Part 40
(68FR51516)

September 8, 2003

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff

RE: 10 C.F.R. Section 2.808 Motion or, at the Commission's Discretion, 10 C.F.R. Section 2.802 Petition, Responding to 68 Fed. Reg. 51516-51518 (August 27, 2003)

Dear Secretary:

This "motion" is submitted pursuant to 10 C.F.R. Part 2, Subpart H, Section 2.808[1] (Authority of the Secretary to rule on procedural matters), and insofar as this motion might be considered by the Commission to be a "petition," it is submitted pursuant to 10 C.F.R. Part 2, Subpart H, Section 2.802 (Petition for rulemaking) (Attachment A).

MOTION OPTION

This is a 10 C.F.R. § 2.808 motion insofar as the Nuclear Regulatory Commission (NRC), claiming that it was within its discretion, has developed and announced an obligatory "hearing process" —as a de facto regulation (i.e., agency statement of general or particular applicability and future effect)—without first properly issuing a relevant rule, regulation, or order.

Such "hearing process," which was publicly noticed on August 27, 2003 (68 Fed. Reg. 51516-51518), is claimed by the NRC to be a fulfillment of the "notice and opportunity for public hearing" provisions of Section 274o of the Atomic Energy Act of 1954, as amended (the Act) (Attachment B).

This motion addresses the failure of the NRC to properly establish procedures, by way of rule, regulation, or order, for the implementation of the "notice and opportunity for public hearing" requirements in Section 274o of the Act before the announcing the opportunity for such "public hearing."

[1] All Federal Register notices, United States Codes, and Commission regulations cited and quoted herein were found at http://www.gpoaccess.gov/index.html.

Template=SECY-067

SECY-02

This motion addresses the failure of the NRC to properly notice the actual procedures to be used in the proceeding announced by the August 27 Federal Register Notice (FRN).

RULEMAKING PETITION OPTION

This is a 10 C.F.R. 2.802 petition insofar as the NRC chooses not to respond to this submittal as a 10 C.F.R. § 2.808 motion.

In the matter of the August 27 FRN petitioner has exercised due diligence. On August 25, 2003, petitioner submitted a Freedom of Information Act Request (FOIA/PA-2003-0407) to the NRC (Attachment C). In that FOIA request petitioner requested SECY-03-0025 and the April 10, 2003, SRM that responded to SECY-03-0025. There are requests for clarification and information that petitioner has tendered to the NRC, which relate to the August FRN.

This petition would incorporate by reference the August 27 Commission public notice and all NRC records referenced therein or relied upon by the NRC staff or the Commission. Petitioner would reserve the right to supplement this petition, given the procedural discrepancies and missing records that have accrued thus far.

FACTUAL BACKGROUND—CHRONOLOGY

A partial chronology that outlines the development of the "hearing process," which was used by the NRC to implement the "notice and opportunity for public hearing" requirements in Section 274o of the Act, might be helpful:

On October 23, 2002 (ML022980335)[2], the State of Utah submitted to the NRC information regarding how the State of Utah proposed to regulate the groundwater aspects of uranium milling and 11e.(2) byproduct material impoundments in the State of Utah, pursuant to Section 274 of the Act. This October 23 transmittal is mentioned in the August 27 FRN.

Subsequently, the NRC staff presented to the Commission SECY-03-0025 (undated—not publicly available).

On April 21, 2003, in response to SECY-03-0025, the Commission issued a Staff Requirements Memorandum (SRM) (not publicly available).

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[2] NRC accession number. Documents are publicly available electronically at the NRC's Electronic Reading Room at http://www.nrc.gov/NRC/ADAMS/index.html. From this site, access the NRC's Agencywide Document Access and Management System (ADAMS), for files of NRC public documents. For information, contact the NRC Public Document Room at 1-800-397-4209, 301-415-4737, or by e-mail to pdr@nrc.gov.

On July 25, 2003, the NRC staff submitted COMSECY-03-0038 (ML032240263) to the collegial Commission. COMSECY-03-0038 proposed the publication of a public notice, included as an attachment to the COMSECY.

On August 11, 2003, the Commission, issued an SRM (ML032230259). That SRM responded to COMSECY-03-0038 and authorized the publication of the proposed public notice, with corrections.

On August 27, 2003, the NRC staff, for the Commission, published a notice in the Federal Register entitled "State of Utah: NRC Staff Assessment of Utah's Proposed Alternative Standard To Use Utah's Existing Groundwater Regulation in Lieu of the Nuclear Regulatory Commission Regulations." 68 Fed. Reg. 51516-51518.

FACTUAL BACKGROUND—NRC RECORDS

Requestor would now go to the items listed in the above (partial) chronology and present brief characterizations and clarifying quotes.

SECY-03-0025

Apparently, after the NRC staff received the October 23, 2002, request for alternate standards, the NRC staff presented SECY-03-0025 to the Commission. Although the July 23 NRC staff memorandum listed below (COMSECY-03-00238) references SECY-03-0025, that NRC record is at this time inaccessible to the public. COMSECY-03-0038 states:

> As stated in SECY-03-0025, the staff has prepared a Federal Register (FR) notice which provides for a hearing process similar to the process in Subpart H of 10 CFR Part 2, "Rulemaking," to implement the notice and hearing requirement in Section 274o of the Atomic Energy Act, as amended.

SRM Responding to SECY-03-0025

On April 21, 2003, in response to SECY-03-0025, the Commission issued an SRM. The SRM, referenced in COMSECY-03-0038, is also inaccessible to the public. COMSECY-03-0038 states:

> In Staff Requirements Memorandum-SECY-03-0025 dated April 21, 2003, the Commission approved the staff's proposal for processing the State of Utah's request to use alternative standards.

COMSECY-03-0038

The July 25 NRC staff proposal (COMSECY-03-0038) discusses "a hearing process similar to" the procedures laid out Subpart H, and, thus, it discusses NRC conformance with the notice and public hearing requirement in Section 274o:

> As stated in SECY-03-0025, the [NRC] staff has prepared a Federal Register (FR) notice which provides for a hearing process similar to the process in Subpart H of 10 CFR Part 2, "Rulemaking," to implement the notice and hearing requirement in Section 274o of the Atomic Energy Act, as amended. [Emphasis added.]

The July 25 staff proposal also indicates that it is the intent of the NRC staff to commingle the various aspects of the process to be announced by the FRN:

> The [NRC] staff is proceeding with the evaluation of the application and will process the application in parallel with the alternative standards hearing process. [Emphasis added.]

SRM Responding to COMSECY-03-0038

The August 11 SRM states that the purpose of the FRN should be to provide for a "hearing process similar to the process in Subpart H of 10 CFR Part 2 to implement the notice and hearing requirement in Section 274o of the Atomic Energy Act, as amended [emphasis added]."

August 27, 2003, FRN

The August 27, 2003, FRN (cited above) was published in the Federal Register section entitled "Proposed Rules" and announced a "notice and opportunity for public hearing on Utah's proposal to use alternative groundwater protection Standards for uranium mills and 11e.(2) byproduct material disposal facilities." It should be noted that the title of the FRN (see chronology at page 3, above) fails to mention threshold material aspects of the proceeding announced in the FRN.

The August 27 FRN (page 51516, under "Summary") states:

> The Commission has determined that Utah's proposed approach constitutes use of alternative standards. Under section 274o of the Atomic Energy Act, as amended (Act), the Commission must make a determination that such alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and non-radiological hazards associated with such sites, after notice and opportunity for public

hearing. Through this Federal Register notice, the Commission intends to fulfill both the notice and opportunity for public hearing provisions of section 274o of the Act. [Emphasis added.]

The FRN (page 51516, under Supplementary Information: Background) states:

> The NRC had not previously identified any instances in which an Agreement State had proposed alternative standards under section 274o and, therefore, the implementing process for this provision had not been previously developed. Upon receiving the Utah request, the NRC undertook development of an implementing process which included a Commission determination that notice through the Federal Register and a hearing process similar to the process in subpart H of 10 CFR part 2, "Rulemaking," would fulfill the NRC's requirements in section 274o. [Emphasis added.]

And, further, that:

> This notice is being published in fulfillment of the requirement to notice and provide an opportunity for public hearing in this instance.

The FRN goes on to state with respect the "hearing process" and the implementation of Subpart H of 10 C.F.R. Part 2 (page 51518, under "Section 274o Hearing for Alternative Standards"):

> The Commission has approved the use of a hearing process similar to the provisions in subpart H of 10 CFR part 2 for the "hearing" component required by the last paragraph of section 274o. The proposed alternative standards have been subject to the State of Utah rulemaking process which includes opportunity for a public hearing. A hearing process similar to the provisions in subpart H is not intended to duplicate the State's process; rather, it will be used to provide sufficient information for the Commission to make the determination required in section 274o. [Emphasis added.]
>
> Pursuant to the hearing process set forth in subpart H of 10 CFR part 2, the Commission is requesting information from interested members of the public on the alternative standards proposed by the State of Utah of substituting Utah Administrative Code R317-6 for the groundwater protection standards in 10 CFR part 40, Appendix A, Criteria 5B(1) through 5H, 7A, and 13. The NRC staff will evaluate the information received and provide the information to the Commission for a final determination. [Emphasis added.]

INTRODUCTION

According to the August 11 SRM and the August 27 FRN, the Commission would provide for a hearing process "similar to the process in Subpart H." See pages 4 and 5, above.

As will be shown below, the Commission decision, announced in the August 11 COMSECY-03-0038 SRM and the August FRN, does not conform to the requirements of the applicable statutes. The Commission has determined that all SRMs are internal agency documents without "force and effect of law."

Likewise, it will be shown below that the Commission, in establishing a hearing process fulfilling "both the notice and opportunity for public hearing provisions of section 274o of the Act" has failed to properly follow the statutory requirements for the establishment of the such a hearing process. Proper hearing procedures must be properly established, by way of rule, regulation, or order, before being implemented.

It will also be shown below that the hearing process described in the August FRN is vague, contradictory, arbitrary, and without foundation.

Absent proper notice of the "public hearing" procedures to be used by the NRC in hearings required by Section 274o of the Act, it is hard to fathom how a member of the public who has an interest in the present proceeding could respond to the subject FRN.

DISCUSSION

The NRC failed to properly establish procedures, by way of rule, regulation, or order, for the implementation of the "notice and opportunity for public hearing" requirements in Section 274o of the Act before the announcing the opportunity for such "public hearings."

On November 19, 2001, the State of Utah submitted to the NRC an application to amend its Agreement with the NRC, pursuant to Section 274 of the Act (ML013250578). That application has subsequently been variously amended.

In the "process" of reviewing that application, the NRC staff made a determination that the State of Utah was proposing "alternative standards" pursuant to Section 274o of the Act. Such proposed alternative standards are contemplated by Section 274o. FRN at page 51516 (page 4, above).

NRC staff then discovered that they lacked an "implementing process" which contemplated the "notice and opportunity for public hearing" provisions of Section 274o. FRN at page 51516 (page 5, above).

The NRC staff then decided to develop an "implementing process" to fulfill the "notice and opportunity for public hearing" provisions of Section 274o. On August 27 they announced that "hearing process" at the very same time at they announced the opportunity for a "public hearing" using that process. FRN at page 51516 (page 5, above).

A determination was made by the NRC staff to commingle both the evaluation of the State of Utah application and the "alternative standards" hearing with the "development" of the appropriate "process" implementing the "notice and opportunity for public hearing" statutory requirements.

NRC's statements regarding the "development" of the "implementing process" would lead a reasonable person to conclude that the implementing "process" developed by the NRC would apply generally to other public hearings held in fulfillment of the "public hearing" requirements in Section 274o and the review of any applications received by the NRC pursuant to Section 274.

The August FRN states that the hearing process eventually arrived at is "similar" to a 10 C.F.R. Part 2, Subpart H "Rulemaking" and was "the hearing process set forth in subpart H of 10 CFR." FRN at page 51518 (page 5 above).

There is no discussion which shows that the hearing allowed by the FRN is, in fact, "the hearing process set forth in subpart H of 10 CFR."

There is no discussion in the FRN as to what specific implementing "process" was actually "developed." There is no discussion of how and why a hearing process "similar" to the provisions in Subpart H would be sufficient to fulfill the "notice and opportunity for public hearing" requirements set forth in Section 274 of the Act.

It is clear that, in announcing the "hearing process," the NRC avoided announcing the "procedures" for public hearings implementing the provisions of Section 274o of the Act—as in application "process" and hearing "procedures."

* * *

Although on August 11 the NRC issued an SRM approving the hearing "process," this does not suffice. A rule, regulation, or order that has been properly promulgated is required. As the Commission recently stated in CLI-03-06, June 13, 2003 (ML031640114), page 4:

> A Commission SRM is an internal agency pronouncement. It is binding inside the Commission only. It is neither a regulation resulting from notice-and-comment rulemaking under the Administrative Procedure Act nor a Commission adjudicatory decision. It thus lacks the "force and effect of law." [Cite omitted.]

The Act, at 42 U.S.C. Section 2231 (Applicability of administrative procedure provisions; definitions) states, in pertinent part:

> The provisions of subchapter II of chapter 5, and chapter 7, of title 5 [Administrative Procedure Act] shall apply to all agency action taken under this chapter, and the terms "agency" and "agency action" shall have the meaning specified in section 551 of title 5. . . . [Emphasis added.]

Additional applicable provisions of the Administrative Procedure Act (APA) found at 5 U.S.C., Chapter 5 (Administrative Procedure), Subchapter II (Administrative Procedure), are found at Attachment D.

The APA, at 5 U.S.C. Section 552 (Public information; agency rules, opinions, orders, records, and proceedings) states, in part:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
>
> ***
>
> (C) rules of procedure . . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

Section 552(a) goes on to state:

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

Contrary to the statutory requirements in 5 U.S.C. Section 552(a), the NRC did not "separately state and currently publish in the Federal Register for the guidance of the public" the rules of procedure of general applicability that were "developed," by way of rule, regulation, or order, to implement the notice and opportunity for public hearing requirement in Section 274o. The plain language of the APA reveals that there has been no proper notice.

* * *

The NRC has failed to explain exactly how a 274o "notice and opportunity for public hearing" or the proceeding announced on August 27 falls within the "Scope" of Subpart H. 10 C.F.R. §2.800 (Scope of rulemaking) states:

> 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.

If the NRC intended to implement various procedures found in 10 C.F.R. Part 2, Subpart H to fulfill the "notice and opportunity for public hearing" provisions of Section 274o, then the NRC should have properly amended Subpart H, by way of rule, regulation, or order.

The applicable provisions of Section 274o were adopted in 1983 (Pubic Law 97-415, Sec. 19(a), Jan. 4, 1983, 96 Stat. 2078), so the Commission has had ample opportunity to properly promulgate, by way of rule, regulation, or order, any applicable criteria governing a public proceeding contemplated by Section 274o.

It would appear that the Commission is intent on disregarding the plain language of 274o and the applicable sections of the APA quoted above.

* * *

The August 27 FRN, announced that the "Commission made a determination that notice through the Federal Register and a hearing process similar to the process in subpart H of 10 CFR part 2, 'Rulemaking,' would fulfill the NRC's requirements in section 274o." FRN at page 51518 (page 5, above).

This similar-to-Subpart H "hearing process" that the NRC "developed" and announced on August 27 is vague, contradictory, and does not set forth with specificity and particularity the procedures to be used in the public hearing "process," with citations to the specific applicable criteria in Subpart H (or elsewhere).

The FRN does not state in what manner the "hearing process" is similar to the procedures in set forth Subpart H or in what manner it is different from the procedures in set forth in that subpart.

The FRN affirmatively states that "pursuant to the hearing process set forth in subpart H of 10 CFR part 2, the Commission is requesting information from interested members of the public." But, the FRN does not properly lay out the "hearing process set forth in subpart H," with citations referencing the applicable Subpart H "hearing" procedures. FRN at page 51518 (page 5, above).

This is confused further by the fact that Subpart H sets forth criteria at Section 2.804(b)(4), (5), and (6) for "public hearings" under the subpart. However, those procedures are not what is contemplated by the "hearing process" outlined in the August FRN.

The Subpart H "public hearing" requires the designation of a "presiding officer" and a notice announcing the "time and place, and nature of the hearing," "any special directions for the conduct of the hearing," and "such explanatory statement as the Commission may consider appropriate." See 10 C.F.R. § 2.804(b)(4), (5), and (6). The August 27 announces only a notice-and-comment hearing process, without any specific "procedures."

* * *

The August 27 FRN does not affirmatively, explicitly announce that the present proceeding is a 10 C.F.R. Part 2, Subpart H "Rulemaking."

Further, by stating that "pursuant to the hearing process set forth in subpart H of 10 CFR part 2 the Commission is requesting information" the Commission is announcing that the hearing that "would fulfill the NRC's requirements in section 274o" falls within the "Scope" of Subpart H.

As Subpart H currently reads, Subpart H does not include within its "Scope" the opportunity for public hearings pursuant to Section 274o of the Act. See page 8, above.

Clearly, the Commission is placing the implementation of the statutory requirements of Section 274o within the "Scope" of Subpart H, without properly issuing a rule, regulation, or order to that effect.

REQUEST FOR RELIEF

Insofar as the NRC considers this pleading to be a 10 C.F.R. § 2.808 motion, would respectfully move that the applicable August 27 public notice be withdrawn and a subsequent notice propose that the proceeding contemplated by the August 27 notice be held in abeyance or additional time be provided until the issues outlined herein are satisfactorily resolved.

I respectfully move that the Commission properly establish, by way of rule, regulation, or order, procedures implementing the Section 274 requirements for notice and opportunity for public hearing and that this take place prior to the implementation of such procedures.

Note here that the August 27 FRN, under "Environmental Analysis," references two applicable environmental analyses: Final Generic Environmental Impact Statement on Uranium Milling, NUREG-0706, September 1980, and Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Processing, EPA 520/1-83-008, September 1983. The NRC did not indicate in the FRN where a member of the public might obtain a copy of these pertinent National Environmental Policy Act (NEPA) documents. Neither of these two lengthy documents have been placed on ADAMS or the NRC web site, nor are they readily accessible to the public.

I request that these Environmental Impact Statements be made available to the public at the NRC web site and/or on ADAMS as part of the proceeding announced on August 27.

I request additional time for these NRC and EPA NEPA documents to be made accessible convenient for use.

Insofar as the NRC considers this pleading to be a 10 C.F.R. § 2.802 petition, would respectfully request that 10 C.F.R. Part 2, Subpart H, be properly implemented in considering this rulemaking petition.

I also request that the proceeding announced in August 27 FRN be held in abeyance pending the outcome of the rulemaking.

Petitioner reserves the right to supplement this petition upon receipt of a response to the request for related records, FOIA/PA 2003-0407.

Thank you for your prompt consideration of this matter.

Sincerely,

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TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

Subpart H — Rulemaking

§2.800 Scope of rulemaking.

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.

[35 FR 11459, July 17, 1970]

§2.801 Initiation of rulemaking.

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, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

(b) A prospective petitioner may consult with the NRC before filing a petition for rulemaking by writing to the Chief, Rules and Directives Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. A prospective petitioner also may telephone the Rules and Directives Branch on (301) 415-7163 or toll free on (800) 368-5642.

(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:

(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 Administrative Services, Office of Administration, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC Web site, http://www.nrc.gov. 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.

(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.

(g) The Director, Division of Administrative Services, Office of Administration, will prepare on a semiannual 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 at the NRC Web site, http://www.nrc.gov, and/or at the NRC Public Document Room.

[44 FR 61322, Oct. 25, 1979, as amended at 46 FR 35487, July 9, 1981; 52 FR 31609, Aug. 21, 1987; 53 FR 52993, Dec. 30, 1988; 54 FR 53315, Dec. 28, 1989; 56 FR 10360, Mar. 12, 1991; 59 FR 44895, Aug. 31, 1994; 59 FR 60552, Nov. 25, 1994; 62 FR 27495, May 20, 1997; 63 FR 15742, Apr. 1, 1998; 64 FR 48948, Sept. 9, 1999]

§2.803 Determination of petition.

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.

(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:

(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 will be made available at the NRC Web site, http://www.nrc.gov;

(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.

(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 --

(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.

[27 FR 377, Jan. 13, 1962, as amended at 50 FR 13010, Apr. 2, 1985; 64 FR 48948, Sept. 9, 1999]

§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.

(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.

[27 FR 377, Jan. 13, 1962, as amended at 50 FR 13010, Apr. 2, 1985; 50 FR 15865, Apr. 22, 1985]

§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.

§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:

(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.

[39 FR 24219, July 1, 1974]

§2.809 Participation by the Advisory Committee on Reactor Safeguards
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§2.810 NRC size standards.
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Annette L. Vietti-Cook
September 8, 2003

Attachment B

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 23--DEVELOPMENT AND CONTROL OF ATOMIC ENERGY

Division A--Atomic Energy

SUBCHAPTER I--GENERAL PROVISIONS

Sec. 2021. Cooperation with States
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(o) State compliance requirements: compliance with section 2113(b) of this title and health and environmental protection standards; procedures for licenses, rulemaking, and license impact analysis; amendment of agreements for transfer of State collected funds; proceedings duplication restriction; alternative requirements

In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require--

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

(3) procedures which--

(A) in the case of licenses, provide procedures under State law which include-

(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript,

(ii) an opportunity for cross examination, and

(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review;

(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment, which analysis shall include--

(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

(ii) an assessment of any impact on any waterway and groundwater resulting from such activities;

(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

(iv) consideration of the long-term impacts, including decommissioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e)(2) of this title; and

(D) prohibit any major construction activity with respect to such material prior to complying with the provisions of subparagraph (C).

If any State under such agreement imposes upon any licensee any requirement for the payment of funds to such State for the reclamation or long-term maintenance and monitoring of such material, and if transfer to the United States of such material is required in accordance with section 2113(b) of this title, such agreement shall be amended by the Commission to provide that such State shall transfer to the United States upon termination of the license issued to such licensee the total amount collected by such State from such licensee for such purpose. If such payments are required, they must be sufficient to ensure compliance with the standards established by the Commission pursuant to section 2201(x) of this title. No State shall be required under paragraph (3) to conduct proceedings concerning any license or regulation which would duplicate proceedings conducted by the Commission. <u>In adopting requirements pursuant to paragraph (2) of this subsection with respect to sites at which ores are processed primarily for their source material content or which are used for the disposal of byproduct material as defined in section 2014(e)(2) of this title, the State may adopt alternatives (including, where appropriate, site-specific alternatives) to the requirements adopted and enforced by the Commission for the same purpose if, after notice and opportunity for public hearing, the Commission determines that such alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose and any final standards promulgated by the Administrator of the Environmental Protection Agency in accordance with section 2022 of this title.</u> Such alternative State requirements may take into account local or regional conditions, including geology, topography, hydrology and meteorology. [Emphasis added.]

(Aug. 1, 1946, ch. 724, title I, Sec. 274, as added Pub. L. 86-373, Sec. 1, Sept. 23, 1959, 73 Stat. 688; amended 1970 Reorg. Plan No. 3, Secs. 2(a)(7), 6(2), eff. Dec. 2, 1970, 35

F.R. 15623, 84 Stat. 2086; Pub. L. 95-604, title II, Sec. 204(a)-(e)(1), (f), Nov. 8, 1978, 92 Stat. 3036-3038; Pub. L. 96-295, title II, Sec. 205, June 30, 1980, 94 Stat. 787; Pub. L. 97-415, Sec. 19(a), Jan. 4, 1983, 96 Stat. 2078; renumbered title I and amended Pub. L. 102-486, title IX, Sec. 902(a)(6), (8), Oct. 24, 1992, 106 Stat. 2944.)
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Attachment C

FOIA/PA REQUEST
Case No. 2003-0407
Date Rec'd. 8-25-03
Action Off: Rammling
Related Case:

From: uid no body <nobody@nrc.gov>
To: <foia@nrc.gov>
Date: Sun, Aug 24, 2003 10:27 PM
Subject: WWW Form Submission

Below is the result of your feedback form. It was submitted by

() on Sunday, August 24, 2003 at 22:27:20

FirstName: Sarah

LastName: Fields

Company/Affiliation: Uranium Recovery Education Project

Address1: P.O. Box 143

Address2:

City: Moab

State: UT

Zip: 84532

Country: United_States

Country-Other:

Email: smfields@moci.net

Phone:

Desc: SECY-03-0025 and SECY-03-0025 SRM, including any attachments.

FeeCategory: Educational

MediaType:

FeeCategory_Description:

Expedite_ImminentThreatText:

Expedite_UrgencyToInform: on

Expedite_UrgencyToInformText: This SECY and SRM are referenced in COMSECY-03-0038, which includes a draft FRN for publication. The requested records bear directly on a notice and comment proceeding that is imminent and decisions by the Commission re the scope and procedures related to this immenient proceeding. There is an urgency because the NRC has not made the SECY and SRM publicly available and these requested records will have a direct impact on public's involvement in the proposed "hearing."

Waiver_Purpose:

Waiver_ExtentToExtractAnalyze:

Waiver_SpecificActivityQuals:

Waiver_ImpactPublicUnderstanding:

Waiver_NatureOfPublic:

Waiver_MeansOfDissemination:

Waiver_FreeToPublicOrFee:

Waiver_PrivateCommericalInterest:

TITLE 5--GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

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Sec. 551. Definitions

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

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(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

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(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

***

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "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, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94-409, Sec. 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103-272, Sec. 5(a), July 5, 1994, 108 Stat. 1373.)

Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

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(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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Sec. 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection. [Emphasis added.]

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

Sec. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence--

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

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(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may--

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub. L. 94-409, Sec. 4(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-251, Sec. 2(a)(1), Mar. 27, 978, 92 Stat. 183; Pub. L. 101-552, Sec. 4(a), Nov. 15, 1990, 104 Stat. 2737.)

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