commission's regulations in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings," as a new subpart J and will apply to adversary adjudications pending before the NRC on October 1, 1981, or thereafter. In addition certain minor changes would be made to 10 CFR Part 1 and other sections of Part 2 to indicate the role of the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board in ruling on EAJA applications.

II. Section-by-Section Analysis

Proposed § 2.1000 is a compilation of §§ 0.101-.103 of the ACUS Model Rules and is designed to give a general overview of the proceedings covered by the EAJA. Much of §§ 0.101-.103 of the Model Rules is a restatement of the terms of the Act, which has been omitted. Retained and modified, however, are the Model Rules provisions dealing with those agency proceedings that are to be deemed "adversary adjudications" such that the EAJA is applicable. As a recent information paper submitted to the Commission from the Office of the General Counsel (OGC) and the Office of the Executive Legal Director (OELD) indicates, the EAJA, which applies to proceedings that are required by statute to be conducted on the record, appears to encompass only NRC proceedings relating to the modification, suspension, or revocation of reactor licenses. SECY-81-169, at 3-4 & n.4.[1] See also U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act*, 41-43 (1947). Although the ACUS Model Rules

[1] In addition, as the OGC/OELD paper concluded, the EAJA does not apply to proceedings involving import and export licenses. Likewise, although SECY-81-169 concluded that the EAJA might be applicable to contract dispute proceedings before an agency Board of Contract Appeals, the comments to the ACUS Model Rules indicate otherwise, 46 F.R. at 32901-02, and accordingly no specific mention of such proceedings is considered necessary.

Copies of SECY-81-169 are available for inspection and may be copied for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, DC.

suggest that all covered proceedings should be listed in the agency's rules, as was noted in SECY-81-169, there is no definitive answer about the EAJA's applicability to proceedings concerning domestic materials licenses. The Commission, therefore, has decided to include only language delineating the general statutory exemption for proceedings granting or renewing licenses without indicating what specific types of licensing action are involved.[3]

Proposed § 2.1001 corresponds to § 0.104 of the ACUS Model Rules and denotes the eligibility requirements for award applicants.

Minor changes include the rewording of § 2.1001(a) to indicate more specifically that the types of applicants are limited, the addition of an example to § 2.1001(e) to show how part-time employees are to be counted, and the substitution of the term "presiding officer" for the statutory term "adjudicative officer" in § 2.1001(f). The last change, which has been implemented throughout the remainder of the proposed rule, is in line with the use of the term "presiding officer" in 10 CFR Part 2 to designated the Atomic Safety and Licensing Board, Administrative Law Judge, or other adjudicative official having the designated responsibility for rendering an initial agency decision.

Proposed § 2.1002, which corresponds to ACUS Model Rule § 0.105 and restates the statutory standard for awards, is unchanged except for the substitution of the term "agency staff" for "agency counsel" to conform the language to NRC practice. Similar conforming changes have been made throughout the proposed rules.

Revisions to ACUS Model Rules § 0.106, which is § 2.1003 of the NRC's proposed rule and relates to allowable fees and expenses, are also mostly minor grammatical and conforming changes. Contrary to the suggestion in § 0.106(b) of the Model Rules, however, no exact figure has been provided in the proposed § 2.1003(b) for the highest rate of compensation for expert witnesses because that figure, dependent as it is on the highest rate at which NRC pays its expert witnesses, potentially would be subject to numerous changes and is otherwise available from the agency.

Proposed § 2.1004 corresponds to ACUS Model Rules § 0.107 and sets forth procedures for rulemaking proceedings, as are referenced in the EAJA, 5 U.S.C. § 504(b)(1)(A)(ii), for raising the $75 per hour cap on attorney or agent fees. Any petition for rulemaking on this subject will be handled in conformity with 10 CFR 2.802.

Proposed § 2.1005, which corresponds to ACUS Model Rule § 0.108, provides for an award against an agency of the United States other than the NRC in those rare instances in which another agency participates in an NRC proceeding that is subject to the EAJA.

Proposed § 2.1006, which corresponds to § 0.109 of the ACUS Model Rules, is a general Commission delegation of authority to presiding officers, including the Atomic Safety and Licensing Board, and the Atomic Safety and Licensing Appeal Board to take final action with regard to EAJA matters in adversary adjudications that may be before them. This is in conformity with existing Commission practice regarding reactor licensing matters, *see* 10 CFR 2.721, 2.760, 2.785, and is subject to any other designation the Commission may make in a particular instance.

Sections 2.1010–.1013 of the proposed rules, the agency's counterparts to ACUS Model Rules §§ 0.201–.204, have been adopted from the ACUS suggestions almost *in toto* with only two changes of substance. The purpose of these sections is to set out in detail the information that must be submitted to the agency by applicants for awards under the EAJA as well as when such applications should be filed. The first change, which is in proposed § 2.1013(b), is an additional sentence not found in § 0.204(b) of the Model Rules that specifically indicates that judicial review of the final decision on the underlying controversy before the agency would stay any filing of an EAJA claim with the NRC. In that event, any EAJA award would be determined in accordance with the Act's provisions concerning judicial review of adversary adjudications, 28 U.S.C. 2412(d)(3); 5 U.S.C. 504(c)(1).

Special mention also should be made of § 2.1011(b), which seeks to provide for confidential treatment of financial information submitted to the agency. Although the NRC General Counsel in comments on the proposed ACUS Model Rules expressed some doubt about the ability of any agency to protect such information from disclosure under the Freedom of Information Act (FOIA), nonetheless, in the absence of any specific statutory FOIA exclusion for such information, the proposed rule appears to present the best method of dealing with the potential problem by providing the agency with the information it is most likely to need in handling any FOIA request for financial information deemed by the presiding officer to be confidential. In addition, the second change mentioned has been made in this § 2.1011 (b) by the addition of procedures to allow all parties to receive and comment upon an applicant's motion for nondisclosure and to allow the applicant, in the event of a finding that its net worth information will not be withheld, to receive back the information and withdraw its application. This latter provision is similar to the Commission's existing regulations governing requests for withholding, 10 CFR 2.790(c).

Proposed §§ 2.1020–.1028 are basically unchanged from their ACUS Model Rules counterparts, §§ 0.301–.310, except for certain conforming amendments. These provisions set forth the procedures that applicants should follow in submitting, and that the agency will follow in considering, requests for EAJA awards. A sentence has been added to proposed § 2.1025(a) to indicate that, absent a Commission designation of another official pursuant to proposed § 2.1006, the presiding officer with responsibility for the underlying proceeding will preside over the determination of any EAJA application. In addition, the time limits set for the answer, reply, and presiding officer's decision are slightly longer than those now allowed for comparable submissions in the course of a licensing hearing. Compare 10 CFR 2.705 (twenty days for answer), 2.708 (ten days for reply), and Part 2, App. A, ¶III(d) (thirty-five days for presiding officer's initial decision) with proposed 10 CFR 2.1021 (thirty days for answer to application), 2.1022 (fifteen days for reply), and 2.1028 (forty-five days for presiding officer's initial decision). The unique nature of the questions presented in determining whether an EAJA award should be made as well as the fact that the time expended in reaching such a determination will not impact on the operation of the facility involved in the underlying adversary adjudication makes such longer limitations acceptable. A further change is found in proposed § 2.1027, in that the provision of its ACUS Model Rules counterpart, § 0.308, providing for discretionary agency review of an initial EAJA award decision has been dropped as inconsistent with present NRC regulations that provide an appeal of right in agency adjudications. Also deleted is the final sentence of Model Rule § 0.308, which denotes those actions that may be taken by the reviewing body, and Model Rule § 0.309, which indicates that judicial review of a final agency decision on an EAJA application is available under 5 U.S.C.

[3] SECY-81-169 expressed some uncertainty about whether the EAJA applied to civil penalty proceedings under 10 CFR 2.205 because an opportunity for a hearing is provided by rule rather than required by statute. However, in response to comments on its proposed Model Rules, ACUS dropped a provision suggesting that awards would be available when agencies voluntarily held on the record hearings and acknowledged that the EAJA should be considered to apply only when a formal hearing is a statutory or constitutional requirement. 46 F.R. at 32901.

§ 504(c)(2). Both of these provisions are considered unnecessary in light of existing regulations and the terms of the EAJA.

Finally, conforming amendments indicating the applicability of the Equal Access to Justice Act are proposed to be made to existing NRC regulations 10 CFR 1.12, which gives a general description of the Atomic Safety and Licensing Appeal Board's duties; 10 CFR 2.1, which defines the scope of the procedural rules found in Part 2; and 10 CFR 2.721 and 2.785, which respectively set forth the functions of the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board.

In accordance with 5 U.S.C. 553(d)(3), it is the Commission's intention to make these proposed rules immediately effective when they are published in final form. Good cause exists for such action in that the rules are procedural and, as such, will not adversely affect any member of the public.

III. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. A recent ACUS estimate based on the Uniform Caseload Accounting system indicates that the number of small entities involved will amount to perhaps one-half dozen per year. Moreover, the rule will have a beneficial effect for such entities by establishing a procedural framework for the submission and determination of applications for fees and expenses incurred in participating in NRC adversary adjudications.

IV. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 44 U.S.C. 3501-3520, this proposed rule has been submitted to the Office of Management and Budget (OMB) for clearance of its reporting/recordkeeping/application requirements. The SF-83, "Request for Clearance," a supporting statement, and other related documentation submitted to OMB have been placed in the NRC Public Document Room at 1717 H Street, NW., Washington, DC 20555 for inspection and copying for a fee.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of title 5 of the United States Code, notice is hereby given that the following revisions to Title 10, Chapter 1, Parts 1 and 2, Code of Federal Regulations are contemplated:

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

1. The authority citation for Part 1 is revised to read as follows:

Authority: Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); secs. 201, 203, 204, 205, and 209, Pub. L. 93-438, 88 Stat. 1242, 1244, 1245, 1246, and 1248 (42 U.S.C. 5841, 5843, 5844, and 5849); Pub. L. 94-79, 89 Stat. 413; and 5 U.S.C. 504, 552, and 553.

2. Section 1.12 of Part 1 is revised to read as follows:

§ 1.12 Atomic Safety and Licensing Appeal Panel.

The Atomic Safety and Licensing Appeal Panel is the organizational group from which Atomic Safety and Licensing Appeal Boards are selected. Under powers delegated by the Commission, these three-member Boards exercise the authority and perform the regulatory review functions which would otherwise be exercised and performed by the Commission. They perform these functions in proceedings on licenses under 10 CFR Part 50, and such other licensing proceedings as the Commission may specify, reviewing initial decisions and other issuances of Atomic Safety and Licensing Boards and other presiding officers. They shall also perform these functions in proceedings under the Equal Access to Justice Act. The Panel shall be comprised of a Chief Administrative Judge who shall be Chairman and such other Adminstrative Judges as may be appointed members of the Panel.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEDURE

3. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161p and 181, Pub.L. 83-703, 68 Stat. 950 and 953 (42 U.S.C. 2201(p) and 2231); sec. 191, as amended, Pub.L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, as amended, Pub.L. 93-438, 88 Stat. 1242 (42 U.S.C. 5841); 5 U.S.C. 522; 5 U.S.C. 504; unless otherwise noted. Sections 2.200-2.206 also issued under sec. 186, Pub.L. 83-703, 68 Stat. 955 (42 U.S.C. 2236) and sec. 206, Pub.L. 93-438, 88 Stat. 1248 (43 U.S.C. 5846). Sections 2.600-2.608 also issued under 5 U.S.C. 553.

4. Section 2.1 of Part 2 is revised to read as follows:

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in Part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for: (a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license; (b) imposing civil penalties under section 234 of the Act; and (c) public rulemaking. This part also governs proceedings under the Equal Access to Justice Act.

5. In Part 2, section 2.721, paragraph (a) is revised to read as follows:

§ 2.721 Atomic safety and licensing boards.

(a) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may from time to time establish one or more atomic safety and licensing boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission or the Chairman of the Atomic Safety and Licensing Board Panel deems appropriate to the issues to be decided, to preside in such proceedings for granting, suspending, revoking, or amending licenses of authorizations as the Commission may designate, to preside in proceedings under the Equal Access to Justice Act as set forth in Subpart J of this Part, and to perform such other adjudicatory function as the Commission deems appropriate. The members of an atomic safety and licensing board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission.

* * * * *

6. In section 2.785, paragraph (a) is revised to read as follows:

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

(a) The Commission has authorized Atomic Safety and Licensing Appeal Board to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission, including, but not limited to, those under §§ 2.760-2.771, 2.912, and 2.913 in: (1) Proceedings on applications for licenses under Part 50 of this chapter, (2) such other licensing proceedings under the regulations in this chapter as the Commission may specify, and (3) proceedings under the Equal Access to Justice Act.

* * * * *

7. Part 2 is amended by adding a new Subpart J to read as follows:

Subpart J—Implementation of the Equal Access to Justice Act in Agency Proceedings

General Provisions

2.1000 Scope.
2.1001 Eligibility of applicants.
2.1002 Standards for awards.
2.1003 Allowable fees and expenses.
2.1004 Rulemaking on maximum rates for attorney or agent fees.

2.1009 Awards against other agencies.
2.1008 Delegations of authority.

Information Required From Applicants

2.1010 Contents of application.
2.1011 Net worth exhibit.
2.1012 Documentation of fees and expenses.
2.1013 When an application may be filed.

Procedures For Considering Applications

2.1020 Filing and service of documents.
2.1021 Answer to application.
2.1022 Reply.
2.1023 Comments by other parties.
2.1024 Settlement.
2.1025 Further proceedings.
2.1026 Decision
2.1027 Agency review.

2.1028 Payment of award.

General Provisions

§2.1000 Scope.

The Equal Access to Justice Act (referred to as "the Act" in this subpart) provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are prevailing parties to adversary adjudications conducted by the NRC. Such adjudications are those held under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is represented by an attorney or other representative who enters an appearance and participates in the proceeding. Proceedings to grant or renew licenses are excluded by the Act, but proceedings to modify, suspend, or revoke a license are covered if they are otherwise adversary adjudications within the meaning of the Act. If a proceeding includes matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§2.1001 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this section and in §§2.1010–.1013.

(b) Applicants eligible for awards under the Act are limited to:

(1) An individual with a net worth of not more $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agriculture Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis (*e.g.*—two part-time employees each working one-half the time required of an average full-time employee should be counted as one full-time employee).

(f) The net worth and number of employees of the applicant and all of its affiliates must be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this subpart, unless the presiding officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the presiding officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§2.1002 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency staff, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§2.1003 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the NRC pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for these expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the presiding officer shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§2.1004 Rulemaking on maximum rates for attorney or agent fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys or agents qualified to handle certain types of proceedings), the NRC may adopt regulations providing that attorney or agent fees may be awarded at a rate

higher that $75 per hour in some or all of the types of proceedings covered by this subpart. Any person may file with this agency a petition for rulemaking to increase the maximum rate for attorney or agent fees, in accordance with 10 CFR 2.802. The petition should identity the rate the petitioner believes this agency should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted.

§ 2.1005 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the NRC and takes a position that is not substantially justified, the award or an appropriate portion of the award must be made against that agency.

§ 2.1006 Delegations of authority.

The Commission delegates to the presiding officer and the Atomic Safety and Licensing Appeal Board authority to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. 504, in adversary adjudications before these officials. The Commission may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Information Required From Applicants

§ 2.1010 Contents of application.

(a) An application for an award of fees and expenses under the Act must identify the applicant and the proceeding for which an award is sought. The application must show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application must also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application must also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application must state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the NRC to consider in determining whether and in what amount an award should be made.

(e) The application must be signed by the applicant or an authorized officer or attorney of the applicant. It must also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

§ 2.1011 Net worth exhibit.

(a) Each applicant, except a qualified tax-exempt organization or cooperative association, shall provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 2.1001(f) of this subpart) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit is included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the presiding officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion must describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The net worth material in question must be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. The motion to withhold the information shall be served on all parties to the proceeding, who shall have ten (10) days within which to file any reply supporting or contesting the request for nondisclosure. If the presiding officer finds that the information should not be withheld from disclosure, it must be placed in the public record of the proceeding, unless the applicant has indicated in its motion that, in the event of a refusal to withhold from disclosure, it would prefer that all net worth material be returned to it and that its award application be withdrawn. Otherwise, any request to inspect or copy the exhibit will be disposed of in accordance with the NRC's established procedures under the Freedom of Information Act, 10 CFR 9.3-.16.

§ 2.1012 Documentation of fees and expenses.

The application must be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought. A separate itemized statement must be submitted for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 2.1013 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than thirty (30) days after a final disposition of the proceeding.

(b) If agency review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees will be stayed pending final disposition of the underlying controversy. If judicial review is sought or taken of a final disposition of the underlying controversy as to which an applicant believes it has prevailed, proceedings for the award of fees will be stayed and determined in accordance with 28 U.S.C. 2412(d)(3) and 5 U.S.C. 504(c)(1).

(c) For purposes of this subpart, final disposition means the later of (1) the date on which an initial decision or other disposition of the merits of the proceeding by the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission becomes administratively final; (2) issuance of an order disposing of any petitions for

reconsideration of a final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

Procedures For Considering Applications

§ 2.1020. Filing and service of documents.

Any application for an award or other pleading or document related to an application must be filed and served on all parties to the proceeding in accordance with the Commission's rules, 10 CFR 2.701 and 2.712, except as provided in § 2.1011(b) for confidential financial information.

§ 2.1021 Answer to application.

(a) Within thirty (30) days after service of an application, staff counsel may file an answer to the application. Unless staff counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the thirty-day period may be treated as a consent to the award requested.

(b) If staff counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement extends the time for filing an answer for an additional thirty (30) days, and further extensions may be granted by the presiding officer upon request by staff counsel and the applicant.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on in support of staff counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, staff counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 2.1025.

§ 2.1022 Reply.

Within fifteen (15) days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceeding under § 2.1025.

§ 2.1023 Comments by other parties.

Any party to a proceeding other than the applicant and staff counsel may file comments on an application within thirty (30) days after it is served or on an answer within fifteen (15) days after it is served. A commenting party may not participate further in proceedings on the application unless the presiding officer determines that the public interest requires its participation in order to permit full exploration of matters raised in the comments.

§ 2.1024 Settlement.

The applicant and staff counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and staff counsel agree on a proposed settlement of an award before an application has been filed, the application must be filed with the proposed settlement. Any settlement is subject to approval by the presiding officer. See 10 CFR 2.203.

§ 2.1025 Further proceedings.

(a) The presiding officer who renders the initial decision in the underlying proceeding will preside over any Equal Access to Justice Act proceeding unless the Commission designates some other official pursuant to § 2.1006. Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or staff counsel, or *sua sponte*, the presiding officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Any further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application, and must be conducted as promptly as possible.

(b) A request that the presiding officer order further proceedings under this section must specifically identify the information sought or the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

§ 2.1026 Decision.

The presiding officer's initial decision on the application should ordinarily be issued within forty-five (45) days after completion of proceedings on the application. The decision must include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision must also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision must allocate responsibility for payment of any award made among the agencies, and must explain the reasons for the allocation made.

§ 2.1027 Agency review.

Review of the initial decision on the fee application shall be requested and conducted in accordance with §§ 2.760, 2.782–.783, 2.770–.772, and 2.785–.787. If neither the applicant nor staff counsel seeks review and neither the Atomic Safety and Licensing Appeal Board nor the Commission takes review on its own initiative, the initial decision on the application becomes a final decision of the agency thirty (30) days after it is issued.

§ 2.1028 Payment of award.

An applicant seeking payment of an award from the NRC shall submit a copy of the agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts to Director, Division of Accounting, Office of the Controller, U.S. Nuclear Regulatory Commission, Washington, DC, 20555. The agency will pay the amount awarded to the applicant within sixty (60) days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Dated at Washington, DC, this 23d day of October 1981.

For the Commission.

Samuel J. Chilk,

Secretary of the Commission.

51 FR 43367
Published 12/2/86
Comment period expires 3/2/87.

10 CFR Parts 2 and 20

Radioactive Waste Below Regulatory Concern; Generic Rulemaking

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering amending its regulations to address disposal of radioactive wastes that contain sufficiently small quantities or low concentrations of radionuclides that their disposal does not need to be regulated as radioactive. The NRC recently published a policy statement that provides guidance for filing petitions for rulemaking to exempt specific waste streams. Generic rulemaking might provide a more efficient and effective means of dealing with disposal of wastes below NRC regulatory concern. A generic approach could potentially reduce the burdens associated with disposal of radioactive waste by all Commission licensees. For NRC to find that wastes may be disposed of without regard to radioactive content, the disposal must not pose an undue risk to public health and safety or the environment. Generic rulemaking would supplement the earlier policy statement response to a mandate in section 10 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Pub. L. 99-240).

DATE: The comment period expires March 2, 1987. Comments received after this date will be considered if it is practical to do so but assurance of consideration may not be given except as to comments received on or before this date.

ADDRESSES: Mail comments to Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555: Attention: Docketing and Service Branch, or deliver comments to the NRC's Public Document Room, 1717 H Street NW., Washington, DC between 8:15 a.m. and 5:00 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Kitty S. Dragonette, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 427-4300.

SUPPLEMENTARY INFORMATION: On August 29, 1986, the NRC published a policy statement and staff implementation plan regarding how it plans to expedite handling of petitions for rulemaking to exempt specific radioactive waste streams from disposal in a licensed low-level waste disposal facility (51 FR 30839). The policy statement and staff implementation plan were published as Appendix B to 10 CFR Part 2. The policy statement and plan are in the nature of regulatory guidance for implementing existing requirements for rulemaking petitions contained in 10 CFR 2.802. These documents describe the kind of information petitioners should file to allow expedited Commission review of the petition as well as the decision criteria that should enable expedited action on petitions and upon which NRC would base its judgments.

Commenters should consult the August 29, 1986 Federal Register notice for assistance in formulating their comments on this issue. However, the decision criteria listed in the policy statement are repeated here for the reader's convenience.

1. Disposal and treatment of the wastes as specified in the petition will result in no significant impact on the quality of the human environment.

2. The maximum expected effective dose equivalent to an individual member of the public does not exceed a few millirems per year for normal operations and anticipated events.

3. The collective doses to the critical population and general population are small.

4. The potential radiological consequences of accidents or equipment malfunction involving the wastes and intrusion into disposal sites after loss of normal institutional controls are not significant.

5. The exemption will result in a significant reduction in societal costs.

6. The waste is compatible with the proposed treatment and disposal options.

7. The exemption is useful on a national scale, i.e., it is likely to be used by a category of licensees or at least a significant portion of a category..

8. The radiological properties of the waste stream have been characterized on a national basis, the variability has been projected, and the range of variation will not invalidate supporting analyses.

9. The waste characterization is based on data on real wastes.

10. The disposed form of the waste has negligible potential for recycle.

11. Licensees can establish effective, licensable and inspectable programs for the waste prior to transfer to demonstrate compliance.

12. The offsite treatment or disposal medium (e.g., sanitary landfill) does not need to be controlled or monitored for radiation protection purposes.

13. The methods and procedures used to manage the wastes and to assess the impacts are no different from those that would be applied to the corresponding uncontaminated materials.

14. There are no regulatory or legal obstacles to use of the proposed treatment or disposal methods.

The policy statement and staff implementation plan responded to the six-month mandate in the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required NRC to establish standards and procedures for expedited action on below regulatory concern waste disposal petitions. However, the Commission realizes that a generic rulemaking on the issues associated with findings that certain wastes may be exempted from further NRC control of the radioactive content without posing an undue risk to public health and safety would reduce the issues to be considered in individual rulemakings on specific wastes. Generic rulemaking could also address broader issues associated with the general issue of slightly contaminated radioactive materials. The six-month mandate in the Act effectively precluded rulemaking as an initial approach but the Commission can now consider the matter more carefully. The policy statement and staff implementation plan will be used in the interim while the Commission considers rulemaking in the area. Publication of this notice should in no way discourage petitioners from making use of the option for petitions for expedited rulemaking on specific waste streams.

The NRC requests public comment on the general question of whether and how to proceed on the matter of exempting slightly contaminated radioactive materials from its requirements for disposal. The NRC also seeks public comment with respect to the following issues and questions. (In responding, commenters are encouraged to provide specific suggestions and the basis for suggestions offered.)

(1) In the past, the Commission has concluded that consideration of exempting wastes from regulation on a waste-stream-by-waste-stream basis is the most practical way to proceed and will lead to exemptions most useful for licensees. Assuming this course of action, what type of rulemaking would facilitate exemption of waste streams? For example,

(a) Should the decision criteria listed above from the Commission policy statement be codified as rules instead of guidance?

(b) Should the decision criteria in the Commission policy statement be quantified where possible and then be codified to facilitate processing petitions?

(c) Should additional criteria be added or criteria be deleted before they are quantified and codified?

(2) Should the NRC take an entirely different approach than that reflected in the policy statement? For example,

(a) Should the NRC try to establish concentrations or quantities of radionuclides that are below regulatory concern regardless of the form or disposal circumstances? In the past, the Commission has concluded that such concentrations or quantities would be so low or small that they would be of no practical value to licensees. Factors such as the uncertainty in potential pathways and further uses or recycle of the contaminated materials and the consequent conservatism that must therefore be considered have contributed to this conclusion. Innovative ideas form commenters on how to deal with these uncertainties would be welcome.

(b) Should NRC develop a risk or dose value that would represent generic regulatory cut-off levels for an individual licensee's waste (e.g., 0.1, 1, or 10 millirems per year)? If so, how would a licensee demonstrate that its disposal practices do not result in members of the public being exposed in excess of the established limit? For example, can computer codes be developed that licensees would have to use to demonstrate compliance with a generic below regulatory concern risk or dose value? What survey, recordkeeping, and reporting requirements should be included in such regulations?

(3) How can NRC most effectively address the potential for exposures of members of the public from multiple disposal practices or sources that are each below NRC regulatory concern? This concern has been addressed internationally and in the staff implementation plan published with the Commission's policy statement by limiting the maximum potential exposures from individual practices. Under this approach inadvertent exposure of a member of the public to five or ten individual disposal practices would still be of no regulatory concern. How can this aspect of below regulatory concern be best addressed in waste-stream-by-waste-stream or more generic approaches?

(4) Should NRC develop additional guidance instead of rulemaking? If so, what guidance would be most helpful?

(5) The Environmental Protection Agency (EPA) has issued notices on two aspects of slightly contaminated radioactive wastes. In its ANPRM on low-level wastes (48 FR 38563; August 31, 1983), EPA asked, "Are there some types or classes of radioactive waste which do not need regulatory control to protect the public?" In its ANPRM published June 18, 1986 (51 FR 22264), EPA requested comments on standards for residual activity in buildings and soils of facilities being decommissioned. Should NRC defer entirely, or only in part, to EPA standards development in this area?

(6) Are there other national or international standards or standards development activities that NRC should encourage or support that could negate or minimize the need for further NRC action?

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 20

Byproduct material, Licensed material, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Special nuclear material, Source material, Waste treatment and disposal.

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Dated at Washington, DC, this 26th day of November, 1986.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary to the Commission.

55 FR 12370
Published 4/3/90.
Comment period expires 6/18/90.

10 CFR Part 2

RIN 3150-AD53

Revisions to Procedures To Issue Orders

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to revise the Commission's procedures for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. The proposed revisions would more accurately reflect the Commission's existing statutory authority to issue orders than is presently the case. The proposed revision also would identify the types of Commission orders to which hearing rights attach.

DATES: The comment period expires on June 18, 1990. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Send written comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Comments may also be delivered to the Office of the Secretary, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. weekdays. Copies of any comments received may be examined and copied for a fee at the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC between the hours of 7:45 a.m. and 4:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Mary E. Wagner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-1683.

SUPPLEMENTARY INFORMATION:

Background

The procedures to be followed by the Commission to initiate formal enforcement action are found in the Commission's Rules of Practice set forth in 10 CFR part 2, subpart B. These actions include notices of violation, described in § 2.201, show cause orders, described in § 2.202, orders to modify licenses, described in § 2.204, and civil penalties, described in § 2.205.

Until 1983, with the exception of the civil penalty procedures in § 2.205, the language in these procedures referred solely to licensees. At that time, it was recognized that the Commission's regulations did not provide a procedural mechanism to issue a formal notice of violation to an unlicensed person (corporate or individual) who had violated Commission requirements. For example, by referring only to licensees, the procedures in § 2.201 did not address issuing a notice of violation to a person who possessed radioactive material without a license in violation of Commission requirements or an unlicensed person who violated provisions of 10 CFR part 21, which implements section 206 of the Energy Reorganization Action of 1974. Consequently, the Commission amended its regulations to permit the issuance of notices of violation to unlicensed persons who violated Commission requirements. Changes were published in the Federal Register on September 28, 1983 (48 FR 44170) to amend § 2.200 (Scope of subpart) and § 2.201 (Notice of violation) to add the phrase "or other person subject to the jurisdiction of the Commission."

As stated above, the provisions for issuing show cause orders only address licensees. In practice, the Commission has fashioned orders to non-licensees where necessary to compel a person to cease unauthorized activities that would require a license or to compel actions by a former licensee with respect to its activities previously under license. *See e.g., Michael F. Dimun*, 54 FR 12704 (March 28, 1989); *Pacific Armatechnica Corp.*, 48 FR 38356 (Aug. 23, 1983). The Commission's statutory authority to issue orders, which is found in Section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, is not limited solely to licensees. In fact, the Commission's Atomic Energy Act authority to issue orders is extremely broad, extending to any person (defined in section 11s to include, e.g., any individual, corporation, Federal, state and local agency) who engages in conduct within the Commission's subject matter jurisdiction. The few court cases which deal with the scope of the general authority Congress has granted the Commission usually do so in a general discussion or in passing and conclude that section 161 confers uniquely broad and flexible authority on the Commission. *See Power Reactor Dev. Co.* v. *International Union of Elec. Radio and Mach. Workers, AFL-CIO*, 367 U.S. 396 (1961); *Connecticut Light and Power Co.* v. *Nuclear Regulatory Comm'n*, 673 F.2d 525, 527, n. 3 (D.C. Cir. 1982); *New Hampshire* v. *Atomic Energy Comm'n*, 406 F.2d 170, 173-74 (1st Cir. 1969); *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 779, 783 (D.C. Cir. 1968); *but cf. Reynolds* v. *United States*, 286 F.2d 433 (9th Cir. 1960) (interpreting section 161i in detail and holding, in the context of the AEC's bomb testing activities, that section 161i(3) authorized the AEC to take action to govern the activities of private licensees and not the activities of the Commission itself; the court's use of the word "licensee" is dictum with regard to the term in the context of this notice).

Cases analyzing the Federal Communications Commission's (FCC) enabling statute, which, in many ways, is analogous to the 1954 Act, also support the principle that the Commission's authority is broad in scope. The Federal Communications Act of 1934 (the 1934 Act) broadly authorizes the FCC to "make such rules and regulations, and issue such orders, not inconsistent with [the 1934 Act], as may be necessary in the execution of its functions", 47 U.S.C. 154i (1982). This provision is similar to section 161i(3) of the Atomic Energy Act of 1954, which authorizes the Commission to "prescribe such rules, regulations, and orders as it may deem necessary to govern any activity authorized pursuant to the [Atomic Energy Act of 1954] * * * in order to protect health and to minimize danger to life or property * * *" 42 U.S.C. 2201(i)(3) (1982). A number of cases have analyzed section 154i in detail and determined that the FCC's ordering authority is necessarily broad. *See Federal Communications Comm'n* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 at 793 (1978); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 at 203 (1955); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 at 196 (1943); *Lincoln Telephone and Telegraph Co.* v. *Federal Communications Comm'n*, 659 F.2d 1092 (D.C. Cir. 1981); *American Telephone and Telegraph* v. *Federal Communications Comm'n*, 487 F.2d 865 (2d Cir. 1973); *GTE Service Corp.* v. *Federal Communications Comm'n*, 474 F.2d 724 (2d Cir. 1973); and *Western Union Telegraph Co.* v. *United States*,

267 F.2d 715, 722 (2nd Cir. 1959). It has been held that the FCC has authority to issue orders under section 154i to persons whether licensed or not. *United States* v. *Southwestern Cable*, 392 U.S. 157, 180–81 (1968).

Section 161i provides broad authority to issue orders as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue orders to establish standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material. As relevant here, section 161o authorizes the Commission to order reports as may be necessary to effectuate the purposes of the Act.

Given this broad statutory authority, it is appropriate to amend 10 CFR 2.202 to have the procedural mechanism in place to issue orders, as necessary, to unlicensed persons when such persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is deemed to be necessary or desirable to protect public health and safety or to minimize danger to life or property or to protect the common defense and security. This amendment would revise § 2.202 to establish that mechanism both as to a licensee, as the current § 2.202 provides, and to any person subject to the jurisdiction of the Commission. Such a person includes, but is not limited to, a person who held a license or who was otherwise engaged in licensed activities at the time of the conduct in question, but who no longer holds a license or is so engaged.

In addition, the procedural mechanism for issuing orders to show cause, renamed demands to show cause by this rulemaking, to licensees and other persons would be set forth in a separate section in order to make it clear that the right to a hearing does not attach at the time of issuance of a mere demand for information; i.e., a demand that a person or licensee "show cause" why it should not be compelled to take or refrain from certain action. Orders, including orders to show cause, currently are issued under section 161 of the Atomic Energy Act of 1954, as amended, which are implemented by §§ 2.202 (order to show cause), and 2.204 (order for modification of license). In addition, civil penalty orders are issued under section 234, implemented by § 2.205 (civil penalties). NRC practice commonly has been to issue a single order, an order to show cause, which requires that certain information be provided to demonstrate why either a proposed or immediately effective action modifying, suspending, or revoking a license should not be taken. The order affords a hearing with regard to these actions. While section 189 of the Atomic Energy Act provides for the granting of a hearing in connection with proceedings to modify, suspend, or revoke a license, neither the Act nor the Administrative Procedure Act would require a hearing in connection with an order to show cause which requires only the submission of information, but does not by its terms modify, suspend or revoke a license.

The Act does not explicitly set out the form or requirements for an order to show cause. The Act does, however, authorize the Commission to collect information pursuant to sections 161c and o and the Commission may issue show cause orders to implement this authority. Section 182 of the Act authorizes the Commission to request information from licensees and the Commission has implemented this authority by promulgating regulations such as 10 CFR 50.54(f). Licensees subject to Commission requests under 10 CFR 50.54(f) or its equivalent in other parts of the NRC's regulations have no hearing rights under the Act regarding these information requests.

Accordingly, to clarify that hearing rights do not attach to mere "show cause" demands for information, the Commission proposes to separate its current provisions on orders to show cause from the Commission's general ordering authority contained in § 2.202. To avoid any confusion with orders under revised § 2.202, such actions will be called "demands to show cause" and provisions concerning demands to show cause are set forth in a new § 2.204. Under the proposed rule, a demand to show cause will be issued only to require the submission of information. If a demand to show cause is issued as part of an order requiring action pursuant to § 2.202, hearing rights will be offered but only with respect to the provisions of the order requiring action. This revision to the regulations governing orders changes the rule in *Dairyland Power Cooperative*, LBP–80–26, 12 NRC 367, 370–72 (1980) and *Consumers Power Company*, CLI–73–38, 6 AEC 1082 (1973), by setting the point at which a "proceeding" begins for purposes of triggering the adjudicatory rights under section 189 of the Atomic Energy Act to the point of issuance of an order compelling a licensee or other person to take or refrain from certain actions rather than the point where the agency merely demands information to show why no action should be taken. The change in practice is consistent with the Commission's power to define the scope of its proceedings. *See Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

In order to avoid unnecessary duplication in the regulations, it is proposed that the current § 2.204, "Order for modification of license," be deleted from part 2, since procedures for modification of a license are included in proposed § 2.202. Proposed § 2.202(f) provides that if the action ordered by the Commission constitutes a backfit of a part 50 licensee, the procedures described in 10 CFR 50.109 must be followed. This provision currently appears in the last sentence of § 2.204.

Section 2.202 is also revised to provide that if the licensee or other person to whom an order is issued consents to its issuance, or the order confirms actions agreed to by the licensee or such other person, such consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing and any associated rights. Such orders will be immediately effective. This is not a departure from current Commission practice, but merely conforms the Commission's regulations to such practice. Section 2.202(d) also provides that the licensee's or other person's agreement to an order must be in writing. The addition of this provision is intended to minimize the possibility of issuance of a confirmatory order (i.e., an order intended to confirm and bind a licensee to its commitments to certain actions) which does not accurately reflect the agreement reached by the parties. Whether or not the licensee or other person consents to any order, a person adversely affected by an order issued under § 2.202 to modify, suspend or revoke a license will be offered an opportunity for a hearing pursuant to section 189 of the Atomic Energy Act, consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order. *See Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983). The Commission will continue to publish orders in the Federal Register in accordance with current practice.

The existing § 2.202 vests authority to issue orders in the Executive Director for Operations (EDO), and various staff office directors. Currently, the rule limits the EDO's authority to issue orders to emergency situations. Existing § 2.204 vests authority to issue orders in the Commission, though this authority has been delegated to staff officers. The revised rules consistently vest such authority in the Commission, leaving it to the Commission's internal delegation authority to delegate such authority to

others. This change will avoid the need to amend the regulations each time the title of one of the currently enumerated officials is changed, and it will also remove the unnecessary limitation on the EDO's authority.

The Commission is retaining, in new § 2.202(e), a provision that, upon a finding that the public health, safety or interest so requires or that the violation is willful, the proposed action may be made immediately effective, pending further proceedings on the order. A similar provision appears in current § 2.202(f) and § 2.204. Relief from the requirements of an immediately effective order, on the other hand, may be sought under the relaxation provisions contained in that order, or by motion to the Atomic Safety and Licensing Board or the Presiding Officer if a hearing has been requested.

The proposed rule also continues, in § 2.202(f), the backfitting requirements of § 50.109, including the provision therein that when immediately effective action is required, the documented evaluation may follow, rather than precede, the regulatory action.

Finally, consistent with the changes to §§ 2.202 and 2.204, § 2.1 is amended to specify that the scope of part 2 includes the issuance of orders and demands to show cause to unlicensed persons, and § 2.700 is amended to specify that subpart G (Rules of General Applicability) applies to all adjudications initiated by an order.

The proposed amendments are procedural in nature. They do not establish the substantive standards or conditions under which the NRC would issue an order to a licensed or an unlicensed person. The Commission is proposing, in a separate rulemaking published simultaneously with this rulemaking, a substantive addition to its regulations in order to put unlicensed persons on notice that they may be held accountable for willful misconduct which undermines, or calls into question, adequate protection of the public health and safety. Once the proposed rules are in effect, consistent with the Commission's statutory authority, there will be procedural rules governing the issuance of an order or demand to show cause not only to a licensee, as currently provided, but also to an unlicensed person who willfully causes a licensee to be in violation of Commission requirements or whose willful misconduct undermines, or calls into question, the adequate protection of the public health and safety in connection with activities regulated by the NRC under the Atomic Energy Act of 1954, as amended.

An example of a situation in which it might be appropriate to issue an order to an unlicensed person is where an employee of a corporate licensee might willfully cause that licensee to be in violation of Commission requirements such that the Commission does not have reasonable assurance that requirements to protect the public health and safety will be followed if that person continues to engage in activities licensed by the Commission. Depending on the circumstances in such cases, it might be appropriate to issue an order to such a person to either prohibit the person from being involved in activities licensed by the Commission or require the person to provide prior notice to the Commission before engaging in licensed activities. These types of conditions have been used by the Commission in settlement of litigation in accordance with 10 CFR 2.203. *See Edward Hines, Jr. Medical Center*, 27 NRC 477, ALJ-88-2 (October 7, 1988), and *Finlay Testing Laboratories, Inc.*, LBP-88-17, 27 NRC 588 (1988).

This rulemaking establishes the procedures to be used in issuing orders to licensed and unlicensed persons. The procedures establish the mechanism to provide notice of the issuance of an order and to resolve, through adjudication, whether a particular order is appropriate under the circumstances.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Regulatory Analysis

The existing regulations in 10 CFR 2.202 authorize the NRC, through its designated officials, to institute a proceeding to modify, suspend, or revoke a license by service of an order to show cause on a licensee. The regulations, as currently written, do not provide procedures for the NRC to take direct action against unlicensed persons whose willful misconduct causes a licensee to violate Commission requirements or places in question reasonable assurance of adequate protection of the public health and safety, although such action is authorized by the Atomic Energy Act of 1954, as amended. The amendments will make the Commission's Rules of Practice more consistent with the Commission's existing statutory authority and provide the appropriate procedural framework to take action, in appropriate cases, in order to protect the public health and safety. The amendments also will make clear that hearing rights do not attach to demands to show cause, consistent with section 189 of the Atomic Energy Act of 1954, as amended, and the Administrative Procedure Act.

The proposed rule constitutes the preferred course of action and the cost involved in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule establishes the procedural mechanism to issue orders and demands to show cause to unlicensed persons in addition to licensed persons, who were previously covered. The proposed rule, by itself, does not impose any obligations on entities including any regulated entities that may fall within the definition of "small entities" as set forth in section 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards found in 13 CFR part 121. Such obligations would not be created until an order is issued, at which time the person subject to the order would have a right to a hearing in accordance with the regulations.

Backfit Analysis

This proposed rule does not involve any new provisions which would impose backfits as defined in 10 CFR 50.109(a)(1). Accordingly no backfit analysis pursuant to 10 CFR 50.109(c) is required for this proposed rule.

List of Subjects in 10 CFR Part 2

Administative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special

nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Sec. 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i) (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C are also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241, (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1642 (42 U.S.C. 2021b *et seq.*).

2. Section 2.1 is revised to read as follows:

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for:

(a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license;

(b) Issuing orders and demands to show cause to persons subject to the Commission's jursidiction, including licensees and persons not licensed by the Commission;

(c) Imposing civil penalties under section 234 of the Act; and

(d) Public rulemaking.

3. Section 2.202 is revised to read as follows:

§ 2.202 Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing; and

(5) State the effective date of the order.

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answser under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in paragraph (d) of this section, the answer may demand a hearing.

(c) If the answser demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) When the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

(f) If the order involves the modification of a part 50 license and is a backfit, the requirements of § 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

4. Section 2.204 is revised to read as follows:

§ 2.204 Demand to show cause.

(a) The Commission may issue to a licensee or other person subject to the jurisdiction of the Commission a demand to show cause why such actions as may be proper should not be taken, which will:

(1) Allege the violations with which the licensee or other person is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed; and

(2) Provide that the licensee or other person must file a written answer to the demand to show cause under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the demand to show cause.

(b) A licensee or other person to whom the Commission has issued a demand to show cause under this section must respond to the demand by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the demand to show cause, and shall set forth the matters of fact and law on which the licensee or other person relies.

(c) An answer may consent to the entry of an order in substantially the form proposed in the demand to show cause.

(d) Upon review of the answer filed pursuant to paragraph (a)(2) of this section, or if no answer is filed, the Commission may institute a proceeding pursuant to 10 CFR 2.202 to take the action proposed in the demand to show cause or to take such other action as may be proper.

5. Section 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order pursuant to § 2.202, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3). The procedure applicable to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are set forth in subpart J of this part.

Dated at Rockville, Maryland, this 28th day of March 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

55 FR 27645
Published 7/5/90
Comment period expires 9/4/90.

10 CFR Part 2

RIN 3150-AD60

Revisions to Procedures to Issue Orders: Challenges to Orders that are Made Immediately Effective

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to revise its regulations governing orders to provide for the expeditious consideration of challenges to orders that are made immediately effective. The proposed amendments specifically allow challenges to the immediate effectiveness of an order to be made at the outset of a proceeding and provide procedures for the expedited consideration and disposition of such challenges. The proposed amendments also require that challenges to the merits of an immediatley effective order be heard expeditiously, except where good cause exists for delay.

DATES: The comment period expires on September 4, 1990. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Send written comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Comments may also be delivered to the Office of the Secretary, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Maryland, between 7:45 a.m. and 4:15 p.m. Federal Workdays. Copies of any comments recieved may be examined and copied for a fee at the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC between the hours of 7:45 a.m. and 4:15 p.m. Federal Workdays.

FOR FURTHER INFORMATION CONTACT: John Cho, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-1585.

SUPPLEMENTARY INFORMATION:

Background

On April 3, 1990 (55 FR 12370), the Commission published in the Federal Register proposed changes to 10 CFR part 2, subpart B. The proposed changes, if adopted, would make clear that the provisions governing the issuance of orders include within their scope all persons subject to the jurisdiction of the Commission, licensees as well as non-licensees. As it exists now, except for orders imposing civil penalties, subpart B addresses issuance of orders only to licensees. Other changes were also proposed to clarify that hearing rights attach only to orders, in contrast to demands to show cause; e.g., demands for explanation or other information. Upon further consideration, the Commission has decided that additional changes should be made to subpart B. These additional changes pertain to orders that are made immediatley effective.

Under current subpart B, as well as under the amendments proposed on April 3, orders can be made immediately effective when required to protect the public health, safety, or interest or when there has been willful misconduct. There are no provisions, however, under the existing rule or under the proposed changes, that specifically require that challenges to such orders, including challenges to the immediate effectiveness of such orders, be heard expeditiously. The revisions proposed herein address this and other related matters.

As the rule is structured, currently and under the April 3 proposal, the recipient of an order may answer it by consenting to the order or by challenging it by demanding a hearing. Where the hearing demand concerns an order that is immediately effective, the person or persons to whom the order is issued are nevertheless required to comply with its provisions pending the completion of the hearing. The imposition of this requirement is necessary to enable the Commission to carry out its responsibility for protecting the public health, safety, and interest. The public health, safety, and interest must be held paramount over any conflicting private interests. At the same time, fairness considerations dictate that the interests of the recipients be accommodated to the extent it can be done without impediment to the Commission's exercise of its responsibility. To this end, the Commission is proposing further changes to § 2.202, in addition to those published on April 3.

The Commission believes that a proper balance between the private and governmental interests involved is achieved by a hearing conducted on an accelerated basis. The revisions proposed herein add a provision to the earlier proposed § 2.202 directing that any requested hearing on an immediately effective order will be conducted expeditiously, giving due consideration to the rights of the parties. Another added provision allows challenges to be made at the outset on the need for immediate effectiveness. Such a challenge can be initiated by a motion by the recipient of the order to set aside the immediate effectiveness of the order.

A motion to set aside immediate effectiveness must be based on one or both of the following grounds: The wilful misconduct charged is unfounded or the public health, safety or interest does not require the order to be made immediately effective. No other ground or challenge is permitted inasmuch as no other ground is relevant. The motion must set out specifically its supporting reasons and must be accompanied by any necessary affidavits providing the factual basis for the request.

The added provision also specifies that a motion to set aside the immediate effectiveness of an order will be decided promptly by the presiding officer (an atomic safety and licensing board or an administrative law judge as designated by the Commission) before the presiding officer takes up any other matter not necessary to the resoluton of that request. To assure prompt decision, the provision establishes short time periods for action by the parties as well as by the presiding officer. It is expected that the presiding officer normally will decide the question of immediate effectiveness solely on the basis of the order and other filings in the record. The presiding officer may call for oral argument. However, an evidentiary

hearings is to be held only if the presiding officer finds the record is inadequate to reach a proper decision on immediate effectiveness. Such a situation is expected to occur only rarely.

In deciding the question of immediate effectiveness under § 2.202 as proposed herein, the presiding officer will apply an adequate evidence standard. This standard is analogous to the evidence necessary to find probable cause to make an arrest, to obtain a search warrant, or to obtain a preliminary hearing on a criminal matter. In a criminal enforcement context, "[p]robable cause is deemed to exist where facts and circumstances within affiant's knowledge, and of which he has reasonabley trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." (*United States* v. *Hill*, 500 F.2d 315, 317 (5th Cir. 1974)). In the context of the proposed rule, adequate evidence is deemed to exist when facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges of willful misconduct, if any, contained in the order are true and/or that the action specified in the order is necessary to protect the public health, safety or interest.

The Commission believes that the "probable cause" standard, adapted as the adequate evidence standard for use in the Commission's proceedings involving challenges to the immediate effectiveness of orders, serves the public interest. Commission orders often deal with willful misconduct or other circumstances that threaten harm to the public health, safety or interest. In some instances, the threat may be imminent. In other instances, while no violation may be involved, information available to the Commission may indicate the need for certain immediate action to provide reasonable assurance that the public health, safety, and interest will be protected. In all cases, it is imperative that the Commission be able to take whatever measures that may be necessary to protect the public health, safety, and interest. The adequate evidence standard for deciding questions of immediate effectiveness enables the Commission to proceed with necessary protective action on the basis of reasonably trustworthy information without having to await the completion of a full hearing on the merits of the order. At the same time, it provides the affected parties a measure of protection against forced compliance, before a hearing, with an order that is insubstantially founded. The adequate evidence standard has been applied to allow an agency to suspend persons from bidding on government contracts (and thus allowing the suspension to remain in effect for a reasonable period without a hearing), where significant governmental interests are involved and the risk of erroneous deprivation of an individual's interest is slight. See *Transco Security Inc.* v. *Freeman*, 639 F.2d 318 (6th Cir. 1981), *cert. denied*, 454 U.S. 820 (1981); *Horne Brothers, Inc.* v. *Laird*, 463 F.2d 1268, (D.C. Cir. 1972). Those same considerations support adoption of the adequate evidence rule here.

The following example illustrates how the Commission intends that the adequate evidence standard will be applied. A common type of order directs a licensee to take or desist from taking certain action because of an asserted willful violation of a license or regulation. An affidavit by a cognizant NRC official that sets forth facts sufficient to lead a reasonably cautious person to believe that the asserted willful violation did occur is sufficient to sustain the immediate effectiveness of the order. As another example, an order directs a licensee to take certain action because the Commission is in possession of information indicating that the ordered action is necessary to protect the public health, safety or interest. Similarly, an affidavit by a cognizant NRC official that sets forth sufficient information to lead a reasonably cautious person to believe that the ordered action is necessary to protect the public health, safety, or interest is sufficient to sustain the immediate effectiveness of the order. This standard does not require evidence by persons with first hand knowledge of the facts. Nor does it call for a balancing of evidence between that provided by the NRC staff and that provided by the person seeking to set aside immediate effectiveness. It is not a preponderance of the evidence test. Rather, if the staff's evidence is sufficient to cause a person of reasonable caution to believe that the order is properly founded, that is, the conduct or activities of the person identified in the order present a public health, safety, or interest threat that requires immediate remedial action, the presiding officer is required to uphold the immediate effectiveness of the order. In this regard, the presiding officer must view the evidence presented in a light most favorable to the staff and resolve all inferences in the staff's favor.

The burden of going forward on the immediate effectiveness issue is with the party who moves to set aside the immediate effectiveness provision. The burden of persuasion on the appropriateness of immediate effectiveness is on the NRC staff.

The Commission intends that a motion to set aside the immediate effectiveness of an order will be the only mechanism for challenging immediate effectiveness. In the circumstance, a presiding officer will not entertain any motion to stay the immediate effectiveness of an order; nor will a presiding officer issue *sua sponte* such a stay. In general, the Commission expects that, through the licensing board's imposition of shortened response periods and expedited filing mechanisms, a motion to set aside immediate effectiveness will be decided within fifteen (15) days of the date the hearing request and accompanying motion are referred to the presiding officer. See 10 CFR 2.772(j).

A presiding officer's order upholding the immediate effectiveness of an order will constitute the final agency action on immediate effectiveness. A presiding officer's order setting aside immediate effectiveness will be referred promptly to the Commission for review and will not be effective pending further order of the Commission.

The Commission's authority under § 2.202 to issue immediately effective orders includes the authority to issue amendatory or supplemental orders that are immediately effective. Section 2.202 will remain the same in this respect. If such an order is issued by the staff after a hearing has been ordered, the licensee or other person affected may move that the immediate effectiveness of the amendatory or supplemental order be set aside pending completion of the hearing on the merits. Such a motion will be given expedited consideration by the presiding officer and decided on the basis described above.

Notwithstanding the factors that call for expedited resolution of disputes arising out of immediately effective orders, there may be instances when overriding public interest considerations require delay in the proceeding on the merits. The revisions proposed herein to the earlier proposed § 2.202 include a provision allowing reasonable delays in the conduct of the proceedings on the merits where good cause exists. As an example of the kind of good cause warranting delay, there may be a need for further investigation by the Commission or the U.S Department of Justice. In such instances, to allow the Commission to investigate further into

the matter or the Department of Justice to undertake criminal investigation without prejudice to possible prosecution of any discovered crime, it may be necessary to hold the hearing on the immediately effective order in abeyance for a reasonable period of time. The proposed revision to § 2.202 allows the Commission, either on motion by the staff or any other party, to delay the hearing in such cases, for such periods as may be appropriate in the circumstances. The proposed revision, however, does not authorize delay in the proceeding on a motion to set aside immediate effectiveness. The length of a delay in the proceeding on the merits should be based on a balance of the competing interests involved. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Such a motion will be expeditiously heard and decided.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The existing regulations in 10 CFR 2.202 authorize the NRC, through its designated officials, to institute a proceeding to modify, suspend, or revoke a license by service of an order to show cause on a licensee. The regulations, as currently written, do not provide procedures for the NRC to take direct action against unlicensed persons whose willful misconduct causes a licensee to violate Commission requirements or places in question reasonable assurance of adequate protection of the public health and safety, although such action is authorized by the Atomic Energy Act of 1954, as amended.

On April 3, 1990 (55 FR 12370), the Commission proposed amendments to make the Commission's Rules of Practice more consistent with the Commission's existing statutory authority and to provide the Commission with the appropriate procedural framework to take action, in appropriate cases, in order to protect the public health and safety. The proposed amendments also were to make clear the distinction between orders—e.g., directions to take or desist from taking certain actions—and demands for information. Only orders were proposed to be made immediately effective and subject to hearing, consistent with existing regulations. Neither the existing regulations nor the proposed amendments, however, contained provisions requiring that any such hearing be conducted expeditiously. The amendments proposed by this rulemaking supplement the earlier proposal by adding provisions directing the expeditious conduct of any hearing on an immediately effective order but allowing delays in the conduct of such hearings in certain circumstances where good cause for delay is shown, and establishing a separate, informal procedure for dealing rapidly with challenges to the immediate effectiveness of such order.

The proposed rule constitutes the preferred course of action and the cost involved in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule establishes the procedural mechanism for dealing with orders that are made immediately effective. The proposed rule, by itself, does not impose any obligations on entities including any regulated entities that may fall within the definition of "small entities" as set forth in section 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards found in 13 CFR part 121. Such obligations would not be created until an order is issued, at which time the person subject to the order would have a right to a hearing in accordance with the regulations.

Backfit Analysis

This proposed rule does not involve any new provisions which would impose backfits as defined in 10 CFR 50.109(a)(1). Accordingly no backfit analysis pursuant to 10 CFR 50.109(c) is required for this proposed rule.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Sec. 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b)), (i), (o), 2236), 2282); sec. 206 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section 2.202 is revised to read as follows:

§ 2.202 Order.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on

the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or other person of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing;

(5) State the effective date of the order, and

(6) Provide, for stated reasons, that the proposed action be immediately effective, pending further order, where the Commission finds that the public health, safety or interest so requires or that the violation or conduct causing the violation is willful.

(b) The licensee or other person to whom the Commission has issued an order under paragraph (a) of this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in paragraph (d) of this section, the answer may include a demand for a hearing.

(c)(1) If a hearing is demanded, the Commission will issue an order designating the time and place of hearing. If a hearing is demanded with respect to an immediately effective order, the hearing will be conducted expeditiously, giving due consideration to the rights of the parties.

(2) The licensee or other person to whom the Commission has issued an order may, in addition to demanding a hearing, move to set aside the immediate effectiveness of the order. The motion shall state with particularity the reasons why the immediate effectiveness of the order should be set aside and shall be accompanied by affidavits or other evidence relied on. The Commission staff shall respond within (5) days of the filing of the motion. The motion shall be decided by the presiding officer expeditiously before any other matter unnecessary to the disposition of the motion. The presiding officer shall exercise its powers to regulate the conduct of the proceeding, including reducing the times specified in subpart G for particular actions, to assure expeditious consideration and disposition of the motion. During the pendency of the motion or at any other time, the presiding officer shall not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person. The presiding officer shall uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. An order setting aside immediate effectiveness will be referred promptly to the Commission itself and will not be effective pending further order of the Commission.

(3) Except as provided in paragraph (c)(2) of this section, the Commission may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee and other affected parties.

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent of the licensee or other person to whom the order has been issued to the entry of a consent order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. The consent order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) If the order involves the modification of a Part 50 licensee and is a backfit, the requirements of § 50.109 of this chapter shall be followed unless the licensee has consented to the action required.

Dated at Rockville, Maryland, this 28th day of June 1990.

For the Nuclear Regulatory Commission.
Samuel J. Chilk,
Secretary of the Commission.

55 FR 29043
Published 7/17/90
Comment period expires 10/15/90.

10 CFR Parts 2, 50, and 54

RIN 3150-AD04

Nuclear Power Plant License Renewal

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to issue a rule that would establish the requirements that an applicant for renewal of a nuclear power plant operating license must meet, the information that must be submitted to the NRC for review so that the agency can determine whether those requirements have in fact been met, and the application procedures. This proposed rule will inform nuclear power plant licensees of necessary requirements for renewing operating licenses.

DATES: The comment period expires October 15, 1990. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Comments may be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be hand-delivered to One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, between 7:30 am and 4:15 pm Federal workdays. Copies of comments received may be examined at the Commission's Public Document Room at 2120 L St., NW. (Lower Level), Washington, DC, between the hours of 7:45 am and 4:15 pm Federal workdays.

FOR FURTHER INFORMATION CONTACT: George Sege, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-3917.

SUPPLEMENTARY INFORMATION:

I. Introduction.
II. Background.
III. Proposed Action.
IV. Principal Issues.
- a. Regulatory Philosophy and Approach.
- b. Current Licensing Basis.
- c. Aging Management.
- d. Nature of License.
- e. Latest Date for Filing Renewal Application, the Timely Renewal Doctrine, and Sufficiency of the Renewal Application.
- f. Earliest Date for Filing Applications.
- g. Renewal Term.
- h. Effective Date of Renewed License.
- i. Content of Application—Technical Information.
- j. Environmental Information.
- k. Backfit Considerations.
- l. Hearings.
- m. Report of the Advisory Committee on Reactor Safeguards.
- n. Emergency Planning Considerations.
- o. Plant Physical Security Considerations.
- p. Operator Licensing Considerations.
- q. Financial Qualification Considerations.
- r. Decommissioning Considerations.
- s. Antitrust Review.
- t. Compliance with 10 CFR Part 140

V. Questions.
VI. Availability of Documents.
VII. Environmental Impact.
VIII. Paperwork Reduction Act Statement.
IX. Regulatory Analysis.
X. Regulatory Flexibility Act Certification.
XI. Non-Applicability of Backfit Rule.

I. Introduction

The Atomic Energy Act of 1954 (AEA) limits the duration of most operating licenses for nuclear power plants to a maximum of 40 years, but permits their renewal. The Commission's regulations at 10 CFR 50.51 implement this authority by permitting renewal. However, § 50.51 provides no standards or procedures for determining renewal applications. The nuclear utility industry has expressed considerable interest in operating existing nuclear power plants beyond their initial term of operation. The industry has undertaken several initiatives in support of plant life extension. A Steering Committee on Nuclear Plant Life Extension (NUPLEX) has been formed under the direction of the Nuclear Management and Resources Council (NUMARC). The Electric Power Research Institute (EPRI), in cooperation with the U.S. Department of Energy (DOE), and two utilities have sponsored research on life extension, including pilot studies on two nuclear plants, Surry-1 and Monticello. This has culminated in DOE funding of two lead applications for renewal of the operating licenses for the Yankee Rowe and Monticello facilities.

The nuclear industry has urged the NRC to develop standards and procedures for license renewal so that the utilities would know what will be required to obtain a renewed operating license. The industry states that a license renewal rule is needed now because of the need for a significant number of plants to make decisions in the near future as to whether to seek license renewal. For the oldest nuclear power plants the expiration of their original operating licenses is approaching. If the 108 nuclear power plants licensed as of the end of 1989 were licensed for 40 years from the date of their operating license, the first eight plants will have their licenses expire during the years 2000 to 2009, with another 40 licenses expiring by 2014. Utilities contend that they will require 10 to 15 years to plan and build replacement power plants if the operating licenses for existing nuclear power plants are not renewed. They also contend that the NRC's technical requirements for license renewal must be established before utilities can reasonably determine whether renewal of their existing operating licenses is

economically and technically justified. (For more information on the expiration of facility operating licenses, see Appendix A to the Regulatory Analysis for License Renewal, NUREG–1362.) To ensure a reasoned process for considering license renewal for those who may pursue it, the NRC has determined to proceed with license renewal rulemaking now in order to establish the requirements for renewal of nuclear power plant operating licenses in a timely fashion.

II. Background

The NRC's research program on the degradation of nuclear power plant systems, structures, and components (SSCs) due to aging began in the early 1980s. In 1982, the NRC staff, recognizing the potential impact of plant aging phenomena on the continued safe operation of nuclear power plants, convened a "Workshop on Plant Aging" in Bethesda, Maryland. The purpose of the workshop was to focus attention on how to best proceed to identify and resolve the various technical plant aging issues relevant to life extension. In 1985, the Division of Engineering of the Office of Nuclear Regulatory Research issued the first comprehensive program plan (NUREG–1144) for nuclear power plant aging research. By 1986, age-related degradation became a more important priority with the recognition that utilities were interested in extending the life of their existing power plants beyond the term of up to 40 years of their original operating licenses. In response, the NRC staff developed the "Plan to Accomplish Technical Integration for Plant Aging/ Life Extension" (May 1987) and established a Technical Review Group for Aging and Life Extension (TIRGALEX). The objectives of TIRGALEX were to clearly define the technical safety and regulatory policy issues associated with plant aging and life extension and to develop a plan for resolving the issues in a timely, well-integrated manner. In May 1987, the TIRGALEX report was issued. It identified a broad spectrum of technical safety and regulatory policy issues. These included identification of systems, structures, and components that are susceptible to aging and could adversely affect safety; degradation processes; testing, surveillance, and maintenance requirements; and criteria for evaluating residual life. TIRGALEX concluded that many aging phenomena are readily managed and do not pose major technical issues that would preclude life extension, provided that necessary compensatory measures such as maintenance, surveillance, repair, and replacement are effectively implemented during the extended operation, and for a number of the measures during the existing license term as well.

Simultaneously, a request for comments on establishment of a policy statement on life extension was published in the Federal Register (51 FR 40334; November 6, 1986). Comments were requested on seven major policy, technical, and procedural issues (21 separate questions). The first and sixth policy areas focused on the timing of regulatory action on life extension, including the need for a policy statement, and timing of resolution of policy, technical, and procedural issues. The earliest and latest dates for filing a life extension application and the potential term of such an extension were the subject of the second and a portion of the fourth policy area. The question of an appropriate licensing basis was the third policy issue, including the need for and role of a probabilistic risk assessment (PRA). The fourth and fifth areas focused on technical issues regarding the nature of aging degradation, its identification and mitigation, and the need for research and changes to industry codes and standards. The final policy area was the need for procedural changes in the Commission's regulations for handling life extension requests. A total of 56 written comments were received from the electric utility industry, public interest groups, private citizens, independent consultants, and government agencies. These comments were reviewed and a summary provided in SECY–87–179, "Status of Staff Activities to Develop a License Renewal Policy, Regulations and Licensing Guidance and to Report on Public Comments" (July 21, 1987).

Based on these comments, the staff began to specifically identify and resolve the wide variety of policy and technical issues relevant to life extension. In August 1988, the staff published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register (53 FR 32919; August 29, 1988) in which the Commission announced its intention to bypass a policy statement and go directly to preparing a proposed rule on license renewal. The ANPRM also announced the availability of NUREG–1317, "Regulatory Options for Nuclear Plant License Renewal," and requested comments on the issues discussed. First, three alternative licensing bases for assessing the adequacy of a life extension application were presented and discussed: (a) the existing licensing basis for a facility, (b) supplementation of the existing licensing basis with reviews in safety significant areas, or (c) compliance with new plant standards at the time the application is submitted. Commenters were asked to identify whether any other major, regulatory options for license renewal should be considered, and whether verification of the existing licensing basis at each plant should be required for license renewal. Second, two alternatives for handling uncertainties in age-related degradation were described and discussed: (a) emphasize maintenance, inspection, and reliability assurance, or (b) emphasize defense-in-depth. The relative merit of the two alternatives was the second subject for comment. Third, the advisability of preparing a generic environmental impact statement (EIS) and whether part 51 should be amended to permit the NRC the option of preparing an environmental assessment (EA) instead of an EIS were discussed. Finally, 12 procedural and policy issues were discussed. Comments on the environmental, procedural, and policy issues were invited.

Fifty-three written comments were received from nuclear industry groups and individual utilities, public interest groups, and Federal and State agencies in response to the ANPRM and commenting on NUREG–1317. An overview and summary analysis of the comments are contained in NUREG/CR–5332, "Summary and Analysis of Public Comments on NUREG–1317: Regulatory Options for Nuclear Plant License Renewal" (March 1989).

Also in 1988 the NRC, in cooperation with the American Nuclear Society (ANS), the American Society of Civil Engineers (ASCE), the American Society of Mechanical Engineers (ASME), and the Institute of Electrical and Electronics Engineers (IEEE), sponsored an International Nuclear Power Plant Aging Symposium. The symposium, which was held in Bethesda, Maryland, from August 30 to September 1, 1988, was attended by more than 550 internationally prominent nuclear scientists and engineers from 16 countries. The symposium focused on the potential safety issues arising from progressive aging of nuclear power plants. These issues included aging of structures in austenitic steel, fatigue life of structural materials, aging of insulating materials, degradation of pumps and valves, reliability of safety system components, radiation and thermal embrittlement of metals, and erosion-corrosion of fluid-mechanical systems. Discussion addressed topics in the staff's report NUREG–1317, which had been published immediately

preceding the symposium. The proceedings of the symposium were published as NUREG/CP-0100 in March 1989.

The NRC staff's views on specific license renewal issues, as evolved in early 1989, were presented to the public in an NRC panel discussion and question and answer session at the NRC's Regulatory Information Conference, held on April 18, 19, and 20, 1989. Among the issues discussed were the nature of a renewed license (renewed license versus amendment of existing license), the need for probability risk assessment (PRA), integration with the Individual Plant Examination (IPE) process, and compliance with the National Environmental Policy Act (NEPA).

On October 13, 1989 (54 FR 41980), the Commission announced that a workshop would be held on November 13 and 14, 1989, to focus on specific technical issues, including identification of the significant technical issues bearing on safety, the nature and content of standards for issuance of a renewed license, and the appropriate role and scope of deterministic and probabilistic risk assessments. In addition, the schedule for rulemaking and alternatives for addressing compliance with NEPA were identified as issues for discussion. General questions to focus workshop discussions were provided in the Federal Register notice and later supplemented by a more detailed set of questions. In addition, the Federal Register notice included a "Preliminary Regulatory Philosophy and Approach for License Renewal Regulation" and an "Outline of a Conceptual Approach to a License Renewal Rule." Written comments on the questions posed, the statement of regulatory philosophy, and the conceptual rule outline were accepted by the agency up to December 1, 1989. Transcripts were made of the entire workshop. Two hundred and one individuals (not including NRC staff) representing 89 organizations registered for the workshop. A partial listing by category includes 62 individuals representing 28 electric utilities, 10 individuals representing 2 nuclear industry groups, 16 individuals representing 4 nuclear vendors, 5 individuals representing 2 architect-engineer firms, 36 industry consultants representing 26 firms, 5 individuals representing 4 State agencies, 2 journalists from 2 trade press organizations, and 1 individual from a public interest group. Comments provided during the workshop were from industry representatives and individuals affiliated with the nuclear industry. The Nuclear Management and Resources Council (NUMARC), Yankee Atomic Electric Company, and Northern States Power Company presented prepared comments at each session. In addition, written comments were received from 12 organizations, including substantial submissions by NUMARC, Yankee Atomic, Northern States Power, Westinghouse, the Illinois Department of Nuclear Safety, and an independent consultant. DOE was the only Federal agency submitting written comments. No comments were submitted by any public interest group.

III. Proposed Action

The Atomic Energy Act, which permits renewal of licenses, and the license renewal rule already in effect (10 CFR 50.51) do not contain specific procedures, criteria, and standards that must be satisfied in order to renew a license. The proposed rule would establish the procedures, criteria, and standards governing nuclear power plant license renewal.

The following are the principal elements of the proposed rule:

(1) The licensing basis for a nuclear power plant during the renewal term will consist of the current licensing basis for that plant together with any additional considerations related to possible degradation through aging of systems, structures, and components (SSCs) important to license renewal, necessary to ensure that the facility can continue to be operated without undue risk to the health and safety of the public. The "current licensing basis" includes all applicable NRC requirements and licensee commitments, as defined in the rule.

(2) Provisions are included requiring renewal applicants to perform and submit an integrated plant assessment, in which systems, structures, and components important to license renewal are identified and screened, to determine and describe the required age-related degradation management actions.

(3) An application is required to contain specified information for NRC review, including a description of plans for aging management.

(4) Opportunity for public hearings is provided.

(5) Application may be made not more than 20 years before license expiration. It must be made not less than 3 years before license expiration for the timely renewal provision of 10 CFR 2.109 to apply.

(6) A renewal license is effective upon its issuance.

(7) A renewal term may be granted or approved as justified by the licensee, but not for more than 20 years beyond the original license expiration.

IV. Principal Issues

a. Regulatory Philosophy and Approach

(i) Two Principles

The regulation that the Commission proposes for license renewal is founded on two key principles. The first principle is that, with the exception of age-related degradation, the current licensing basis for each reactor provides and maintains an acceptable level of safety for operation during any renewal period. The second and equally important principle is that each plant's current licensing basis must be maintained during the renewal period, in part through a program of age-related degradation management for systems, structures, and components that are important in this connection.

(ii) First Principle: Licensing Basis Retention

The current licensing basis, as used above, means the Commission requirements and licensee commitments imposed on a nuclear power plant at the time of the initial license, as modified or supplemented by the many additional requirements that have been imposed on the licensee by the Commission subsequent to the initial license and by the additional commitments made by the licensee during the period of plant operation up to the filing of a renewal application. This principle is founded on the Commission's initial finding of adequate protection for the initial design and construction of a nuclear power plant, as well as the Commission's continuing oversight and regulatory actions with respect to nuclear power plants. The Commission may issue an operating license to a utility only if it can make the findings required by 10 CFR 50.57. More specifically, the Commission must conclude that the facility will operate in compliance with the application, as amended, and the rules and regulations of the Commission. Further, the Commission must conclude that the authorized activities can be conducted without endangering the health and safety of the public and that the issuance of an operating license will not be inimical to the common defense and security or the public health and safety. Thus, when the Commission issues an initial operating license, it has determined that the design, construction, and proposed operation of the facility satisfy the Commission's requirements and provide adequate protection of the public health and safety and common defense and security.

However, the licensing basis upon which the Commission determined that an acceptable level of safety existed does not remain fixed for the term of the operating license. Rather, the licensing basis continues to evolve during the term of operation, in part due to the continuing regulatory activities of the Commission. These include research, inspections, and the evaluation of operating experience. New requirements and guidance are promulgated by the Commission which may require plant modifications on a plant-specific basis; generic and unresolved safety issues are resolved and the resolution may require that licensees evaluate and modify their designs; and additional evaluations are routinely required as the Commission identifies areas of plant operation that require additional understanding.

(iii) Review of Operating Events

The Commission has a program for the review of operating events at nuclear power plants. As a requirement of the current licensing basis, and one which would continue during the renewal term, each licensee is required to notify the Commission promptly of any plant event that meets or exceeds the threshold defined in 10 CFR 50.72 and to file a written licensee event report for those events that meet or exceed the threshold defined in 10 CFR 50.73. This information is reviewed daily and followup efforts are carried out for events that appear to be potentially risk significant or are judged to be a possible precursor to a more severe event. Depending on the significance, further action may be taken to notify all licensees or to impose additional requirements. Information on operating events is disseminated by the NRC in the form of information notices, bulletins, and other reports; by individual licensees in the form of licensee event reports. The total process offers a high degree of assurance that events that are potentially risk significant or precursors to potentially significant events are being reviewed and resolved expeditiously.

(iv) Generic Safety Issues

As described in SECY-89-138, the Commission also maintains an active program for evaluating and resolving generic issues that may impact public health and safety. A generic safety issue (GSI) involves a safety concern that may affect the design, construction, or operation of all, several, or a class of reactors or facilities. Its resolution may have a potential for safety improvements and promulgation of new or revised requirements or guidance. It should be noted, however, that all unresolved GSIs generally address only enhancements of safety. This conclusion was determined during the initial evaluation of the generic concern which assessed whether any aspect of the generic concern might have a significant impact on the protection of the public health and safety or that immediate remedial action would be warranted. The licensing basis of individual plants includes changes that have resulted from resolution of generic issues determined to be applicable and will include applicable generic-issue-derived changes in the future.

A special group of 22 generic safety issues deemed to be of sufficient significance to warrant both a high-priority resolution effort and special attention in tracking was designated as unresolved safety issues (USIs). All USIs have been resolved. Most of the USI resolutions have been implemented; the remainder are being implemented on a schedule found satisfactory by the staff.

The USI and GSI resolution process is limited to issues that are not of such gravity that immediate action (remedy or shutdown) is required.

Cost-benefit analyses were employed as part of the basis of resolving GSIs involving safety enhancement above the adequate-safety level. In these tradeoffs between net safety benefit and net cost, the remaining plant operating term ordinarily enters the calculations. However, such calculations do not have a precision sufficient to make a significant distinction between plant operating terms with and without a 20-year renewal, given the fact that these decisions have been based on average plant ages in the first half of a 40-year license term. Accordingly, it is not necessary to reexamine in the license renewal context such cost-benefit calculations underlying decisions not to backfit. Should special circumstances in connection with a particular issue as applied to a particular plant warrant reassessment, such reassessment would be undertaken on a plant-specific basis.

(v) Systematic Evaluation Program

In 1977 the NRC initiated the Systematic Evaluation Program (SEP) to review the designs of older operating nuclear power plants and thereby confirm and document their safety. The reviews were organized into approximately 90 review topics (reduced by consolidations from 137 originally identified). The review results were documented in a series of Integrated Plant Safety Assessment Reports. As a result of these reviews with respect to some of the issues, the licensees proposed and implemented procedural or hardware modifications or additional analyses to define corrective actions that would improve plant safety with respect to the differences from current requirements that were identified.

The SEP effort highlighted a smaller group of 27 regulatory topics for which corrective action was generally found to be necessary for all of the initial SEP plants and for which significant safety improvements for other operating plants of the same vintage could be expected. The topics on this smaller list are referred to as the SEP "lessons learned," and the staff expects that these topics would be generally applicable to operating plants that received their construction permits in the late 1960s or early 1970s.

As part of the current staff effort associated with documenting the regulatory processes that contribute to the continued adequacy of the current licensing bases at operating plants, the staff has under way a short-term effort to identify how specific "lessons learned" from the SEP effort have been factored into the licensing bases of all operating plants or into ongoing regulatory programs. The staff program includes identification and definition of the lessons learned as generic safety issues and determination of the appropriate priority rankings for the resolution of these issues. The staff effort will take public comments on this issue into account.

(vi) Consistency of Regulatory Philosophy

The regulatory philosophy containing the two fundamental principles is also consistent with the Commission policy stated in the Policy Statement entitled "Severe Reactor Accidents Regarding Future Designs and Existing Plants (50 FR 23138; August 8, 1985)." In this Policy Statement, the Commission concluded that existing plants pose no undue risk to public health and safety. Moreover, the Commission stated that it has ongoing nuclear safety programs, described in NUREG-1070, that include the resolution of unresolved safety and generic safety issues, the Severe Accident Research Program, operating experience and data evaluation concerning equipment failures and human error, and scrutiny by NRC inspectors to monitor the quality of plant construction, operation, and maintenance. If new safety information were to become available, from any source, to question the conclusion of no undue risk, then the technical issue(s) so identified would be resolved by the NRC under its backfit policy and other existing procedures including the possibility of generic rulemaking.

(vii) Probabilistic Risk Assessment

Although a plant-specific probabilistic risk assessment (PRA) or plant safety assessment (PSA) will not be a requirement for the renewal of plant operating licenses, the Commission recognizes that a plant-specific probabilistic assessment can be used as an effective tool that can provide integrated insights into the plant design and procedures and provide an additional measure of overall plant safety. The Commission understands that all plants will have completed a plant-specific PRA as part of the Individual Plant Examination program. Probabilistic assessment techniques could also be used as a supplemental tool in the renewal applicant's integrated plant assessment that is to underlie the plant's age-related degradation management program as well as in monitoring the safety implications of a plant's performance during the renewal term. As part of the monitoring function, time trends in the frequency of events or in the rate of deterioration of equipment with significant safety implications could be identified. This monitoring process helps ensure that acceptable levels of safety are maintained during the lifetime of any reactor, including any renewal terms.

(viii) Ongoing Assurance

Thus, the Commission-required changes to a plant's licensing basis provide ongoing assurance that the original Commission conclusion of adequate protection of the health and safety and common defense and security continues to remain valid throughout the remaining term of the facility's operating license.

(ix) Second Principle: Maintaining the Licensing Basis During Renewal Term

The second principle for license renewal is that the Commission must ensure that the plant-specific licensing basis is maintained during the renewal term. This principle is a necessary complement to the first principle. As discussed above, the first principle is founded upon a generic determination that each nuclear power plant's licensing basis, if complied with, provides reasonable assurance of adequate protection throuhout the renewal term. Therefore, it follows that each nuclear power plant that complies with its license throughout the renewal term will actually provide the adequate protection thought to be provided by the licensing basis. The Commission believes that adherence to the licensing basis can and will be ensured by: (a) § 54.33(d), which states the licensing basis for the renewed license shall include the plants' current licensing basis as defined in § 54.3(a), including those provisions addressing age-related degradation, and (b) continuing the NRC's regulatory oversight program throughout the term of a plant's renewed license. In this manner the current licensing basis will remain enforceable by the Commission throughout the term of the renewed license to the same extent as during the original licensing term.

The Commission intends to continue its regulatory oversight program throughout the term of renewed licenses. This program, which is discussed below in greater detail in Section b, "Current Licensing Basis," has been successful in the past in ensuring licensee compliance with applicable requirements and licensee commitments, as well as identifying important areas of noncompliance. The Commission believes that this oversight, if continued throughout the term of the renewed license and modified as necessary to reflect new information and experience of extended operation, will also provide assurance that licensees will comply with their plants' licensing bases during the term of their renewed licenses.

(x) Licensing Basis Changes

The principle of compliance with the licensing basis does not preclude changes to the licensing basis; as discussed above, the licensing basis changes throughout the term of the original operating license, and will also change throughout the term of the renewed license. However, changes to the plant's current licensing basis that are unrelated to age-related degradation will not be considered or proposed by the Commission in determining whether to grant the renewal application. Such changes to the licensing basis are inconsistent with the first key principle of license renewal, viz., that the current licensing basis for a plant is sufficient to ensure adequate protection. The proposed rule incorporates this principle by making a generic finding in § 54.29 that the plant-specific licensing bases for all nuclear power plants are sufficient to ensure adequate protection to the public health and safety. This finding will preclude reexamination of the adequacy of a plant's current licensing basis in individual license renewal proceedings.

To preclude the renewal proceeding from developing into a general reconsideration of a plant's current licensing basis, the proposed rule has been carefully structured to establish a regulatory process that is precisely directed at addressing age-related degradation during the renewed license term. Sections 54.19, 54.21, and 54.23, which specify the information that must be submitted in a renewal application, require only information regarding administrative matters, age-related degradation, and environmental impact. While the applicant must submit a list of documents describing portions of the current licensing basis which are relevant to the system, structure, and component screening process, the rule does not require submission of information relating to the adequacy of a plant's current licensing basis. Section 54.29, which defines the standard for issuance of a renewed license, does not require a finding that the plant's current licensing basis is sufficient to ensure adequate protection.

The only situation in which a plant's current licensing basis may be changed in a license renewal proceeding is when the licensee asserts that it is impossible or extremely impractical for it to comply with its current licensing basis due to age-related degradation. Any changes in the current licensing basis proposed by the licensee to accommodate age-related degradation must be thoroughly analyzed and justified by the licensee. The justification must show that the licensee-proposed changes provide adequate protection to the public health and safety. Such licensee-initiated changes in the current licensing basis would be subject to challenge in a hearing.

If the staff or the licensee seeks to make changes in a plant's licensing basis for reasons other than age-related degradation, they should be pursued either in the existing operating license or the renewed license, once issued. Staff-initiated changes would be evaluated in accordance with the backfit rule, 10 CFR 50.109.

b. Current Licensing Basis

(i) Current Licensing Basis Explained

As discussed earlier and as defined in this proposed rule, the current licensing basis (CLB) means the Commission requirements for the plant that are in effect at the time of the renewal application. Included are the requirements at the time that the initial license for the plant was granted together with requirements subsequently imposed. It includes the licensee's commitments for complying with those requirements at the time the initial license was granted, including those documented in the operating license application or Final Safety Analysis Report (FSAR). Further, the CLB

includes those requirements and commitments as modified or supplemented by additional requirements imposed by the Commission and by commitments made by the licensee during the period of plant operation up to the filing of a renewal application that are part of the docket for the plant's license. More specifically this includes, but is not limited to, plant-specific compliance with the Commission regulations as prescribed in parts 2, 19, 20, 21, 30, 40, 50, 55, 72, 73, and 100 and the appendices thereto of Title 10 of the Code of Federal Regulations; orders; license conditions; exemptions; and technical specifications. In addition, the current licensing basis includes written commitments made in docketed licensing correspondence, such as responses to NRC bulletins, generic letters, and enforcement actions, that remain in effect at the time of the application.

The licensing basis for the plant at the time of application will form the basis for each licensee's compilation of those items that would be tested against the criteria used in the SSC screening process as acceptance or rejection criteria and, therefore, for determining the need for additional measures related to preventing, mitigating, or monitoring age-related degradation.

The Atomic Energy Act directs the Commission to ensure that nuclear power plant operation provides adequate protection to the health and safety of the public. However, adequate protection is not absolute protection or zero risk and therefore safety improvements beyond the minimum needed for adequate protection are possible. As new information is developed on technical subjects, the NRC identifies potential hazards and then may require that designs be able to cope with such hazards with sufficient safety margins and reliable systems. When this new information may reveal an unforeseen significant hazard or a substantially greater potential for a known hazard, or insufficient margins and backup capability, the Commission may, in light of the information, conclude that assurance of an acceptable level of safety requires changes in the existing regulations. Therefore, as the Commission identifies new issues or concerns, reasoned engineering decisions occur within the Commission concerning whether any additional measures must be taken at plants to resolve the issues. When specific actions are identified, the Commission, through its regulatory programs, can modify the licensing bases at operating plants at any time to resolve the new concern. This process of determinations concerning backfitting of evolving requirements to plants already licensed is currently guided by the provisions of the backfit rule (10 CFR 50.109). Before promulgation of the backfit rule, similar considerations were applied, though the backfit rule enhanced the discipline of the process.

In view of the regulatory programs and processes just described, it is evident that the licensing basis differs among plants. These differences arise from differences in license date as well as differences in such factors as site, plant design, and plant operating experience. The paragraphs above have described, in general terms, the processes employed by the Commission to provide continued assurance that the licensing basis at an operating plant provides an acceptable level of safety at any point in time of its operating life and that the current licensing bases of older plants remain acceptable through backfit of newly evolving requirements and guidance when that is necessary for adequate safety or warranted as worthwhile safety enhancements. These regulatory processes also ensure that the licensing bases of older plants excused from complying with specific new requirements remain acceptable.

(ii) Foundation for the Adequacy of the Licensing Bases

In order to limit the Commission's license renewal decision to consideration of whether age-related degradation has been adequately addressed, the part 54 rulemaking must make a generic finding for all nuclear power plants that the reasonable assurance findings for issuance of an operating license continue to be true at the time of the renewal application and accordingly need not be made anew at the time of license renewal. The technical and policy bases for this generic finding are set forth in a document entitled "Foundation for the Adequacy of the Licensing Bases" (NUREG–1412), which is a separate supplement to this statement of considerations. This document describes how the licensing process has evolved in major safety issue areas, under processes that have ensured continued adequacy of older plants. The document thus details the Commission's reasons for considering it unnecessary to re-review an operating plant's licensing basis, except for age-related degradation concerns, at the time of license renewal. The document does this in generic terms. Plant-specific details can be found in the docket files containing the records of individual plant license applications and licenses. The document also illustrates how the regulatory process will continue to ensure that an operating reactor's licensing basis will continue to provide an acceptable level of safety during any renewal term.

In view of the differences in the licensing bases among plants, each licensee will be required to compile its plant's licensing basis for use in the screening process to identify SSCs requiring action to manage age-related degradation. Since portions of this compilation constitute acceptance criteria for determining the adequacy of the screening methodology and will be carried forward in the renewed term, a list of documents identifying these portions of the current licensing basis should be submitted as part of the application. All documents describing the current licensing basis should be maintained in an auditable and retrievable form.

(iii) Compliance with the Licensing Bases

The Commission has determined that a finding of compliance by a plant with its current licensing basis is not required for issuance of a renewed license. When a plant's original operating license was issued, the Commission made a finding, pursuant to 10 CFR 50.57(a)(1), that construction of the plant had been substantially completed and was "in conformity with" the construction permit, the operating license application, the requirements of the Atomic Energy Act, and the NRC's rules and regulations. That finding was essentially equivalent to a finding that the plant was in compliance with its licensing basis as it existed at the time of issuance of the operating license.

Once the operating license is issued, the licensee must continue to comply with its licensing basis, unless the licensing basis is properly changed or the licensee is excused by the NRC from compliance. Assurance of continued licensee compliance during the license term rests on two factors: (a) licensee programs required by the NRC's rules and regulations to ensure continued safe operation of the plant, and (b) the NRC's regulatory oversight program.

The licensee programs include self-inspection, maintenance, and surveillance programs that monitor and test the physical condition of plant equipment as the plant operates, as well as review of systems, structures, and components to ensure that plant life can be extended beyond the originally planned 40 years. Through these programs, licensees identify the

degradation of components due to a number of different environmental stressors and are, in general, able to replace or refurbish their equipment so that the frequency and severity of challenges to plant systems, structures, and components remain within acceptable limits and the necessary safety features would work when actually called upon under transient or accident conditions.

The Commission's regulatory oversight programs are established to ensure that the plant's licensing basis is modified as appropriate to reflect new information on technical topics affecting the design, construction, or operation of the licensed plant so that the licensing bases at operating plants continue to provide an acceptable level of safety. These continuing activities in place during the initial license term would continue during the renewal term as well. Examples of these types of programs include its inspection, operating events assessment, and generic issues programs and are discussed in greater detail in the paragraphs below. In the cases where the Commission finds that additional protection is necessary to ensure the public health and safety or where significant additional protection at a reasonable cost substantially enhances plant safety, the Commission may require the backfit of a licensed plant, i.e., the addition, elimination, or modification of the systems, structures, or components of the plant.

Historically, the Commission's inspection program has been constructed around a series of inspection procedures that provide for the routine examination of activities at an operating nuclear facility on a periodic basis. Once licensed, a nuclear facility remains under NRC surveillance and undergoes periodic safety inspection during its operating term. The inspection program is designed to obtain sufficient information on licensee performance, through direct observation and verification of licensee activities, to determine whether the facility is being operated safely and whether the licensee management control program is effective, and to ascertain whether there is reasonable assurance that the licensee is in compliance with the NRC regulatory requirements. The program includes inspection of the licensee's performance in technical disciplines such as operations, radiological controls and protection, maintenance, surveillance, emergency preparedness, physical security, and engineering. In summary, the policy contained in NRC Inspection Manual Chapters (IMC) 2500, Reactor Inspection Program, and IMC-2515, Light-Water Reactor Inspection Program—Operations Phase, is designed to provide for reasonable assurance that the licensee is in compliance with the NRC regulatory requirements, to ensure that the plant is operated and maintained in a safe condition and that conditions adverse to quality and safe operation are identified and corrected.

In sum, the licensee's programs and actions to ensure continued compliance with its evolving licensing basis, together with the Commission's activities to ensure continuing licensee compliance with its licensing basis, provide reasonable assurance that a licensee continues to be in compliance with its current licensing basis at the time of issuance of the renewed license. Therefore, the proposed rule's standard for issuance of a renewed operating license does not require a finding that a nuclear power plant is in compliance with its current licensing basis.

c. Aging Management

The proposed rule requires that the applicants for license renewal take necessary actions to ensure that the plant will continue to meet an acceptable level of safety during the renewal term. Required actions would include those necessary for the effective management of age-related degradation of systems, structures, and components (SSCs) important to license renewal.

Aging can affect all SSCs to some degree. Generally, the changes due to the aging mechanisms involved are gradual. Where necessary, nuclear power plant licensees are and have been required to establish programs for managing age-related degradation during the original license term. Age-related degradation becomes a subject of regulatory concern in the context of license renewal if the SSCs involved have a role in ensuring plant safety and the degradation of SSCs can progress to a point of impairing safety performance during the renewal term, but the SSCs involved are not yet subject to an established effective program of aging management.

Continued safe operation of a commercial nuclear power plant requires that SSCs that perform or support safety functions continue to perform in accordance with the applicable requirements in the current licensing basis of the plant and that other plant SSCs do not substantially increase the frequency of challenges to plant safety systems. As a plant ages, a variety of aging mechanisms are operative. They include erosion, corrosion, thermal and radiation embrittlement, creep, oxidation, wear, fatigue, and vibration.

Existing regulatory requirements, ongoing licensee programs, and national consensus codes and standards address the aforementioned aging mechanisms and the means of mitigating age-related degradation. However, the Commission believes that not all age-related degradation that may be important in the renewal term will be adequately addressed by existing regulatory or licensee programs and, for some SSCs, age-related degradation, if unmitigated, could affect the operability and reliability of SSCs important to license renewal and could lead to loss of safety functions or to unacceptable reduction in safety margins during the renewal term.

The approach reflected in the proposed rule is to require each renewal applicant to address age-related degradation in an integrated plant assessment which demonstrates that age-related degradation of the facility's systems, structures, and components have been identified, evaluated, and accounted for as needed to ensure that the facility's licensing basis will be maintained throughout the term of the renewed license. The required assessment consists of a screening process to select SSCs important to license renewal, based on their intended safety functions or contribution to challenging safety systems; an evaluation and demonstration of the effectiveness of the already ongoing licensee actions under existing regulatory requirements and plant-specific programs to address aging concerns; and the implementation, as necessary, of supplemental programs to prevent or mitigate age-related degradation during the renewed license term. Where such supplemental programs are not needed at the inception of the renewal term, the plan may provide for a deferred start.

Screening of SSCs will identify those that, by virtue of safety roles, are important to license renewal and, accordingly, could require additional attention. In the screening, it is recognized that there are many SSCs that are either covered by the existing ongoing NRC requirements and licensee-established programs or are not subject to age-related degradation. The screening process and methods for the selection of SSCs important to license renewal are expected to take such factors into account and will allow programs for understanding and managing age-related degradation to be properly scoped and focused.

The renewal applicant is required to identify and propose acceptable methods to be employed for the SSC selection process. The methods are expected to be primarily deterministic. Consistent with requirements for compliance with the current licensing basis, the selection process is expected to employ a deterministic basis for identifying SSCs with known important-to-safety functions.

The screening methods—as well as aging management approaches—selected by the license renewal applicants may also include use of probabilistic risk assessment (PRA) techniques as a supplement to the primarily deterministic methods. The public comments at the November 1989 License Renewal Workshop and those submitted in writing following the workshop reflected the view that the use of PRA should be permitted, but not required, in the screening process for systems, structures, and components. Appropriate aging data and models have not been developed for many SSCs for inclusion in the PRAs, and uniform criteria do not exist for evaluating the PRA results. However, as aging research progresses, it may become appropriate to use PRA to a greater extent in license renewal applications.

The planning for the management of age-related degradation reflects the knowledge that materials, stressors, the operating environment, and their interactions contribute to age-related degradation in SSCs. When these interactions cause degradation of reliability and may impact safety, then age-related degradation effects must be mitigated to ensure that the aged SSCs will adequately perform their design safety functions.

To gain the necessary understanding of aging mechanisms, the renewal applicants will need to review the system, structure, or component design, fabrication, installation, testing, inservice inspection, operation, and maintenance cycles.

The recognized elements for timely mitigation of age-related degradation effects are inspection, surveillance, condition monitoring, maintenance, trending, recordkeeping, replacement, refurbishment, and appropriate adjustments in operating environment of the equipment in which the degradation occurs.

Adequate recordkeeping is needed on such items as transients, component failures, and root causes, and repair and replacement of components. Records being generated now will be useful in providing the technical bases for continued safe operation of nuclear power plants.

Maintenance, refurbishment, replacement of parts and components, residual life assessment, and changes in operating environment are other elements useful for mitigating age-related degradation effects. Timely mitigation of degradation through servicing, repair, refurbishment, or replacement of components is the prime function of an effective maintenance program. Mitigation of age-related degradation can be construed as the collection of activities that to a large extent relate directly to physical maintenance of components.

Operating practices that reduce stresses on the equipment by adjustment of the operating environment are also important considerations to mitigating degradation effects. For example, if warranted, operations could be required in an environment with lower temperatures, reduced flux, or controlled humidity. However, in taking such actions, the potential consequences need to be evaluated and considered in order to guard against inadvertent adverse side effects on some other aspect of safety.

d. Nature of License

An issue that the Commission identified early in the rulemaking is the legal nature of the license authorizing operation beyond that approved in the original operating license. Industry commenters suggested that extended operation could be accomplished through amendment of the expiration date in the existing operating license. After reviewing the Atomic Energy Act (AEA), as amended, and the relevant legislative history, the Commission concludes that extended operation of nuclear power plants licensed under section 103 of the AEA should be accomplished by issuance of renewed operating licenses. The Commission proposes that extended operation of nuclear power plants licensed under section 104b of the AEA also be accomplished through issuance of renewed operating licenses.[1] Section 103c of the AEA limits the term of licenses for commercial nuclear power plants issued under section 103 to 40 years, but provides that they may be renewed upon expiration. Based on the AEA's explicit prohibition of license terms in excess of 40 years, together with the statutory provision for renewal, the Commission concludes that the term of a section 103 operating license may not be extended beyond 40 years by amending the expiration date in the existing operating license. While the record does not show any safety basis for the Congress's decision to set the 40-year limitation, the Commission is not free to ignore the statutory mandate.

Section 104b does not contain any limit on the term of operating licenses for nuclear power plants licensed as research and development facilities,[2] although the Commission has as a matter of practice limited section 104b operating licenses to 40 years. Nonetheless, the Commission believes that life extension for nuclear power plants licensed under section 104b should also be accomplished through issuance of renewed licenses.

From the point of view of regulatory complexity, stability, and consistency, it is simpler to have one process and one set of regulations governing license renewal for all nuclear power plants. For all practical purposes, there is no technical distinction between the class of nuclear power plants licensed under section 103 and the class licensed under section 104b. Only the 1970 change in the AEA mandated by Congress separates these two classes of plants. Accordingly, the proposed rule makes no distinction between section 103 and section 104b power reactor licenses. Non-power reactors, including research and test reactors, on the other hand, differ as a class from nuclear power plants; they are not covered by this rulemaking.

In sum, the Commission has concluded that life extension for facilities with both section 103 and section 104b operating licenses shall be achieved through issuance of renewed operating licenses, rather than through amendment of the existing operating license. The Commission does not regard the legal form of a license authorizing extended operation as having any substantial effect on the technical aspects of life extension. Indeed, as discussed in the following section, the licensee-applicant for a renewed license is entitled to favorable treatment under the Timely Renewal Doctrine of the Administrative Procedure Act and 10 CFR § 2.109. This

[1] Until 1970, nuclear power plants were licensed as "research and development facilities" under section 104b of the AEA, since the Atomic Energy Commission (AEC) did not make a "practical value" finding for any power plant design, which was a necessary prerequisite for issuing an operating license under section 103. In 1970, the AEA was amended so that all commercial nuclear power plants whose construction permits were filed after 1970 must be given section 103 operating licenses.

[2] Research and test reactors, which are licensed under section 104c of the AEA, are also not limited by statute to any particular term. However, the Commission has, as a matter of practice, issued operating licenses for such facilities for shorter terms, e.g., 10 years.

treatment is not available to an applicant for a license amendment.

e. Latest Date for Filing Renewal Application, the Timely Renewal Doctrine, and Sufficiency of Renewal Application

Section 9(b) of the Administrative Procedure Act (APA), referred to as the "timely renewal doctrine," provides that if a licensee of an activity of a continuing nature makes a "timely and sufficient" application for renewal in accordance with agency rules, the existing license does not expire until the application has been finally determined by the agency. The timely renewal doctrine is embodied in the Commission's regulations at 10 CFR 2.109:

> If, at least thirty (30) days prior to the expiration of an existing license authorizing any activity of a continuing nature, a licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

The 30-day deadline for timely renewal contained in § 2.109 would not provide the NRC a reasonable time to review an application for a renewed operating license for a nuclear power plant. Staff review of a technically complete and sufficient renewal application is projected to require approximately 2 years. Any necessary hearing would likely add an additional year. Therefore, the Commission proposes that § 2.109 be modified to require that nuclear power plant operating license renewal applications be submitted at least 3 years prior to their expiration in order to take advantage of the timely renewal doctrine.

Renewal applications should be essentially complete and sufficient when filed. Section 9(b) of the APA confers the benefit of "timely renewal" to those who make a timely filing of a "sufficient application," although the current wording of the Commission's parallel rule in § 2.109 only refers to the timely filing of an "application for a renewal or for a new license * * * " and does not include the proviso for a "sufficient" application. The Commission proposes to modify § 2.109 to parallel the APA's provision for a "sufficient" application. Other considerations lead the Commission to incorporate the requirement for a sufficient application into § 2.109. First, the proposed 3-year deadline for timely submission of renewal applications is based upon a projected 3-year period for completing staff review of a renewal application and any necessary hearing, which in turn is premised on renewal applications that are reasonably complete and sufficient when filed. In addition, the Commission does not wish to encourage the filing of pro-forma renewal applications which are filed simply for the sake of meeting the 10 CFR 2.109 deadline. For these reasons, the proposed revision to § 2.109 requires a "sufficient" renewal application. By making this change the Commission does not contemplate litigation over the "sufficiency" of the application in order for a license to continue in force under timely renewal. Sufficiency is essentially a matter for the staff to determine based on the required contents of an application under §§ 54.19 and 54.20. It is enough that the licensee submits the required reports, analyses, and other documents required in such application. That such documents may require further supplementation or review is of no consequence to continued operation under timely renewal.

The NRC staff plans to issue a regulatory guide on the content of nuclear power plant license renewal applications that will present one acceptable way of preparing a renewal application that would meet the criterion of a "sufficient" application.

f. Earliest Date for Filing Applications

Neither the AEA nor the Commission's current regulations contain a limit on how long before the expiration of the operating license a renewal application may be filed. However, the Commission has decided to impose such a limit to ensure that substantial operating experience for the nuclear power plant is accumulated before consideration of the renewal application for that plant. The 20-year limit established allows the licensee ample time to plan for license renewal or alternative actions.

g. Renewal Term

Although the AEA permits the Commission to issue operating licenses, including renewed licenses, with terms of up to 40 years, the Commission has decided to limit the maximum term of a renewed license to 20 years beyond the expiration of the existing (previous) operating license. The Commission believes that there is now sufficient technical understanding of age-related degradation to justify permitting extended operation for an additional 20 years beyond expiration of existing licenses. However, a 20-year limit on extended operation will, in the Commission's judgment, provide a useful opportunity to validate and reassess, if necessary, the current understanding of age-related degradation effects.

The proposed rule does not include a minimum term for a renewed license that may be requested by an applicant. The primary reason for such a limitation would be to discourage repetitive renewal applications for relatively short periods, which may consume an unwarranted amount of staff resources to review, as well as the potential for abuse. Upon consideration, the Commission believes that the renewal applicant's need for longer-term planning of its electric power generating capacity will ordinarily motivate him to seek a longer renewal term and that setting of a minimum term would be an unnecessary constraint on flexibility.

h. Effective Date of Renewed License

Two alternatives were identified early by the Commission with respect to the effective date of a renewed license: (a) a "tack-on" license which takes effect at the expiration of the current operating license, and (b) a "supersession" license which takes effect immediately upon NRC approval of the renewal application. The tack-on approach is initially attractive, since, in general, renewals of licenses take effect upon expiration of the pre-existing license. Moreover, it may be argued that "tack-on" licensing was contemplated by Congress, since section 103c of the AEA states that licenses "may be renewed upon the expiration of [the specified license term]." However, nuclear power plant licensing renewal is unique in that a potentially long period may occur between the agency decision to approve a renewal application and the expiration date of the original operating license (in some cases as much as 20 years), since utilities need ample time to develop alternative sources of power if the license is not renewed. If issuance of the renewed license were kept in abeyance for such an extended period, there would be a great deal of uncertainty in terms of the administrative finality of the renewal decision. As for the "upon expiration" language of section 103c, the Commission does not believe that Congress intended by that language to preclude supersession licenses. Since section 103c provides for licenses to be issued for a "specified period," it would be natural to speak of renewal following the "expiration of such period." On balance, the Commission has determined that a renewed license should be in the form of a supersession of the pre-existing operating license.

i. Content of Application—Technical Information

The proposed renewal rule identifies specific requirements for the content of a renewal application.

Unless updated, the information submitted in the previous operating license docket continues to apply and is incorporated into both the renewal license application and the renewed license docket under the provisions of §§ 54.19 and 54.33.

In addition, the proposed rule requires the submittal of specific information related to the integrated plant assessment for age-related degradation.

In general, the proposed rule requires that renewal applicants submit, for staff review and approval, a methodology for assessing plant systems, structures, and components for age-related degradation and to provide the results at specific steps within the assessment. It also requires that the applicant describe specific mitigative actions and the bases for the actions to be taken for each system, structure, and component for which present programs were not judged to be effective in preventing or mitigating deleterious degradation.

j. Environmental Information

As part of a separate rulemaking, the NRC is undertaking a generic environmental study with the purpose of defining the scope and focus of environmental effects that need to be considered in individual relicensing actions. To the extent this study is successful, reductions in the scope and focus will be codified through changes to 10 CFR part 51. The programmatic findings in the environmental assessment (EA) supporting the present proposed rulemaking, 10 CFR part 54, indicate that the generic environmental study will achieve some degree of success. This study will assess the full range of NEPA issues that will need to be reviewed in individual relicensing actions. The proposed action would be relicensing under part 54. NEPA issues include need for the proposed action, alternatives to the proposed action, environmental effects of the proposed action, and alternative actions. The study will attempt to bound the full range of plants and sites in order that any issues eliminated or bounded by 10 CFR part 51 will be applicable to as large a number of plants as possible. The study will attempt to build from the foundation provided by the EA for the 10 CFR part 54 rule.

k. Backfit Considerations

The nuclear industry proposes that a new section be added to the proposed renewal rule that explicitly imposes backfit requirements during the license renewal application review in order to: (a) control the NRC's reconsideration of the adequacy of the current licensing basis (CLB); (b) require the NRC to use the "substantial increase in safety" and value/impact tests required by 10 CFR 50.109(a)(3) when evaluating the acceptability of the renewal application's proposals for addressing age-related degradation; and (c) make clear that the backfit rule applies throughout the term of the renewed license. The Commission does not agree that a new backfit provision or a change to the backfit rule is required.

The Commission believes that it would be useful to explain how, in its view, the current backfit rule would apply to the review of individual license renewal applications, should the license renewal rule be adopted. All age-related requirements that the staff believes are necessary to ensure adequate protection during the extended life would be imposed without regard to cost. This is the same as the "adequate protection exemption" in 10 CFR 50.109(a)(4)(ii). Second, any age-related requirements necessary to ensure that the plant will operate in conformance with the current licensing basis may be imposed without regard to cost. This category of actions is the same as the "compliance exemption" in 10 CFR 50.109(a)(4)(i). In either case, the staff need not prepare a separate document explaining the basis for this conclusion. Instead, the basis for such a conclusion will be explicitly documented by the staff in a safety evaluation report that presents the results of the staff's license renewal application review.

However, if a proposed requirement to address age-related degradation goes beyond what is necessary to ensure adequate protection or compliance with the current licensing basis, the staff must prepare a backfit analysis that addresses the factors in § 50.109(c) and shows that the direct and indirect costs of implementing the proposed requirement are justified in view of the increase in the overall protection of the public health and safety or the common defense and security to be derived from the proposed requirement.

l. Hearings

Section 189a(1) of the AEA provides an interested person the opportunity to request a hearing for the "granting, suspending, revoking or amending of any license * * *." Although "renewal" of a license is not explicitly mentioned as an action where an opportunity for hearing must be provided, the Commission concludes that a hearing opportunity should be provided. Renewal of an operating license is essentially the granting of a license and therefore would fall under section 189a(1)'s requirement for a hearing opportunity for "issuance of a license." A contrary reading of section 189a(1) would produce the anomalous result that an opportunity for hearing is provided for less significant license amendments, but a hearing opportunity is not provided for license renewal. Accordingly, the proposed rule will provide an opportunity for an interested person to request a hearing. If a request for hearing in connection with a renewal application is granted, the Commission proposes that they be hearings conducted in accordance with subpart G of 10 CFR part 2 as is customary for nuclear power plant licensing proceedings.

At the license renewal workshop and in written comments, Yankee Atomic Electric Co. and several other utility commenters urged that special hearing procedures be established for license renewal. Three procedural proposals were made: (a) a limit on the number of interrogatories that may be filed by an intervenor; (b) in lieu of the provision in 10 CFR 2.749 for summary disposition, a requirement that a party wishing to go forward to hearing demonstrate by affidavit that there is a genuine issue of fact which, if resolved in the party's favor, would result in the application being denied or substantially conditioned; and (c) a requirement that the hearing be conducted in accordance with a schedule incorporated as an appendix to a license renewal rule.

The Commission is disinclined to develop special procedures for hearings in license renewal proceedings. The timely renewal doctrine of the Administrative Procedure Act allows the licensee to continue operating its facility until final determination of its renewal application, even though its original license has expired. Therefore, a licensee seeking a renewed license whose application is yet to be acted upon because of an incomplete hearing is not as substantially and directly affected as an applicant for an initial operating license (OL), though the renewal applicant's need for timely contingency planning in view of possible denial of renewal could be impacted.

The staff also points out that the Commission has recently adopted changes to part 2 (54 FR 33168; August 11, 1989), which raise the threshold for admission of contentions, reduce discovery against the staff, and explicitly authorize the presiding officer to require the filing of cross-examination

plans (the Union of Concerned Scientists has filed a suit in the DC Circuit challenging the validity of the changes to part 2). These procedural changes are likely to be more effective in focusing and expediting any necessary hearing than the industry-proposed changes.

With regard to the industry's scheduling proposal, the Commission points out that it has plenary authority to impose a hearing schedule. The Commission has exercised that power several times in licensing proceedings in the past. Moreover, the Atomic Safety and Licensing Board or presiding officer also possesses the authority, in the absence of any specific Commission directive on scheduling, to adopt a schedule for conducting the hearing.

Finally, the Commission believes that the scope of litigable issues in a license renewal proceeding are much narrower than in construction permit and initial operating license proceedings. Technical findings for issuance of a renewed license will focus primarily on age-related degradation concerns (see § 54.23 of the proposed rule) and therefore are much narrower than the 10 CFR 50.57 findings for issuance of an initial OL. The scope of litigable environmental issues in a license renewal proceeding is also expected to be limited by virtue of proposed 10 CFR part 51 rulemaking and the generic environmental document. In view of these factors, the proposed rule does not include any special hearing procedures for license renewal.

m. Report of the Advisory Committee on Reactor Safeguards

Section 182b of the AEA states:

> The ACRS shall review each application under section 103 or section 104b. for a construction permit or an operating license for a facility, any application under section 104c. for a construction permit or an operating license for a testing facility, any application under section 104a. or c. specifically referred to it by the Commission, and any application for an amendment to a construction permit or an amendment to an operating license under section 103 or 104a., b., or c. specifically referred to it by the Commission * * *

Section 182b does not explicitly refer to applications for renewal of an operating license as requiring ACRS review. However, a renewed operating license is an operating license, an application for which is explicitly required by section 182b to be reviewed by the ACRS. Accordingly, § 54.25 of the proposed rule requires ACRS review of a license renewal application.

n. Emergency Planning Considerations

Section 50.47 and appendix E to part 50 establish requirements and performance objectives to protect the public health and safety by ensuring the existence, implementation, revision, and maintenance of emergency preparedness programs for licensed nuclear power plants. These requirements apply to all nuclear power plant licensees and require the specified levels of protection from each licensee regardless of plant design or construction. Section 50.54(q) requires that the emergency plans be maintained until the Commission terminates the license. The requirements of § 50.47 and appendix E are independent of the duration or renewal of the operating license, and they will continue to apply during the license renewal term.

To ensure that a licensee's plan remains adequate to protect the health and safety of the public, NRC requires a detailed annual review of the facility's emergency preparedness plan by persons who have no direct responsibility for its implementation. Included within the review is an evaluation of the continued adequacy of applicable and appropriate communication and working relationships with State and local governments. Licensees must also perform an annual exercise or drill of their emergency preparedness plan and have the drill evaluated by the NRC against definitive performance criteria. These drills, performance criteria, and independent evaluations serve to ensure continued adequacy of emergency preparedness in light of changes in site characteristics, such as transportation systems and demographics. Changes occurring during the term of any renewed license will be addressed just as changes are addressed during the original license term.

The NRC has determined that the current requirements, including continuing update requirements for emergency planning, provide reasonable assurance that an acceptable level of emergency preparedness exists at any operating reactor at any time in its operating lifetime. For this reason, the Commission has determined that no new finding relative to the adequacy of the emergency plans for license renewal need be made. The Commission is proposing changes to 10 CFR 50.47 to clarify that no new finding on emergency preparedness will be made as part of license renewal.

The licensee programs, the annual exercises, and the NRC inspection activities provide continued assurance that the facilities and equipment needed for the proper functioning of the licensee's emergency preparedness program (as defined in 10 CFR part 50, appendix E, section IV.E, items 1 through 9) remain in a state of operational readiness, without significant performance impairment due to age-related degradation. Accordingly, the additional aging management provisions of the proposed 10 CFR part 54 rule are not needed for those facilities and equipment.

o. Plant Physical Security Considerations

Licensees must establish and maintain a system for the physical protection of plants and materials, in accordance with 10 CFR part 73, to protect the plant from acts of radiological sabotage and prevent the theft of special nuclear material.

The NRC reviews the status of physical security measures at each individual plant during the Systematic Assessment of Licensee Performance (SALP). The NRC has also used Regulatory Effectiveness Reviews (RERs) to determine site compliance with 10 CFR 73.55 and ensure that the level of protection required by part 73 is maintained. The RER teams use NRC security personnel and members of the U.S. Army Special Forces to test plant security systems and personnel.

The requirements of 10 CFR part 73, notably the testing and maintenance requirements of 10 CFR 73.55(g), include provisions for keeping up the performance of security equipment against impairment due to age-related degradation or other causes.

Once a licensee establishes an acceptable physical protection system, changes that would decrease the effectiveness of the system cannot be made without filing an application for license amendment in accordance with 10 CFR 50.54(p)(1).

Application for a renewed license will not affect the standards for physical protection required by the NRC. The level of protection will be maintained during the renewal term in the same manner as during the original license term. The requirements of 10 CFR part 73 will continue to be reviewed and changed to incorporate new information, as necessary. The NRC will continue to ensure compliance of all licensees, whether operating under an original license or a renewed one, through ongoing inspections and reviews.

The NRC has reviewed current requirements for physical protection and determined that they provide reasonable assurance that an adequate level of physical protection will exist at any

reactor at any time in its operating lifetime. Based on the above, the Commission has determined that the adequacy of a renewal applicant's physical protection program will not be readdressed during review of individual license renewal applications.

p. Operator Licensing Considerations

Individuals who manipulate the controls of nuclear power facilities licensed under 10 CFR part 50, and individuals who direct activities of those individuals, must be licensed by the NRC. Specific criteria for obtaining a license are set forth in 10 CFR part 55, which establishes the procedures and criteria for issuing operator licenses and defines the terms and conditions under which the NRC grants, modifies, and renews these licenses. The licensing process for individual plant operators is independent of the facility licensing process, and no change to 10 CFR part 55 is necessary.

License renewal of the facility could affect operators, however, in that additional maintenance, surveillance, or equipment replacement may be necessary at some plants. Plant personnel would be informed of and trained to handle these activities through training programs. Operators are currently required to participate in periodic training programs, which cover important changes to the facility or supporting programs and procedures, and to requalify for their licenses, demonstrating this knowledge on a periodic basis. The requirements for operator knowledge set forth in 10 CFR part 55, subpart E, "Written Examinations and Operating Tests," as well as normal NRC review of plant operations, are adequate to ensure that operators are aware of any license renewal developments that may affect their duties. In addition, the use of approved plant simulators for testing individual plant operators is required of all licensees by May 26, 1991, and will not be affected by license renewal.

Ongoing NRC inspection and licensing efforts will verify that important license renewal developments are adequately addressed in the training of plant operators.

q. Financial Qualification Considerations

In 1984, the NRC adopted changes to §§ 50.57 and 2.104 concerning the need to perform financial qualification reviews of applicants for commercial nuclear power plant licenses (49 FR 35747; September 12, 1984).

Under the revised rule, electric utilities that apply for or possess an operating license are excluded from review of their financial qualifications by the NRC during an operating license proceeding. In publishing the final rule, the Commission stated:

> The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule, the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted. (49 FR 35750)

This finding was based on a national survey submitted by the nuclear industry and the National Association of Regulatory Utility Commissioners regarding the provision of operating funds for nuclear power plants through the rate-making process of State commissions. The study concluded, *inter alia*, that rate-making authorities had various mechanisms to ensure the availability of utility revenues sufficient to meet the costs of NRC safety requirements. More specifically, most rate-making bodies indicated that while no specific provision was made for NRC safety requirements, rates are generally estimated to produce sufficient overall revenues to ensure sound functioning of electrical power systems, including nuclear plants. Some public utility commissions indicated that their orders specifically allocate funds to meet NRC safety requirements (49 FR 35750).

The Commission believes that this finding is also true for renewed operating licenses for nuclear power plants. Therefore, the exclusions in §§ 50.57(a)(4) and 2.104(c)(4) with respect to the need for financial reviews of applications for operating licenses will be extended to applicants for renewal of operating licenses. The Commission concluded that the rate-making process generally provides assurance that funds needed for safe operation will be made available to regulated electric utilities. It further concluded that case-by-case litigation of the financial qualification of applicants for operating licenses is not warranted, except in exceptional cases (49 FR 35750). The Commission also stated that the process contained in the rule satisfies the statutory requirements of the Atomic Energy Act concerning the need for financial qualification reviews (49 FR 35762).

r. Decommissioning Considerations

The Commission's current requirements with respect to decommissioning assume that decommissioning is the only option following the expiration of the nuclear power plant's operating license. Five years before an operating license is to expire, the licensee is required by 10 CFR 50.54(bb) to submit written notification to the Commission for review and approval of a program for funding of the costs of management of spent fuel during the time between expiration of the operating license until the spent fuel is transferred to the U.S. Department of Energy for disposal in a spent fuel repository. Also five years prior to the "projected end of operation," the licensee is required, pursuant to 10 CFR 50.75(f), to provide a preliminary decommissioning plan, a cost estimate for implementing the plan, and any changes in funding necessary to ensure that there will be sufficient funds for decommissioning. One year before the license is to expire, the licensee must file an application to terminate its operating license, together with a detailed plan for decommissioning, in accordance with 10 CFR 50.82.

If an operating license is renewed, decommissioning is postponed until expiration of the renewed license. The Commission does not believe that licensees who file their license renewal applications should also be required to proceed as if their facility will be decommissioned at the expiration of the current operating license. Submission of the funding reports required by §§ 50.75 and 50.82, as well as application for termination of the operating license and decommissioning plan in accordance with § 50.82, will require substantial licensee resources that will be wasted if the renewal application were approved.[8] The proposed rule addresses these concerns by amending §§ 50.54(bb) and 50.82 in such a way that licensees who filed sufficient renewal applications, but have not yet received a final determination on their application, would not need to file either the interim spent fuel funding plan or the application for termination and accompanying detailed decommissioning report. The Commission does not believe that any change to § 50.75(f) is necessary, since the current wording may be interpreted to exclude licensees who have filed renewal applications from the

[8] It is unlikely that a detailed decommissioning plan prepared at the time that a renewed license is requested would be considered technically sufficient so that it could be resubmitted at the termination of operation. As much as 35 years could have passed between the plan's preparation and submittal; and it is inevitable that technical information and regulatory requirements on decommissioning would render the decommissioning report obsolete.

requirements for submission of the interim funding reports.

It is expected that, in consideration of their planning needs, licensees will ordinarily elect to apply for license renewal well before the 5-year lead time of the decommissioning planning requirements of §§ 50.54(bb) and 50.82. Thus, timing problems with respect to contingency preparations for decommissioning, in case renewal is denied, would ordinarily not be expected to arise. The requirement for submittal of a proposed decommissioning plan is retained, with a proposed new provision, § 50.82(a)(1)(ii), to allow delay to within 1 year after disapproval of an application for a renewed license.

s. Antitrust Review

The proposed rule does not require antitrust review by the Attorney General of the renewed license application. The legislative history of section 105c(2) of the AEA, which is the statutory basis for antitrust review of commercial nuclear power plants licensed under section 103 of the AEA, makes clear that such review is required only for the initial application for construction permit (CP), or the initial application for operating license (if an antitrust review was not done for the CP), unless there are changes in licensee activities or modifications that would constitute a new or substantially different facility. [Joint Committee On Atomic Energy. Amending the Atomic Energy Act, H. Rep. No. 1470, 91st Cong., 2d Sess. 29 (1970); S. Rep. No. 1247, 91st Cong., 2d Sess. 29 (1970).] License renewal will not require modifications to commercial nuclear power plants such that they will constitute a "new or different facility"; therefore, an antitrust review by the Attorney General would not be necessary. Nuclear power plants licensed under section 104b of the AEA are exempt from antitrust review under section 105c(3).

t. Compliance with 10 CFR Part 140

Section 170 of the AEA (commonly referred to as the Price-Anderson Act) establishes financial protection and indemnification requirements for NRC licensees. 10 CFR part 140 codifies the requirements of the Price-Anderson Act. The part 140 requirements with respect to nuclear power plants apply to all licensees regardless of the plant's design or construction date. Furthermore, licensees are required to comply with any revisions in part 140 that are required as a result of changes in the Price-Anderson Act.

In accordance with 10 CFR 50.57(a)(5), each licensee was found to comply with the requirements of part 140 when the original operating license was issued. Subsequently, the NRC reviews the indemnity provisions and makes required adjustments as a result of further licensing action. In addition, the nuclear power plant insurance pools that form the basis for compliance with the financial protection requirements for 10 CFR part 140 inform the NRC each year regarding any changes in insurance or potential cancellations.

Because all licensees are required to comply with 10 CFR part 140, and because the NRC continues to ensure compliance with those requirements, the Commission concludes that the finding of compliance with part 140 need not be made in any individual nuclear power plant operating license renewal under 10 CFR part 54.

V. Questions

The Commission invites public comment on all aspects of this proposed rulemaking. In addition, the Commission specifically solicits views concerning the following questions:

(1) Are there any specific equipment items, equipment categories, or topics that should by rule be excluded from review under the age-related degradation management program requirements of the proposed rule? If so, what equipment or topics should be excluded, and what would be the justification for such exclusion?

(2) Should any equipment items, equipment categories, or topics (including topics related to the site, such as nearby hazards or demography) that may involve changes over time be added to the review requirements under the proposed rule? If so, what equipment items, equipment categories, or topics should be added, and what would be the justification for such addition?

(3) For certain limited technical issues with respect to which requirements have been established, some work on implementation and compliance remains to be completed. Unimplemented USIs, such as Station Blackout and Anticipated Transients Without Scram, GSIs, and the "lessons learned" issues of the Systematic Evaluation Program are examples. Is there a basis for removal of such issues at this time from the provision of § 54.29 of the proposed rule that the findings under 10 CFR 50.57(a) need not be made in order to issue a renewed license? If so, what would that basis be?

VI. Availability of Documents

The principal supporting documents of this supplementary information are as follows:

(1) NUREG–1412, "Foundation for the Adequacy of the Licensing Bases," Draft for Comment, U.S. Nuclear Regulatory Commission (USNRC), July 1990.

(2) NUREG–1411, "Response to Public Comments Resulting from the Public Workshop on Nuclear Power Plant License Renewal," USNRC, July 1990.

(3) NUREG–1398, "Environmental Assessment for Proposed Rule on Nuclear Power Plant License Renewal," Draft for Comment, USNRC, July 1990.

(4) NUREG–1362, "Regulatory Analysis for Proposed Rule on Nuclear Power Plant License Renewal," Draft for Comment, USNRC, July 1990.

A free single copy of Documents (1), (3), and (4) above, to the extent of supply, may be requested by those considering providing comment by writing to the U.S. Nuclear Regulatory Commission, ATTN: Distribution Section, Washington, DC 20555.

Copies of all documents cited in this Supplementary Information are available for inspection and/or for copying for a fee, in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington DC.

In addition, copies of NUREGs cited in this document may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082. Copies are also available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

VII. Environmental Impact

A draft environmental assessment of this rule has been prepared pursuant to the National Environmental Policy Act (NEPA), the Council on Environmental Quality Regulations, 40 CFR 1500–1508, and NRC's regulations in 10 CFR part 51. Under NEPA and 10 CFR Part 51, the NRC must consider, as an integral part of its decisionmaking process on the proposed action, the expected environmental impacts of promulgating the rule and reasonable alternatives to the action. The NRC concludes that promulgation of the rule would not significantly affect the environment, and, therefore, a full environmental impact statement is not required, and a finding of No Significant Impact can be made. The environmental assessment and finding of No Significant impact are issued as a draft, and public comments are being solicited.

Implementing the proposed action would produce essentially the same effects as would result from implementation of the existing license renewal rule, since the proposed rule is distinguished from the existing rule in

that it would establish the specific criteria and standards for renewal, whereas the existing rule is silent about criteria and standards. However, the proposed rule would add discipline to the license renewal process, tending in the directions of effective control of risk and environmental consequences and favorable benefit-cost relationships. Renewal under either the existing rule or the proposed rule would result in repair, replacement, or refurbishment of selected nuclear plant components and structures that are subject to aging. The scope of such activities would be specific to each plant, based on an assessment of plant safety and operation. Depending on the specific changes required in each case, the plants would make these changes at least partly during normal refueling shutdowns, but some plants may require additional shutdown for as much as 1 to 2 years prior to expiration of the initial license to accomplish the changes. A work force of from 300 to 950 could be on site during this period, regardless of whether renewal is under the existing rule or the proposed rule.

The environmental impacts associated with repair, replacement, or refurbishment would be of the same magnitude as those experienced during other maintenance or replacement activities conducted during the previous operation of the plant. Occupational exposures resulting from these activities are expected to range from 270 to 1930 person-rems based on exposure data from previous major maintenance activities. These impacts would not vary significantly whether renewal is accomplished under the current or the proposed rule.

The modifications, repairs, and replacements undertaken in each plant would not entail changes to the overall design of the plant. Thus, basic plant operating parameters, such as thermal performance, power output, and fuel utilization would not, in general, be expected to change during any renewal term under either the current rule or the proposed action. Further, occupational exposure and both radiological and non-radiological releases from the plant would be essentially the same whether renewal is done under the current or the proposed rule and are not expected to differ in magnitude from those experienced during operation prior to license renewal. The current average occupational radiation dose per plant of 425 person-rems per year (based on 1987 data) is expected to continue at about that level through a 20-year license renewal term.

Under the proposed license renewal rule, each licensee will be required at the time of application to identify safety-significant components and structures of the plant that are subject to aging and, during the renewal term, to assess and manage the aging degradation of those components. These activities will ensure that a reactor would not continue to operate if the probability of radiological release events increases significantly during the renewal term because of degradation of plant systems. Though similar objectives would be required to be met under the current rule, the current rule does not specify the procedures and standards that would be involved.

In either case, annual radioactive waste production is not expected to change significantly from rates during the original license term. A 20-year addition to a 40-year term of operation for a plant would, under either the existing or the proposed license renewal rule, result in about a 50 percent increase in the requirement for high-level waste repository storage, some increase in the spent fuel storage capability at each individual plant, and about a 50 percent increase in low-level waste storage capacity.

In sum, the environmental impact of no new rulemaking (i.e., not establishing specific criteria and standards for renewal) would be similar to those for license renewal with the proposed rule; however, there would be an undesirable level of uncertainty and lack of predictability in the plant relicensing process.

VIII. Paperwork Reduction Act Statement

The proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). This proposed rule has been submitted to the Office of Management and Budget for review and approval under the paperwork requirements. Public reporting burden for this collection of information is estimated to average approximately 130,000 person-hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Information and Records Management Branch (MNBB-7714), U.S. Nuclear Regulatory Commission, Washington, DC 20555; and to the Paperwork Reduction Project (3150-0136, 0011, and 0021), Office of Management and Budget, Washington, DC 20503.

IX. Regulatory Analysis

The NRC has prepared a regulatory analysis of the benefits and costs of the proposed rule and of a set of significant alternatives. The analysis is reported in NUREG-1362. Some highlights are presented below.

The specific objectives of the revised license renewal rule are to establish the standards that must be met by license renewal applicants, to define the scope of information required for reviewing the applications, and to specify the procedures for submitting the applications. In order to determine the specific content of the rule consistent with these objectives, the staff has defined and evaluated a set of specific alternatives that cover the range of alternatives that would meet these objectives, as summarized below. (Also considered and covered in the cited full report, but not included in the summary below, are alternative regulatory positions on issues related to the environmental review and procedural requirements.) The alternative sets of safety criteria and standards, reflecting differing approaches and stringencies, that were evaluated and compared in the regulatory analysis are as follows:

Alternative A: Current licensing basis (original licensing basis, as amended to the date of the renewal application); no additional requirements.

This alternative is based on the proposition that risk-significant changes in the plant's materials and equipment generally occur as a gradual, progressive process. Knowledge of plant condition, maintenance actions to keep up an adequately safe condition, and aging management are all required during the original licensing term as well as after renewal. The current licensing basis, together with such future changes in requirements as may become applicable to particular plants, could thus be viewed as adequately accommodating the evolving technical issues of plant aging past the renewal date.

This alternative would require the lowest renewal expenditures but would be least intensive in addressing the advancing age-degradation issues.

Alternative B: Extension of Alternative A to require assessment and management of aging.

This alternative would place the following requirements on the licensee: (1) Systematic identification of systems, structures, and components important to license renewal; (2) screening to determine components requiring action

to manage age-related degradation; (3) assessment of aging to provide the basis for estimating the remaining service life of the components, for identifying changes necessary to the operational and maintenance plans, and for determining the parameters that should be monitored during the renewal term; and (4) identification of aging management activities to ensure that adequate margins of safety are preserved throughout the renewal term.

Alternative B would provide a formal and consistent structure to the licensee's efforts to assess and manage aging during the renewal term. The results of licensee assessments also would provide information for an NRC finding of whether or not the renewal term requested by the licensee is justified.

As compared with Alternative A, Alternative B offers the benefit of a more intensive and systematic program to control aging risks. However, it foregoes Alternatives C and D's new-plant safety enhancements.

Alternative B would involve greater renewal expenditures than Alternative A, but less than Alternatives C and D.

Alternative C: Extension of Alternative B to require assessment of design differences against selected new-plant standards.

The selection of applicable new-plant standards would be based on potential risk importance and the practicality of overcoming obstacles to the modifications involved. Applicants would be required to demonstrate, through PRA-aided analyses, that their specific plants' differences from the selected new-plant standards are not risk-significant or that the plant and procedural changes are adequate. The objective of Alternative C would be to upgrade the safety of renewed-license plants above the degree of safety that had been deemed acceptable for the original license term by seeking to attain the improvements envisaged for new plants in the more promising and less difficult areas.

Alternative C seeks safety enhancements over Alternative B, but its renewal expenditures would be higher.

Alternative D: Extension of Alternative B to require compliance with all new-plant standards.

Some limited compromises would necessarily be involved, both in new-plant requirements that it may not be possible or practical to comply with and in the fact that much retained equipment would not be free of all aging effects. Without some tolerance for near-equivalents or specific exemptions, this alternative may assimilate to the no-renewal option.

The objective of this alternative would be to seek the closest possible safety equivalence of renewal-license plants with new plants, in recognition of the historic gradual tightening of safety requirements over the years and increasing evolution of more conservative, more risk-averse public attitudes toward safety objectives of technological enterprises, notably nuclear power plants.

Alternative D would be the most ambitious in its safety objectives and highest in renewal expenditures.

Alternative B was chosen as the preferred alternative. Its intensive aging management requirement, absent from Alternative A, is warranted by the importance of equipment aging as the key safety issue in nuclear plant life extension and license renewal and is well justified on a cost-benefit basis. The enhancement over Alternative B offered by the selective or full introduction of new-plant standards, as would be the case with Alternatives C and D, are neither necessary for adequate safety nor worthwhile on a cost-benefit basis.

X. Regulatory Flexibility Act Certification

The proposed rule will not have a significant impact on a substantial number of small entities. The proposed rule sets forth application procedures and technical requirements for renewed operating licenses for nuclear power plants. Nuclear power plant licensees do not fall within the definition of small businesses as defined in section 3 of the Small Business Act, 15 U.S.C. 632, the Small Business Size Standards of the Small Business Administrator (13 CFR Part 121), or the Commission's Size Standards (50 FR 50241; December 9, 1985).

XI. Non-Applicability of Backfit Rule

The proposed rule addresses the procedural and technical requirements for obtaining a renewed operating license for nuclear power plants. The Commission has not previously addressed the policy, technical, and procedural issues unique to renewal of nuclear power plant operating licenses in a rulemaking. Accordingly, the proposed rule, if adopted, would not constitute a "backfit" as defined in 10 CFR 50.109(a)(1) and a backfit analysis need not be prepared. The primary impetus for the backfit rule was "regulatory stability," *viz.*, that once the Commission decides to issue a license, the terms and conditions for operating under that license would not be arbitrarily changed *post hoc*. Regulatory stability is not a relevant issue with respect to the proposed license renewal rule. The rule, if adopted, would have a prospective effect only. There are no licensees currently holding renewed nuclear power plant operating licenses; consequently, there are no valid expectations that may be changed regarding the terms and conditions for obtaining a renewed operating license. As the Commission has previously expressed in the Statement of Considerations for 10 CFR Part 52, which prospectively changed the requirements for receiving design certifications, the backfit rule:

> was not intended to apply to every regulatory action which changes settled expectations. Clearly, the backfit rule would not apply to a rule which imposed more stringent requirements on all future applicants for construction permits, even though such a rule might arguably have an adverse impact on a person who was considering applying for a permit but had not done so yet. In this latter case, the backfit rule protects the construction permit holder, but not the prospective applicant, or even the present applicant.

See 54 FR 15385–86; April 18, 1989.

At the November 1989 workshop and in written comments, the industry asserted that a backfit analysis for the license renewal rule is desirable to ensure that the NRC engages in "disciplined decisionmaking" when determining what additional actions should be required by the rule to address age-related degradation. The Commission believes that the industry concerns in this regard will be achieved by proper implementation of the regulatory analysis process, the internal reviews by the Committee to Review Generic Requirements (CRGR), review of the license renewal rule by the ACRS, the analyses that are required by the Paperwork Reduction Act, the high degree of public interaction and comment which the NRC staff has sought to date with respect to license renewal (e.g., public workshops, advance notices of rulemakings), and the public interaction which the staff will continue to seek on the proposed license renewal rule, as part of its obligation to comply with the rulemaking provisions of the APA.

In sum, because the proposed rule does not constitute a backfit under 10 CFR 50.109(a)(1), because the reasons underlying the Commission's adoption of the backfit rule are inapplicable to the kind of rulemaking being undertaken here, and because the proposed rule would not adversely affect licensees with respect to backfit considerations, the Commission has determined that a

backfit analysis need not be prepared for the proposed rule.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 50

Administrative practice and procedure, Antitrust, Backfitting, Classified information, Criminal penalty, Fire protection, Incorporation by reference, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 54

Administrative practice and procedure, Age-related degradation, Backfitting, Classified information, Environmental protection, Incorporation by reference, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

For the reason set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Commission is proposing to add a new part 54 to 10 CFR chapter I and proposing to adopt the following amendments to 10 CFR parts 2 and 50.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for part 2 continues to read in part as follows:

Authority: Section 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *.

2. Section 2.4 is amended by revising the definitions of "license" and "licensee" to read as follows:

§ 2.4 Definitions.

* * * * *

License means a license, including a renewed license, or construction permit issued by the Commission.

Licensee means a person who is authorized to conduct activities under a license, including a renewed license, or construction permit issued by the Commission.

* * * * *

3. Section 2.109 is revised to read as follows:

§ 2.109 Effect of timely renewal application.

(a) Except for the renewal of an operating license for a nuclear power plant under 10 CFR 50.21(b) or 50.22, if, at least 30 days prior to the expiration of an existing license authorizing any activity of a continuing nature, the licensee files a sufficient application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

(b) If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of an operating license at least 3 years prior to the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

4. The authority citation for part 50 continues to read in part as follows:

Authority: Section 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *

5. In 50.47, paragraph (a)(1) is revised to read as follows:

§ 50.47 Emergency plans.

(a)(1) Except as provided in paragraph (d) of this section, no initial operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protection can and will be taken in the event of a radiological emergency. No finding under this section is necessary for issuance of a renewed operating license under 10 CFR part 54 of this chapter.

* * * * *

6. In § 50.54, paragraph (bb) is revised to read as follows:

§ 50.54 Conditions of license.

* * * * *

(bb) For operating nuclear power reactors, the licensee shall, no later than 5 years before expiration of the reactor operating license, submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor upon expiration of the reactor operating license until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal in a repository. However, no report need be submitted if the licensee has timely filed a sufficient application for a renewed operating license under part 54 of this chapter. Final Commission review will be undertaken as part of any proceeding for continued licensing under part 50 or part 72. The licensee must demonstrate to NRC that the elected actions will be consistent with NRC requirements for licensed possession of irradiated nuclear fuel and that the actions will be implemented on a timely basis. Where implementation of such actions requires NRC authorizations, the licensee shall verify in the notification that submittals for such actions have been or will be made to NRC and shall identify them. A copy of the notification must be retained by the licensee as a record until expiration of the reactor operating license or renewal license. The licensee shall notify the NRC of any significant changes in the proposed waste management program as described in the official notification.

* * * * *

7. In § 50.82, paragraph (a) is revised to read as follows:

§ 50.82 Application for termination of license.

(a) Any licensee may apply to the Commission for authority to surrender a license voluntarily and to decommission the facility. Each application must be accompanied, or preceded, by a proposed decommissioning plan.

(1) After July 27, 1988:

(i) For a facility that permanently ceases operation, this application must be made within 2 years following permanent cessation of operations, but no less than 1 year prior to expiration of the operating license.

(ii) For a facility that has not permanently ceased operation and for which a timely application for a renewed license under part 54 of this chapter has been docketed, this application must be postponed for that period of time until a final determination of the renewal application has been made by the Commission. If the application for a renewed license is disapproved, an application for termination of license must be submitted within 1 year of the disapproval of the application for the renewed license.

(2) For a facility that has permanently ceased operation prior to July 27, 1988, requirements for contents of the decommissioning plan as specified in paragraphs (b) through (d) of this section may be modified with approval of the Commission to reflect the fact that the decommissioning process has been initiated previously.

* * * * *

8. Part 54 is added to read as follows:

PART 54—REQUIREMENTS FOR RENEWAL OF OPERATING LICENSES FOR NUCLEAR POWER PLANTS

General Provisions

Sec.
54.1 Purpose and scope.
54.3 Definitions.
54.5 Interpretations.
54.7 Written communications.
54.9 Information collection requirements: OMB approval.
54.11 Public inspection of applications.
54.13 Completeness and accuracy of information.
54.15 Specific exemptions.
54.17 Filing of application.
54.19 Contents of application—general information.
54.21 Contents of application—technical information.
54.23 Contents of application—environmental information.
54.25 Report of the Advisory Committee on Reactor Safeguards.
54.27 Hearings.
54.29 Standards for issuance of a renewed license.
54.31 Issuance of a renewed license.
54.33 Continuation of current licensing bases and conditions of renewed license.
54.35 Requirements during term of renewed license.
54.37 Additional records and recordkeeping requirements.

Authority: Secs. 102, 103, 104, 161, 181, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, as amended (42 U.S.C. 5841, 5842).

General Provisions

§ 54.1 Purpose and scope.

This part governs the issuance of renewed operating licenses for nuclear power plants licensed pursuant to Sections 103 or 104b of the Atomic Energy Act of 1954, as amended (68 Stat. 919) and Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242).

§ 54.3 Definitions.

(a) As used in this part,

Aging mechanisms are the physical or chemical processes that result in aging degradation. These mechanisms include but are not limited to fatigue, crack growth, corrosion, erosion wear, thermal embrittlement, radiation embrittlement, biological effects, creep, and shrinkage.

Age-related degradation means a change in a system's, structure's, or component's physical or chemical properties resulting in whole or part from one or more aging mechanisms. Examples of change due to age-related degradation include changes in dimension, ductility, fatigue capacity, fracture toughness, mechanical strength, polymerization, viscosity, and dielectric strength.

Current licensing basis (CLB) means the NRC's requirements imposed on a particular nuclear power plant at the time that the initial license for that power plant was granted and the licensee's commitments for complying with those requirements at the time the initial license was granted, including those required to be documented in either the licensee's initial operating license application or Final Safety Analysis Report (FSAR). Additionally, it includes all modifications and new requirements imposed by the NRC and modifications and new commitments made by the licensee during the period of plant operation up to filing of the license renewal application and remaining in effect at the time of application that are part of the docket for the facility's license. These plant-specific requirements and commitments (and modifications and additions thereto) include, but are not limited to, compliance with the Commission's regulations as prescribed in 10 CFR parts 2, 19, 20, 21, 30, 40, 50, 55, 72, 73, and 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. In addition, the current licensing basis includes written commitments made in docketed licensing correspondence such as licensee responses to NRC bulletins, generic letters, and enforcement actions that remain in effect at the time of application.

Established effective program means a documented program that assures that a system, structure, or component important to license renewal will continue to perform its safety function during the renewal term; will not fail in such a way that it could prevent successful accomplishment of a safety function by another system, structure, or component; and will continue to function with sufficient reliability to maintain the licensing basis. This program shall include as appropriate, but is not limited to, inspection, surveillance, maintenance, trending, recordkeeping, replacement, refurbishment, and the assessment of operational life for the purpose of timely mitigation of the effects of aging degradation. This program must:

(i) Be documented in the FSAR, approved by onsite review committees, and implemented by the facility operating procedures,

(ii) Ensure that all system, structure, or component safety functions and age-related degradation are properly evaluated by the program procedures, and

(iii) Establish acceptance criteria against which the need for corrective action is to be evaluated and require that timely corrective action be taken when these criteria are not met.

Nuclear power plant means a commercial nuclear power facility of a type described in 10 CFR 50.21(b) or 50.22.

Renewal term means the period of time which is the sum of the remaining number of years on the operating license currently in effect, plus the additional amount of time beyond the expiration of the operating license (not to exceed 20 years) which is requested in the renewal application. The total number of years for any renewal term shall not exceed 40 years.

Systems, structures, and components (SSCs) important to license renewal are:

(i) Safety-related SSCs, which are those relied upon to remain functional during and following design basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, and the capability to prevent or mitigate the consequences of accidents that could result in potential offsite consequences comparable to the 10 CFR Part 100 guidelines. Design basis events are defined the same as in 10 CFR 50.49(b)(1).

(ii) All systems, structures, and components used in a safety analysis or plant evaluation for the licensing basis. This would include, but is not limited to, systems, structures, and components identified in the Final Safety Analysis Report, the technical specifications, and the evaluations submitted to show compliance with the Commission's regulations such as ATWS, Station Blackout, Pressurized Thermal Shock, Fire Protection, and Environmental Qualification.

(iii) Any, including nonsafety-related, SSCs whose failure could prevent satisfactory accomplishment of required safety functions.

(iv) Post-accident monitoring equipment as defined in 10 CFR 50.49(b)(3).

(b) All other terms in this part have the same meaning set out in 10 CFR 50.2 or section 11 of the Atomic Energy Act, as applicable.

§ 54.5 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General

Counsel will be recognized to be binding upon the Commission.

§ 54.7 Written communications.

All applications, correspondence, reports, and other written communications shall be filed in accordance with applicable portions of 10 CFR 50.4.

§ 54.9 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et seq.). OMB has approved the information collection requirements contained in the part under control number _____.

(b) The approved information collection requirements contained in this part appear in _____.

§ 54.11 Public inspection of applications.

Applications and documents submitted to the Commission in connection with renewal applications may be made available for public inspection in accordance with the provisions of the regulations contained in 10 CFR part 2 of this chapter.

§ 54.13 Completeness and accuracy of information.

(a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee must be complete and accurate in all material respects.

(b) Each applicant or licensee shall notify the Commission of information identified by the applicant or licensee as having for the regulated activity a significant implication for public health and safety or common defense and security. An applicant or licensee violates this paragraph only if the applicant or licensee fails to notify the Commission of information that the applicant or licensee has identified as having a significant implication for public health and safety or common defense and security. Notification must be provided to the Administrator of the appropriate Regional Office within 2 working days of identifying the information. This requirement is not applicable to information which is already required to be provided to the Commission by other reporting or updating requirements.

§ 54.15 Specific exemptions.

Exemptions from the requirements of this part may be granted by the Commission in accordance with § 50.12 of this chapter.

§ 54.17 Filing of application.

(a) The filing of an application for a renewed license must be in accordance with Subpart A of 10 CFR part 2 and §§ 50.4 and 50.30 of 10 CFR part 50.

(b) Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, is ineligible to apply for and obtain a license.

(c) An application for a renewed license may not be submitted to the Commission earlier than 20 years before the expiration of the operating license currently in effect.

(d) An applicant may combine an application for a renewed license with applications for, other kinds of licenses.

(e) An application may reference information contained in previous applications for licenses or license amendments, statements, correspondence or reports filed with the Commission; provided that such references are clear and specific.

(f) If the application contains Restricted Data or other defense information, it must be prepared in such a manner that all Restricted Data and other defense information are separated from unclassified information, in accordance with § 50.33(j) of part 50.

(g) As part of its application and in any event prior to the receipt of Restricted Data or the issuance of a renewed license, the applicant shall agree in writing that it will not permit any individual to have access to Restricted Data until an investigation is made and reported to the Commission on the character, association, and loyalty of the individual and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security. The agreement of the applicant in this regard is part of the renewed license, whether so stated or not.

§ 54.19 Contents of application—general information.

Each application shall provide the information specified in §§ 50.33 (a) through (e), (h), (i) of part 50. Alternatively, the application may reference other documents that provide the information required by this section.

§ 54.21 Contents of application—technical information.

Each application must include a supplement to the Final Safety Analysis Report (FSAR) which presents the information required by this part. The FSAR supplement must include an evaluation of the aging mechanisms that are present and that result in degradation of the plant's systems, structures, and components, and a demonstration that the effects of such degradation will be effectively managed throughout the renewal term. Each FSAR must contain the following information:

(a) *Integrated plant assessment.* An integrated plant assessment which demonstrates that age-related degradation of the facility's systems, structures, and components has been identified, evaluated, and accounted for as needed to assure that the facility's licensing basis will be maintained throughout the term of the renewed license. Each license renewal applicant shall identify and justify any changes in the current licensing basis associated with age-related degradation. Each license renewal applicant shall compile a list of documents identifying portions of the current licensing basis relevant to the integrated plant assessment, to be submitted as part of the application, and maintain all documents describing the current licensing basis in an auditable and retrievable form. Each applicant shall review the current licensing basis compilation for the purpose of determining the systems, structures, and components to be evaluated and the acceptance criteria to be used in the integrated plant assessment. This assessment must:

(1) Describe the applicant's methodology, for the identification of all SSCs important to license renewal, as defined in § 54.3 (a), and list the identified SSCs.

(2) Describe the applicant's methodology, including selection criteria, for the identification of those structures and components that are constituent elements of the SSCs on the list from paragraph (a)(1) of this section that contribute to the performance of a listed SSC's safety function or whose failure could prevent a listed SSC from performing its intended safety function, and list such identified structures and components.

(3) Describe the applicant's methodology for the identification of those structures and components identified in paragraph (a)(2) of this section that are subject to an established effective program as defined in § 54.3(a), which will continue to

ensure the capability of the structures and components to perform their safety functions during the renewal term, and list such identified structures and components and the associated established effective programs.

(4)(i) For those structures or components included on the list from paragraph (a)(2) of this section but not included on the list from paragraph (a)(3) of this section, describe and provide the bases for actions taken or to be taken to manage the age-related degradation or demonstrate, by evaluation, that the age-related degradation is not significant with respect to the current licensing basis.

(ii) Actions to manage age-related degradation could include but are not limited to maintenance, component replacement, or refurbishment; modification of operating practices; or establishment of a program to evaluate and trend effects of the degradation during the renewal term. The basis of any action could include information concerning the component design requirements, functions, environmental conditions, the degradation mechanisms, and any other relevant information as necessary to demonstrate that the action will be effective in ensuring the continued safe operation of the plant.

(b) *Exemptions.* A list of all plant-specific exemptions granted pursuant to 10 CFR 50.12, and reliefs granted pursuant to § 50.55(a)(3). For those exemptions and reliefs that were granted on the basis of an assumed service life or period of operation bound by the original license term of the facility, or otherwise relate to SSCs subject to age-related degradation, a justification for continuing these exemptions and reliefs must be provided.

(c) *Plant modifications.* A description of any proposed modifications to the facility or its administrative control procedures resulting from the evaluation or analysis required by paragraph (a) or (b) of this section.

§ 54.23 Contents of application—environmental information.

Each application must include an environmental report that complies with the requirements of subpart A of part 51 of this chapter.

§ 54.25 Report of the Advisory Committee on Reactor Safeguards.

Each renewal application must be referred to the Advisory Committee on Reactor Safeguards for a review and report. Any report must be made part of the record of the application and made available to the public, except to the extent that security classification prevents disclosure.

§ 54.27 Hearings.

A notice of an opportunity for a hearing will be published in the Federal Register, in accordance with § 2.105 of part 2. In the absence of a request therefor filed within 30 days by a person whose interest may be affected, the Commission may issue a renewed operating license without a hearing, upon 30-day notice and publication once in the Federal Register of its intent to do so.

§ 54.29 Standards for issuance of a renewed license.

A renewed license may be issued by the Commission, up to the full term authorized by § 54.31, based upon a finding that actions have been identified and have been or will be taken with respect to age-related degradation of those SSCs important to license renewal, such that there is reasonable assurance that the activities authorized by the renewed license can be conducted in accordance with the current licensing basis. Such a finding will constitute a finding that the facility can be operated for the term of the renewed license without endangering the public health and safety or the common defense and security and the findings under 10 CFR 50.57(a) need not be made in order to issue a renewed license.

§ 54.31 Issuance of a renewed license.

(a) A renewed license must be of the class for which the operating license currently in effect was issued.

(b) A renewed license will be issued for a fixed period of time to be specified in the license but in no case to exceed 40 years from the date of issuance. The term of a renewal license will be equal to the period of time remaining on the operating license currently in effect at the time of the approval of the application plus the additional period of time justified by the licensee (but no longer than 20 years).

(c) The renewed license will become effective immediately upon its issuance, thereby rendering the operating license previously in effect entirely ineffective and superseded.

(d) A renewed license may be subsequently renewed upon expiration of the renewal term, in accordance with all applicable requirements.

§ 54.33 Continuation of current licensing bases and conditions of renewed license.

(a) Whether stated therein or not, the following are conditions of every renewed license issued under this part:

(1) Each renewed license will contain and otherwise be subject to the conditions set forth in §§ 50.54 and 50.55a(g) of this chapter.

(b) Each renewed license will be issued in such form and contain such conditions and limitations, including technical specifications, as the Commission deems appropriate and necessary to address age-related degradation, including such provisions with respect to any uncompleted items of plant modification and such limitations or conditions as the Commission believes are required to ensure that operation during the period of completion of such items will not endanger public health and safety. Other conditions and limitations, including technical specifications, in the current licensing basis that do not address age-related degradation continue in effect for the renewed license.

(c) Each renewed license will include those conditions to protect the environment that were imposed pursuant to § 50.36b and that are part of the current licensing basis for the facility at the time of issuance of the renewed license. These conditions may be supplemented or amended as necessary to protect the environment during the term of the renewed license and will be derived from information contained in the supplement to the environmental report submitted pursuant to § 51.53(b) of this chapter, as analyzed and evaluated in the NRC record of decision. The conditions will identify the obligations of the licensee in the environmental area, including, as appropriate, requirements for reporting and recordkeeping of environmental data and any conditions and monitoring requirements for the protection of the nonaquatic environment.

(d) The licensing basis for the renewed license shall include the current licensing basis, as defined in section 54.3(a); the inclusion in the licensing basis of matters such as licensee commitments does not change the legal status of those matters unless specifically so ordered pursuant to paragraphs (b) or (c) of this section.

§ 54.35 Requirements during term of renewed license.

During the term of a renewed license, licensees shall continue to comply with all Commission regulations contained in 10 CFR parts 2, 19, 20, 21, 30, 40, 50, 51, 55, 72, 73, and 100 and appendices thereto which are applicable to holders of operating licenses.

§ 54.37 Additional records and recordkeeping requirements.

The licensee shall retain in an auditable and retrievable form for the term of the renewed operating license all information and documentation required by, or otherwise necessary to document compliance with, the provisions of this part.

Dated at Rockville, Maryland, this 10th day of July, 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

55 FR 34939
Published 8/27/90.
Comment period expires 10/15/90.

10 CFR Parts 2, 50, and 54

RIN 3150-AD04

Nuclear Power Plant License Renewal: Denial of Requests to Extend Comment Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule: Denial of requests to extend comment period.

SUMMARY: On July 17, 1990 (55 FR 29043) the Nuclear Regulatory Commission (NRC) published for public comment a proposed rule that would establish the requirements that an applicant for renewal of a nuclear power plant operating license must meet, the information that must be submitted to the NRC for review so that the agency can determine whether those requirements have in fact been met, and the application procedures. The expiration of the comment period was set at October 15, 1990. Three prospective commenters have requested an extension of the comment period by sixty days or more.

The NRC has set the ninety-day comment period (rather than a shorter period) in recognition of the importance and nature of this rulemaking and considers the ninety days allowed to be sufficient. In view of the desirability of developing the final rule as soon as practicable, the requests to extend the comment period are denied.

DATES: The comment period expires October 15, 1990. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Comments may be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be hand-delivered to One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays. Copies of comments received may be examined at the Commission's Public Document Room at 2120 L Street NW (Lower Level), Washington, DC, between the hours of 7:45 am and 4:15 pm Federal workdays.

FOR FURTHER INFORMATION CONTACT: George Sege, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-3917.

SUPPLEMENTARY INFORMATION: Two organizations, Ohio Citizens for Responsible Energy (OCRE) and the Union of Concerned Scientists (UCS) (through Harmon, Curran & Tousley), requested a sixty-day extension. A third organization, Nuclear Information and Resource Service (NIRS), requested an extension of "at least 60 days." These prospective commenters adduce three main arguments for extension. First, they argue that the rule is complex and relies on extensive supporting information, requiring substantial effort and time for study, consideration, and discussions in the preparation of comments. UCS refers, *inter alia*, to "complex analyses of aging reactors" and to the Commission having "taken years to develop its license renewal proposal."

Second, they argue that the importance of the rulemaking warrants allowance of substantial time for public input. UCS asserts that "this rulemaking will affect the level of safety of currently operating plants for the next sixty years." OCRE argues that, "[g]iven the importance of this matter, public comment should be encouraged and accommodated to the maximum extend possible."

Third, NIRS argues that, since licenses won't expire for at least another ten years, there is not a sufficiently urgent need for the rule to make a sixty-day extension unreasonable.

The NRC has considered the issues raised by the prospective commenters. It was precisely the nature of the license renewal issue and the volume of the supporting analyses for the proposed rule that, together with the importance of this rulemaking, led the Commission to allow ninety days, rather than a shorter period, for public comments. The NRC considers ninety days to be adequate. It should be noted that the preparation of the proposed rule has proceeded in full public view, with substantial prior opportunities for public input concerning the issues involved. These earlier opportunities included, in 1986, a request for comments on license renewal policy development (51 FR 40334: November 6, 1986). (The extended comment period closed on February 2, 1987. Summary and analysis of comments in SECY-87-179, issued July 21, 1987.) They also included, in 1988, an Advance Notice of Proposed Rulemaking (53 FR 32919; August 29, 1988), by which the NRC solicited comments on the issues discussed in NUREG-1317, "Regulatory Options for Nuclear Plant License Renewal." (NUREG/CR-5332 presents a summary and analysis of the comments received.) Also in 1988, in an action that was not part of the rulemaking process but relevant as background, the NRC, in cooperation with four professional societies, sponsored an International Nuclear Power Plant Aging Symposium. (Proceedings published as NUREG/CP-0100 in March 1989.)

On November 13 and 14, 1989 the NRC held a public workshop addressing significant technical and policy issues in license renewal. The Federal Register notice announcing the workshop (54 FR 41980; October 13, 1989) included a "Preliminary Regulatory Philosophy and Approach for License Renewal Regulation" and an "Outline of a Conceptual Approach to a License Renewal Rule." Written comments on the questions posed, the statement of regulatory philosophy, and the conceptual rule outline were accepted by the agency up to December 1, 1989. (Proceedings, including a report on associated written comments, published as NUREG/CP-0108 in April 1990).

In determining to proceed with this rulemaking at this time the Commission considered the utilities' need for sufficient time to plan. Utilities have contended that they will require ten to fifteen years to plan and build replacement power plants if the operating licenses for existing nuclear power plants are not renewed. They have also contended that the NRC's technical requirements for license renewal must be established before utilities can reasonably determine whether renewal of their existing operating licenses is economically and technically justified. It is in view of these considerations that the Commission believes that the ninety days allowed to comment on the proposed rule is sufficient and the requests to extend the comment period are denied.

Dated at Rockville, Maryland, this 22d day of August, 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

55 FR 42947
Published 10/24/90
Comment period expires 12/10/90

10 CFR Part 2

RIN 3150-AD73

Options and Procedures for Direct Commission Review of Licensing Board Decisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to provide rules of procedure for direct Commission review of the initial decisions of presiding officers in all formal and informal adjudicatory proceedings. These regulatory changes are necessitated by the Commission's decision to abolish the Atomic Safety and Licensing Appeal Panel (ASLAP or Appeal Panel) which now provides an intermediate level of review of initial decisions of presiding officers in Commission adjudications. The Commissioners of the Nuclear Regulatory Commission will now themselves review initial decisions. The two broad alternatives for a new agency appellate review system are mandatory review, in which the Commission will review initial decisions on the merits on the appeal of a party (as appeal boards presently do) or discretionary review, in which the Commission will consider petitions for review and, in its discretion, take or reject review (as the Commission presently does with respect to appeal board decisions). The Commission seeks public comments on (1) the advantages and disadvantages of these two types of review systems, and (2) necessary or desirable procedural changes incident to either system, e.g., if a discretionary system is chosen, what should be the standard for the Commission taking discretionary review.

DATES: The comment period expires December 10, 1990. Comments received after this date will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Service Branch. Hand deliver comments to: Office of the Secretary, Docketing and Service Branch, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: E. Neil Jensen, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-1634.

SUPPLEMENTARY INFORMATION: Section 189a of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) provides a right to a hearing to any person whose interest may be affected

> [i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c, or 188 [of the Act].

The Commission now implements this statutory requirement through a three-stage process: (1)The presiding officer (usually a licensing board or an administrative law judge) [1] issues an initial decision; (2) a party may appeal the initial decision to an appeal board constituted from the ASLAP for a review on the merits; and (3) the appeal board's decision is then subject to discretionary review by the Commission, either on its own initiative (*sua sponte*) or by petition of a party.

Since the Commission was established in 1975, the bulk of its adjudicatory functions were associated with contested nuclear power reactor construction permit and operating license proceedings. Now, after 15 years of sometimes long and complex administrative litigation, only one such proceeding remains. That proceeding, considering the Seabrook operating license, is now in the appellate stage and is likely to be completed in the next fiscal year.

When the Appeal Board was established by the Atomic Energy Commission in 1969, an intermediate level of review was thought necessary in order to focus the Commissioner's time on important policy matters rather than on routine appeals in the numerous cases then pending. When the Commission was established in 1975, the Appeal Panel was continued for the same reason. In the years since 1969 the Appeal Panel has developed a consistent, well-reasoned, and well-articulated body of case law which assured both safety and the due process rights of parties to nuclear licensing proceedings. The members of the ASLAP must be commended for their sustained, outstanding performance. However, the impending completion of the last major operating license proceeding, as well as the shift in the fundamental character of agency litigation away from licensing proceedings on power plants, present the Commission with an oppo:tunity to restructure the NRC's appellate process and to address some of the criticisms that have been directed to the Commission's isolation from that process over the years by, for example, the Kemeny Commission and the Rogovin Special Inquiry Group. Direct Commission review of licensing board decisions will enable the Commission to increase its direct involvement in agency adjudications, provide earlier regulatory and policy guidance in litigation, and remove some of the overly-judicialized layers of formal appellate procedures that have evloved over the years. Thus the Commission is now faced with the need to devise a procedural mechanism whereby the Commission itself will provide some type of appellate review of licensing board decisions in lieu of that now provided by appeal boards. By its decision to abolish the Appeal panel, the Commission does not intend to abrogate the existing body of appeal board case law and begin writing on a clean slate. To the extend consistent with the procedural rule changes contemplated by this notice, and any other rule change that may be made in the future, existing appeal board precedent may still be cited and relied upon, and will be modified only on a case-by-case basis as issues arise, as any body of case law is modified over time.

I. Options and Procedures for Direct Commission Review of Licensing Board Decisions

In sums, there are two broad options for direct Commission review of initial decisions: discretionary review and mandatory review. Each option can be implemented with a variety of procedures. When using either option under consideration the Commission will need to examine each decision to determine if review at the Commission's own initiative (*sua sponte*) is warranted. The Commission will also be required to decide the merits of certain types of adjudicatory decisions, such as questions certified to the Commission and stay motions. The Commission is not at this time proposing any changes to its standards for interlocutory review or stay motions.

[1] For simplicity, these initial decisions will be referred to as licensing board decisions; however, all initial adjudicatory decisions are covered by this notice of proposed rulemaking.

A. Discretionary Commission Review of Licensing Board Decisions

An appellate system in which the Commission would allow only discretionary review of licensing board decisions, either upon petition of a party or *sua sponte*, is consistent with both the Atomic Energy Act and the Administrative Procedure Act. The advantage of a discretionary review system is that it would enable the Commission to focus its attention only on those cases that meet its standard for granting review.

A disadvantage to a discretionary review system is the possibility that the licensing board's decision might be appealed to a court without any petition for review having been submitted to the agency (which would alert the agency to potential problems with the decision) and in advance of the Commission deciding whether to take review to correct possible problems with the decision. This would occur if (1) the Commission permits the licensing or other action authorized by the licensing board's decision to take place at the time the decision issues [8] and (2) the court does not require the petitioner to file a discretionary petition for review with the agency before coming to court.

The Commission can prevent premature judicial review from occurring by continuing its immediate effectiveness regulation so that the more significant licensing board decisions will not become effective immediately. In addition, NRC's rules of practice could be amended to make explicit that the filing of a petition for review with the Commission is a remedy available before the decision becomes final. The Commission will thereby be creating a potential procedural remedy for a disappointed party which the party will need to exhaust before going to court.

If the Commission adopts a discretionary review system, it will need to establish standards for taking review. At the time the Atomic Safety and Licensing Board was established in 1962 to preside over contested adjudications, the Commission provided for discretionary petitions for review which were evaluated according to the following standard:

> The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to such considerations as the following:
>
> (1) A finding of a material fact is clearly erroneous;
>
> (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (3) A substantial and important question of law, policy or discretion has been raised;
>
> (4) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (5) Any other consideration which the Commission may deem to be in the public interest.

10 CFR 2.762(d) (1962). The Commission's present regulation governing acceptance of petitions for review of appeal board decisions, 10 CFR 2.786(b)(4), is somewhat more restrictive:

> (i) A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy.

This regulation further provides that a petition for review of matters of fact will not be granted absent contrary decisions by the licensing board and the appeal board. However, the Commission has retained supervisory authority to review decisions regardless whether the review standards are met. The advantage of the less restrictive standard is that it gives the Commission greater discretion to review licensing board decisions consistent with its inherent supervisory authority.

B. Mandatory Commission Review of Licensing Board Decisions

If the Commission decides to grant an appeal as-of-right to parties before the licensing board, it will be necessary to review on the merits whatever "errors of fact or law" a party may choose to appeal. *See* 10 CFR 2.762(d)(1). A possible advantage of providing a mandatory review system is that it requires a high degree of Commission involvement because all matters properly appealed would have to be decided by the Commission itself. However, in many routine cases this degree of involvement would be unnecessary. The Commission could retain its present system of allowing licensing to go forward pending a final agency decision if the immediate effectiveness criteria were met and no stay was warranted.

Proposal

The Commission proposes that a discretionary review system be adopted. It will be administratively more efficient in that Commission review would be reserved for only those cases found by the Commission to have a particular problem. Acceptable licensing board decisions would not require further merits review, thus expeditiously ending the adjudicatory proceeding. However, comments are invited on this choice.

The Commission further proposes a review standard like that which applied when the Atomic Safety and Licensing Board was established in 1962. With this revised standard, the review system the Commission has in mind will operate procedurally like the current certiorari Commission review system (10 CFR 2.786). There will be a short petition for review which will need to be filed within a fixed period (perhaps 20 days). If the petition is granted, a schedule will be set for full briefing and the sequence and length of briefs will be established. Decisions on the need for oral argument will be made on a case-by-case basis. Following briefing and any oral argument, a final merits decision will be issued. If the petition for review is denied, and there is no *sua sponte* review, the Licensing Board's decision will become final. Comments are invited on the review standard and review procedures described in this proposed approach.

To assist the Commission in performing its appellate adjudicatory functions, which primarily involves reviewing the licensing board decision and the sometimes voluminous record on which the decision is based and drafting decisions, the Commission will need to use an existing organization or establish a separate opinion writing office. While this is primarily a matter of internal Commission organization, comments are invited on the choice.

J. Transition Plan

Whatever review option is adopted, parties will need to know how cases pending while the final rule is under consideration will be handled. The Commission's transition plan for these cases is as follows.

All appeals and other appellate and related matters (including appeals from initial decisions, interlocutory appeals and motions, certified questions, referrals and petitions for directed certification) pending before an appeal board on the date of publication of this notice will be decided by the appeal board under current regulations. All appeals and other appellate and related matters filed in the period beginning one day after publication of this notice and ending on the effective date of the final rule shall be filed with the Commission, with the Commission assuming the

[8] Under agency practice, finality and effectiveness are not the same: certain licensing board decisions (those comprised within NRC's immediate effectiveness rule (10 CFR 2.764)), can be effective, so the license may be issued, even though the decision is still under Commission review and is therefore not final.

decision role that would otherwise have been performed by the appeal board. However, if a filing is related closely to a matter to be decided by an appeal board, it should be decided by the appeal board even if it is filed after the date of publication of this notice. For example, a motion for stay pending an appeal before the appeal board should be decided by the appeal board even if filed after the date of publication. The appeal board should decide in the first instance whether papers filed with it should be referred to the Commission under this transition plan. The Secretary may refer papers improperly filed with the Commission to an appeal board.

The NRC is publishing in this issue of the Federal Register, in a companion document, a final rule amending certain of its regulations to make them consistent with the transition plan described above.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

Paperwork Reduction Review

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

Regulatory Analysis

Section 189a(1) of the Atomic Energy Act (42 U.S.C. 2239) affords any person whose interest may be affected a right to a hearing

> [i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c, or 188. . . .

The Commission's procedural rules now provide an intermediate layer of administrative appellate review of initial decisions of presiding officers by appeal boards constituted from the ASLAP. However, the Commission has recently determined to abolish the ASLAP. In its place, the Commission intends to establish a mechanism for direct review of decisions of presiding officers by the Commission. The two broad alternative mechanisms being considered by the Commission are a mandatory system of agency appellate review and a discretionary system of agency appellate review. The cost of whatever mechanism is eventually adopted is not expected to be significantly more, in terms of the time and resources needed by the Commission and parties to achieve administrative appellate review of initial decisions, than the present system of appellate review by appeal boards. If a discretionary system is ultimately adopted, the cost for the parties as well as for the Commission in the time and resources needed for appellate review of initial decisions is likely to be less. It is thus apparent that the cost entailed in the promulgation and application of this proposed rule is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

The proposed rule will not have a significant economic impact upon a substantial number of small entities. Many applicants, licensees and intervenors fall within the definition of small businesses found in section 34 of the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121, or the NRC's size standards published December 9, 1985 (50 FR 50241). If a discretionary review system is adopted, the procedural requirements on licensees or intervenors may be reduced because they will not need to fully brief errors of fact or law that they may perceive in a presiding officer's decision prior to seeking judicial review unless the Commission first determines to take review of the decision. Licensees and intervenors will, however, need to file petitions for discretionary review with the Commission if they perceive errors in the presiding officer's decision and intend to seek judicial review. If a mandatory review system is adopted, the burden on licensees and intervenors will be substantially the same as it is at present. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

This proposed rule does not modify or add to systems, structures, components, or design of a production or utilization facility; the design approval or manufacturing license for a production or utilization facility; or the procedures or organization required to design, construct, or operate a production or utilization facility. Accordingly, no backfit analysis pursuant to 10 CFR 50.109(c) is required for this proposed rule.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Nuclear Regulatory Commission is proposing to adopt amendments to 10 CFR part 2. After consideration of public comments, a final rule and notice of final rulemaking will be prepared and published.

55 FR 51728
Published 12/17/90.
Comment period expires 3/4/91

Material Control and Accounting Requirements for Uranium Enrichment Facilities Producing Special Nuclear Material of Low Strategic Significance

See Part 74 Proposed Rule Making

56 FR 46739
Published 9/16/91
Comment period expires 12/2/91

Uranium Enrichment Regulations

See Part 40 Proposed Rule Making

≫ 57 FR 61013
Published 12/23/92
Comment period expires 3/8/93

10 CFR Part 2

RIN 3150-AC07

Availability of Official Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations pertaining to the availability of official records to conform the regulations to existing case law and agency practice. The proposed amendments would have three aspects: It would inform the public of three additional exceptions to a submitter's right to withdraw submitted information; it would provide more specific guidance for marking proprietary information; and it would inform the public of agency practice regarding reproduction and distribution of submitted copyrighted material.

DATES: The comment period expires March 8, 1993. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for those comments received on or before this date.

ADDRESSES: Comments may be mailed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attn: Docketing and Service Branch. Comments may be hand-delivered to Docketing and Service Branch, One White Flint North, 11555 Rockville Pike, Rockville, MD between 7:45 am and 4:15 pm Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Patricia Siemien, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-504-1565.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission is proposing to amend 10 CFR 2.790 to conform its regulations pertaining to the availability of official records to existing case law and agency practice.

Document Withdrawal

10 CFR 2.790(c) currently provides that if the Commission (or an NRC official with delegated authority) denies a request to withhold information from public disclosure which an applicant seeks to have withheld under 10 CFR 2.790(a)(4), the applicant has a right to withdraw the information unless the information has been submitted in a rulemaking proceeding and subsequently forms the basis for a final rule. In this case, the information will not be withheld from public disclosure and will not be returned to the applicant. The NRC is proposing to amend 10 CFR 2.790(c) to add three additional circumstances where information submitted to the NRC will not be returned to the applicant.

The first exception would provide that a document submitted to NRC will not be returned nor may it be withdrawn if it has been made available to or prepared for a Federal Advisory Committee. Section 10(b) of the Federal Advisory Committee Act (FACA) requires that, subject to the FOIA, these records be available for public inspection and copying until the Committee is abolished. Although the Federal Advisory Committee Act permits the closing of Federal Advisory Committee meetings (FACA, sec. 10(d)), all reports received by the committee must be contained in the minutes of the meeting to which they pertain (FACA, sec. 10(c)). The FACA has no provision for withdrawal of a document that has been provided to an advisory committee. In this connection it is important to note that a copy of many of the documents submitted to NRC is provided routinely to the Commission's Advisory Committee on Reactor Safeguards (ACRS) and the Commission's Advisory Committee on Nuclear Waste (ACNW).

The second exception would provide that when information contained in a record submitted to the NRC has been requested pursuant to the Freedom of Information Act (5 U.S.C. 552(b)), the record will not be returned to the submitter. When the NRC receives a FOIA request for a record, that record is "captured" as an agency record. The NRC is then obligated under the FOIA to determine whether to disclose the record or to withhold it, in part or in its entirety, under one of nine exemptions specified in the Act. If the agency discloses the information in a record which a submitter seeks to have withheld from public disclosure, the return of the submitted document provides no protection. Therefore, there generally is no reason for its return. If the record is withheld from public disclosure in response to a FOIA request, the agency is obligated to retain the record for six years under the record retention provisions of its Records Retention and Disposal Schedule, which has been approved by the National Archives and Records Administration. This schedule reflects a decision of the District of Columbia Circuit Court that the statute of limitations for appealing the denial of information requested under the FOIA is six years and ten days from the agency's receipt of the request. (*Spannaus* v. *Department of Justice*, 824 F. 2d (D.C. Cir. 1987)).

The third exception would relate to documents considered in connection with an open Commission meeting held in accordance with the Commission's Sunshine Act regulations, 10 CFR part 9, subpart C. Information discussed at a Sunshine Act meeting is generally subject to the same openness requirements as the meetings themselves. To the extent that proprietary information may be involved in matters discussed by the Commission, 10 CFR 9.104 provides that the meetings may be closed. However, after balancing the interests, if the Commission determines to release the information, there is no reason to provide for its return to the submitter, except for any material that may have been extraneous to the submittal officially before the Commission and that may easily be segregated from the remainder.

Document Marking

The Commission is proposed to amend 10 CFR 2.790(b)(1)(i) to require that any document that contains information which a submitter seeks to have withheld from public disclosure because it contains "Trade secrets and commercial or financial information obtained from a person and privileged

or confidential" (10 CFR 2.790(a)(4)), be clearly marked, on the first page and on every other page that contains this information, to indicate that this type of information is contained within the document. The Commission has a centralized operation for receiving incoming mail relating to its licensing activities. When mail is opened, a determination is made as to whether the information is to be made public. To ensure that information which a submitter seeks to be withheld from public disclosure under 10 CFR 2.790(a)(4) is not placed in the NRC Public Document Room, any document containing this type of information must be clearly marked to indicate that it contains information that the submitter considers company confidential (proprietary) information. The Commission will not be accountable for the public release of a document that is not marked in accordance with the Commission's regulations. Further, to avoid unnecessary delay and wasted effort, if withholding from public disclosure is not intended, any markings that could be misinterpreted as indicating a desire for withholding from public disclosure must be removed before submitting the document to NRC.

Material Subject to Copyright Protection

The rule proposes to redesignate the current 10 CFR 2.790(e) as 10 CFR 2.790(f). The rule proposes a new 10 CFR 2.790(e) that would provide notice to persons submitting copyrighted information to the NRC, that by submitting the material, the submitter authorizes NRC to reproduce sufficient copies of the copyrighted information to carry out its regulatory and public information responsibilities under the Atomic Energy Act of 1954, as amended, and other applicable Federal laws, including the Freedom of Information Act. This authorization includes NRC's reproduction contractor acting within the scope of the reproduction contract with NRC.

Current Commission regulations do not specify how copyrighted material submitted to the NRC in connection with licensing or regulatory activities is handled. Recent submissions of material bearing copyright notices led the Commission's staff to consider this issue. This in turn led to a recognition of the recent changes in U.S. copyright law (Title 17 United States Code), which no longer require a copyright notice on a document in order for that document to be subject to copyright protection. Thus, a much larger quantity of documents may be affected and identifying documents entitled to protection against copying is no longer a matter that the NRC can determine simply by looking for a copyright notice. Because the NRC regularly reproduces and distributes copies of material submitted to the NRC in connection with its licensing and regulatory activities, it has become important to describe explicitly how the Commission will handle material submitted to it that may be subject to protection against copying under the copyright law. Although NRC's copying activities may well be encompassed by the "fair use" provisions of the copyright law, the Commission believes it is preferable to state clearly in its regulations the Commission's policy with respect to copying and distributing documents submitted to the agency.

Specifically, the proposed regulation provides notice that the submission of a document to the NRC in connection with NRC licensing and regulatory activities authorizes NRC to reproduce and distribute copies required for its regulatory and public information responsibilities. Another provision of the proposed rule provides that the submission of a document to the NRC in connection with its licensing or regulatory activities is deemed to be a representation to the NRC by the submitter that the submitter has the authority to submit the document and to authorize the NRC to make copies of the document, whether or not the document bears a copyright notice.

The proposed regulation is designed to assure that copyright restrictions do not limit public access to information submitted to the NRC in connection with its licensing and regulatory activities. The Commission's practice has been to provide broad public access to this information and thus meet its responsibility to keep the public informed of its activities relating to licensing and regulation of nuclear facilities and materials. The Commission believes that making these documents available to the public is essential to satisfy its regulatory and public information responsibilities.

The proposed regulation authorizes only the NRC to copy and distribute the document and does not extend these rights to other persons receiving copies from NRC. The proposed rule provides that if the document bears a copyright notice or is accompanied by an explicit statement that the document is protected under the copyright law, a notice would be placed on the document indicating that the NRC has the authority to copy the document; however, all copyright markings contained on the submitted document would be retained.

The proposed rule states that the NRC would not accept documents submitted in connection with NRC licensing or regulatory activities which bear or are accompanied by a statement that purports to restrict the copying of these documents by the NRC or that indicates that the submitter lacks the authority to permit the NRC to copy and distribute the document. These documents would not be considered by the Commission and would be returned to the submitter unless the Commission has granted a waiver of the regulation. However, with respect to distribution of documents to the general public, only one copy per request will be made of documents bearing a copyright notice or documents accompanied by an explicit statement indicating that the document is protected under the copyright law. In the absence of such an explicit statement, the Commission will continue its customary reproduction practices.

In addition to the provisions included in this proposed rule, the NRC intends to post near each copying machine on NRC premises a copyright notice. This notice will inform users and persons obtaining copies from the NRC that, although NRC has been authorized to copy the material pursuant to 10 CFR 2.790(e), this authorization does not extend to persons obtaining copies or access to documents from NRC and that these persons are responsible for any copyright infringement that may result from their activities.

Submitters of copyrighted information are on notice that, in order to meet its routine regulatory and public information responsibilities under the Atomic Energy Act of 1954, as amended, NRC reproduces sufficient paper and microfiche copies to meet its staff and contract needs, the needs of users of its headquarters Public Document Room (PDR) and Local Public Document Rooms (LPDRs), and to service subscribers of microfiche copies by the Department of Commerce National Technical Information Service (NTIS). As part of its normal practice, the NRC reproduces an average of 35 additional paper copies of written submittals made to the Commission. The copies are dispatched to the NRC staff; one copy is placed in the NRC Public Document Room, and, on occasion, a copy may be provided to an NRC contractor or an organization having an information exchange agreement with the NRC. In many instances, a copy of a document submitted to NRC is also routinely provided to the Advisory Committee on Reactor Safeguards (ACRS) and the Advisory Committee on Nuclear Waste (ACNW). The NRC films each record on

48X, (360-framed, packed) microfiche and currently duplicates 167 microfiche copies, which are made available to the staff, contractors and public users, if any, of the NRC's Nuclear Documents System (NUDOCS). Of these 167 microfiche copies, 71 copies are provided for agency staff use at locations in NRC headquarters and regional offices. Four microfiche copies are placed in the PDR, and one in each of the NRC's 76 power-reactor LPDRs, which are maintained in facilities accessible to the public, such as local and university libraries. An additional microfiche copy is provided to the NTIS, which provides microfiche copies to 20 subscribers in the United States and various foreign countries. Three copies are provided to NRC contractors. One copy is provided to the Institute for Nuclear Power Operations. Ten microfiche copies are maintained for archival reserve and replacement purposes.

The Commission also contracts with a private reproduction company to reproduce copies of records in the PDR collection in response to requests by individuals and organizations, including the processing of standing orders for copies of certain types of public records. Reproduction fees for the contractor service and use of the onsite copying machines are published at 10 CFR 9.35. Billing is handled directly between the contractor and the person or organization ordering the copy and payment is made directly to the contractor. Reference librarians assist users in this interface as needed. In addition, the PDR maintains an electronic on-line system, the Bibliographic Retrieval System (BRS) which permits both retrieval of document citations and subject data and the ordering of desired copies. NRC also maintains an electronic document control system entitled NUDOCS which, for certain documents, has full-text search and retrieval capability. Written submittals to NRC, other than proprietary information, are accessible to the public through the NUDOCS system.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The current regulations in § 2.790 provide submitters of information the right to have the information returned to them upon their request. The amendment proposed in this rule would conform NRC's regulations concerning the availability of official records to existing case law and current agency practice. The proposed amendments would inform the public of three additional exceptions to an applicant's right to withdraw submitted information and of current agency practice concerning the reproduction and distribution of submitted copyright material.

The proposed amendments reflect current agency administrative and procedural practice and would have only minor impact on the benefits or costs associated with the Commission's regulations. Some submitters currently mark documents as specified in the proposed amendments. For others, the proposed amendments shift some responsibility to the submitter for ensuring that privileged material is protected. While actual benefits would accrue to the Commission, they are largely intangible and difficult to quantify. The foregoing constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule clarifies the right of the submitter of information to have that information returned on request and informs the public of the additional exceptions to the right of withdrawal and of agency practice concerning the reproduction and distribution of copyrighted material. The proposed rule does not impose any obligation or have any financial impact on entities including any regulated entities that may be "small entities" as defined by the Regulatory Flexibility Act (5 U.S.C. 601(3)) or under the size standards adopted by the NRC (50 FR 50241; December 9, 1985).

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and, therefore, a backfit analysis is not required for the proposed rule because these amendments do not impose any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR part 2.

PART 2—RULES OF PRACTICES FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 68 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)), sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2012b et seq.).

2. In § 2.790, paragraph (e) is redesignated as paragraph (f); the introductory text of paragraph (b)(1) and paragraph (c) are revised; and a new paragraph (e) is added to read as follows:

§ 2.790 Public inspections, exemptions, requests for withholding.

* * * * *

(b)(1) A person who proposes that a document or a part of a document be withheld in whole or part from public disclosure on the ground that it contains trade secrets, privileged or confidential commercial or financial information shall mark the first page of the document and every other page containing this information "Confidential Information Submitted Under 10 CFR 2.790" or "Proprietary Information Submitted under 10 CFR 2.790", to indicate that it contains information the submitter seeks to have withheld. The person shall also submit an application for withholding accompanied by an affidavit which:

* * * * *

(c)(1) If a request for withholding information under paragraph (b) of this section is denied, the Commission shall notify the applicant of the denial and state the reasons for the denial. The notice of denial will specify a time, not less than 30 days after the date of the notice, when the document will be placed in the Public Document Room. If the applicant requests withdrawal of the document within the time specified in the notice, the document will not be placed in the Public Document Room and will be returned to the applicant unless the information—

(i) Was submitted in a rulemaking proceeding and subsequently forms the basis for a final rule;

(ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;

(iii) Was discussed at an open Commission meeting held in accordance with 10 CFR part 9, subpart C; or

(iv) Is subject to a request submitted pursuant to the Freedom of Information Act.

(2) If a request for withholding information under paragraph (b) of this section is granted, the Commission shall notify the applicant of this determination.

* * * * *

(e)(1) Any person submitting information to NRC to be considered in connection with NRC licensing or regulatory activities, whether or not such information bears a copyright notice, shall be deemed to authorize the NRC, including NRC's reproduction contractor acting within the scope of the reproduction contract with NRC, to reproduce and to distribute fficient copies to carry out the Commission's regulatory and public information responsibilities. Any person submitting such information to NRC shall be deemed to represent to the NRC that such person has the authority to submit such document and the authority to authorize NRC to reproduce and distribute such document and shall hold the Commission harmless from damages that result from the Commission's reproduction or distribution of such documents.

(2) The Commission shall return to the submitter a document bearing or accompanied by a statement purporting to restrict the NRC from copying the document in accordance with this regulation or a document which bears or is accompanied by a statement representing that the submitter lacks the authority to permit NRC to copy and distribute the document. These documents will not be considered by the Commission in the absence of a waiver of this regulation. The Commission may waive the requirements of this paragraph when requested, or by its own initiative, in circumstances the Commission deems appropriate.

* * * * *

Dated at Rockville, MD, this 17th day of December, 1992.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

≫58 FR 31478
Published 6/3/93
Comment period expires 8/17/93

Interim Storage of Spent Fuel in an Independent Spent Fuel Storage Installation; Site-Specific License to a Qualified Applicant

See Part 72 Proposed Rule Making

≫58 FR 34728
Published 6/29/93
Comment period expires 8/27/93

10 CFR Part 2

Section 2.206 Petitions Requesting Institution of a Proceeding To Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper; Workshop

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of workshop.

SUMMARY: The Nuclear Regulatory Commission (NRC) is initiating a review of its regulations and practice governing petitions under 10 CFR 2.206. The first step in that process will be a public workshop where participants from citizen's groups, industry, and government can exchange information on the objectives of the § 2.206 petition process, its effectiveness, and what, if any, revisions should be made to the process. The workshop will be held in Bethesda, Maryland, on July 28, 1993, and will be open to the public.

DATES: Wednesday, July 28, 1993, from 8:45 a.m. to 5:15 p.m.

As discussed later in this notice, the workshop discussions will focus on the issues identified in the background discussion paper developed by the NRC staff. The Commission will accept written comments on the background paper from the public, as well as from workshop participants. Written comments should be submitted by August 27, 1993.

ADDRESSES: Send written comments on the background discussion paper to:

Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. ATTN: Docketing and Service Branch. Hand deliver comments to 11555 Rockville Pike, Rockville, Maryland between 7:45 a.m. and 4:15 p.m. on Federal workdays. The background discussion paper is available from Francis X. Cameron (See FOR FURTHER INFORMATION CONTACT).

The meeting will be held at the Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland. Phone: (301) 652-2000.

FOR FURTHER INFORMATION CONTACT: Francis X. Cameron, Special Counsel for Public Liaison and Waste Management, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 504-1642.

SUPPLEMENTARY INFORMATION:

Background

The § 2.206 petition is the primary formal method for a member of the public to request Commission review of a potential safety problem with an NRC licensed facility, outside of a licensing or rulemaking proceeding. Any person may file a petition under 10 CFR 2.206 to request that the Commission institute a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. This process provides the public with a mechanism to raise issues of concern, which must then be reviewed and addressed by the Commission's staff. Except as specifically provided in the regulations, each § 2.206 petition is reviewed by the appropriate major program Office Director, who must either initiate the requested proceeding or issue a formal Director's Decision providing a specific disposition of the issues raised in the petition within a "reasonable time." If the Director finds that the petition raises a substantial safety question, an enforcement order will be issued or other appropriate action taken, within the Director's discretion.

The § 2.206 Petition Process Review and Workshop

The Commission has approved the initiation of a review of its regulations and practice governing petitions under 10 CFR 2.206. The first step in this evaluation process will be a public workshop where knowledgeable affected interests will share their advice and recommendations concerning the § 2.206 process with the NRC staff. In addition to providing an opportunity for representatives of affected interests to comment on the § 2.206 process, the workshop will also provide an opportunity for participants from citizens' groups, industry, and government to exchange information on the objectives of the § 2.206 process, its effectiveness, and what, if any, improvements could be made to the process. The Commission believes that, whatever the ultimate outcome of the Commission's evaluation of the § 2.206 process, this educational aspect of the workshop will be valuable for all participants in terms of fostering a better understanding of the § 2.206 process.

The NRC has not re-examined the § 2.206 process in any systematic way since this provision was added to the Commission's regulations in 1974. In addition, this process has been the subject of longstanding criticism by citizens' groups and by some members of Congress, primarily because most § 2.206 petitions are denied. Therefore, the Commission believes that it is time to evaluate the § 2.206 process and to determine whether any changes should be made to that process. This evaluation is also consistent with current Commission efforts to enhance public participation in the Commission's decisionmaking process. The purpose of this review is to ensure that the § 2.206 process is an effective, equitable, and credible mechanism for the public to prompt Commission investigation and resolution of potential health and safety problems. In addition, given the reality of shrinking rather than expanding resources, the Commission believes that the evaluation of the § 2.206 process must consider how to achieve a more effective § 2.206 process with equal or fewer resources.

The broad focus of the Commission's review of the § 2.206 process is to determine whether § 2.206 has proven to be an effective mechanism, for not only bringing potential safety problems to the Commission's attention, but also ensuring that the Commission has been responsive in evaluating any such potential safety problems. The review of the § 2.206 process will address such questions as: What is the objective of the § 2.206 process? Is it meeting this objective? How can the § 2.206 process be improved? Is this the most effective mechanism to bring safety problems to the Commission's attention? What other mechanisms exist, such as, for example, the allegation management system, for bringing safety problems to the Commission's attention? How are these different from § 2.206 both in objective and procedure? The workshop will not only focus on these broad issues, but will specifically address the procedures that the Commission uses to evaluate § 2.206 petitions. The staff has identified three broad areas of potential improvement to the § 2.206 process which are discussed in more detail in the background discussion paper: (1) Increasing interaction with the petitioner; (2) Focussing on resolution of safety issues rather than on requesting enforcement action; and (3) Categorizing petitions according to importance of issues raised.

Workshop Format

The workshop format is based on a "roundtable" discussion of the relevant issues by invited participants and representatives of the NRC staff. The workshop discussion will be guided by the workshops issues paper and the agenda set forth below. The NRC has invited representatives from a broad spectrum of affected interests who are knowledgeable on the § 2.206 process. Participants have been invited from citizen groups, industry, state government, and federal agencies. The workshop is open to the general public and time has been set aside for comment and questions from the audience. A member of the NRC staff will serve as the facilitator for the discussion. A complete transcript of the workshop will be taken.

Workshop Agenda

8:45 a.m.
Welcome. Francis X. Cameron, Office of General Counsel, NRC

9 a.m.
Opening remarks. Dr. Ivan Selin, Chairman, Nuclear Regulatory Commission

9:30 a.m.
Workshop format—objectives, agenda, groundrules

9:45 a.m.
Participant introductions—name, affiliation, concerns

10 a.m.
Historical overview of § 2.206. Martin G. Malsch, Deputy General Counsel, Office of General Counsel, NRC

10:30 a.m.
Break

10:45 a.m.
Introductory discussion: Perspectives on the § 2.206 process—What are the objectives of the § 2.06 process? Do the current procedures and process meet these objectives? What is the relationship of the § 2.206 process to other mechanisms for the public to identify safety problems?

11:40 a.m.
Public comment

12 p.m.
Lunch

1 p.m.
Potential revisions to the § 2.206 process: Increased interaction between the NRC staff and the petitioner

1:30 p.m.
Public comment

1:45 p.m.

Potential revisions to the § 2.206 process: Shift the focus of § 2.206 petitions from a specific enforcement action to the exploration and resolution of the underlying safety issue

2:45 p.m.
Public comment

3 p.m.
Break

3:15 p.m.
Potential revisions to the § 2.206 process: Establishing categories of petitions according to significance of the issues raised and specifying different levels of internal review according to these categories

4 p.m.
Public comment

4:15 p.m.
Open agenda item for other issues

4:45 p.m.
Schedule for completion of the evaluation of the § 2.206 process

5:15 p.m.
Closing remarks from participants

Background Discussion Paper

The NRC staff has prepared a background discussion paper which will be provided to each potential workshop participant. Additional copies will be available to members of the public in attendance at the workshop. Copies will also be available in advance from the NRC staff contact identified above. In addition to the comments on the background discussion paper provided at the workshop, the Commission also invites written comments on the issues, as noted under the heading DATES.

Dated at Rockville, MD this 23rd day of June, 1993.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Assistant Secretary of the Commission.