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NUCLEAR REGULATORY COMMISSION

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10 CFR Part 2

IN: 3150 - AD77

OFFICE OF SECRETARY  
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Interim Procedures for Agency Appellate Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This final rule puts into place a transition plan which the Nuclear Regulatory Commission (NRC) is adopting to handle all appeals from initial decisions of presiding officers in all formal and informal agency adjudications, and certain other appellate and related matters, which are filed from the day after the date of publication of this final rule until the effective date of a final rule to be issued pursuant to the Commission's ongoing rulemaking proceeding for establishing procedures for direct agency appellate review by the Commission. A notice of proposed rulemaking in that proceeding is being published in this issue of the Federal Register. As that proposed rule explains, a new procedural system for direct appellate review by the Commission is necessitated by the Commission's recent decision to abolish the Atomic Safety and Licensing Appeal Panel which heretofore has provided an intermediate level of appeal as of right from initial decisions. The transition plan implemented by this final rule provides that, with certain exceptions, the Commission, rather than an appeal board, will provide agency

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appellate review for appellate matters filed in the interim period between the day after the date of this final rule and the effective date of a final appellate review rule. The Commission review, in this interim period, will follow existing procedures. Specific appellate matters which are pending before appeal boards on the date of this final rule will be decided by the appeal boards.

EFFECTIVE DATE: (One day after date of publication)

FOR FURTHER INFORMATION CONTACT: E. Neil Jensen, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-492-1634.

SUPPLEMENTARY INFORMATION: In a companion document published in this issue of the Federal Register, the NRC announces a proposed rulemaking to establish procedures for direct review of initial decisions of presiding officers in all formal and informal agency adjudications by the commissioners of the NRC. Direct review by the commissioners will replace review by appeal boards constituted from the Atomic Safety and Licensing Appeal Panel. The Commission has decided to abolish the Appeal Panel. The notice of proposed rulemaking proposes to adopt a discretionary system of Commission review and invites comments on that choice and on what particular procedures should be adopted.

This final rule implements the plan the Commission is adopting to provide for an orderly transition from appellate review by appeal boards to appellate review by the Commission. The Commission has determined that an orderly

transition will be assisted by the commissioners taking to themselves, with certain exceptions, 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) filed in the period beginning one day after publication of this document and ending on the effective date of a final rule. The Commission review during this interim period will follow existing procedures. Thus the present right of parties to a mandatory review on the merits of initial decisions will not be affected. All appeals and other appellate and related matters pending before an appeal board on the date of publication of this notice will be decided by the appeal board under current regulations.

This transition plan will enable appeal boards to conclude their work on pending appeals without interruption by new ones. In addition, by allowing appeal boards to complete all pending matters the work already expended on these matters will not be lost.

The Commission has allowed for an exception to the requirement that all new appellate matters be filed with it. If a filing is closely related to a matter currently pending before an appeal board, it should be decided by the appeal board even if it is filed after the date of publication of this final rule. For example, a motion for stay pending an appeal on a matter that is pending before an appeal board should be decided by the appeal board even if filed after the effective date of this final rule. Under this exception the Commission expects the appeal board to continue performing its currently pending appellate functions in the Seabrook operating license proceeding.

This will conserve agency resources by assuring that an appeal board will be able to make use of its familiarity with a case to decide pending matters connected with the case. The appeal board is to decide in the first instance whether papers filed with it should be referred to the Commission under this transition plan.

The final rule being issued today amends certain of the Commission's regulations to make them consistent with this transition plan. Thus, the authorization for appeal boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission in 10 CFR 2.785 and 2.1255 is revoked with respect to new appellate matters. 10 CFR 2.788 is amended to make clear that stay requests in the interim period are not to be filed with an appeal board unless closely related to a matter currently pending before the appeal board. Similarly, 10 CFR 2.1015 is amended to make clear that appeals governed by that regulation are to be filed with the Commission and not with an appeal board.

The Commission's procedure in 10 CFR 2.786 for filing a petition for review of an appeal board decision or action with the Commission remains effective for cases pending before an appeal board on the date of publication of this notice. Such a petition for review will be superfluous and will not be available to a party whose appeal is heard by the Commission under the transition plan. However, the Commission's procedure at § 2.771 for petitioning for reconsideration of a Commission decision remains effective.

Because this amendment preserves the right of parties to a merits review of initial decisions of presiding officers and relates solely to matters of agency practice, notice of proposed rulemaking and public procedures thereon are unnecessary and the amendment may be made effective upon publication without deferring effectiveness for 30 days.

#### Environmental Impact: Categorical Exclusion

The NRC has determined that this final 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 final regulation.

#### Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0136.

#### Regulatory Analysis

The Commission needs a plan to achieve an efficient transition between agency appellate review by appeal boards and agency appellate review by the Commission. The transition plan put in place by this rule change will have no effect on parties other than to change the forum for appellate review of initial decisions in affected proceedings. The transition plan will, however, enable appeal boards to complete their work on existing cases without being interrupted by new appeals. By leaving all pending appellate matters for

resolution by appeal boards, this transition plan also prevents any potential loss in the efforts already expended by an appeal board. Thus the cost entailed in the promulgation and application of this final rule is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this rule.

#### Backfit Analysis

This 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 is required for this final 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. 552 and 553, the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Part 2:

PART 2 - RULES OF PRACTICE 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, 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, 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. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 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 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 2.785 is amended to add the following note:

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

\* \* \* \* \*

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding for establishing procedures for direct Commission review of initial

decisions, i.e., until the effective date of a final rule, the authorization of Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission is restricted as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this regulation to the contrary.

(a) Appeal boards are authorized to decide 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 on which this final rule is published in the Federal Register)

(b) Appeal boards are not authorized to decide appeals and other appellate and related matters filed in the period beginning \_\_\_\_\_ (one day after publication of this final rule in the Federal Register) and ending on the effective date of a final rule in the rulemaking proceeding referred to above, unless a filing is closely related to a matter currently pending before an appeal board. Appeals and other appellate and related matters filed in this period will be decided by the Commission under current regulations. The appeal board should decide in the first instance whether papers filed with it should be referred to the Commission under the terms of this Note.



3. Section 2.788 is amended to add the following note:

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

\* \* \* \* \*

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding establishing procedures for direct Commission review of initial decisions, requests for stays of decisions of presiding officers shall not be filed with an Atomic Safety and Licensing Appeal Board in the period beginning \_\_\_\_\_ (one day after publication of this final rule in the Federal Register) unless a stay request is related closely to a matter currently pending before an appeal board.

4. Section 2.1015 is amended to add the following note:

§ 2.1015 Appeals.

\* \* \* \* \*

NOTE: Any appeal taken pursuant to the terms of this regulation after \_\_\_\_\_ (the date on which this final rule is published in the Federal Register) 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.

5. Section 2.1255 is amended to add the following note:

§2.1255 Review by the Atomic Safety and Licensing Appeal Board.

\* \* \* \* \*

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding for establishing procedures for direct Commission review of initial decisions, i.e., until the effective date of a final rule, the authorization of Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission is restricted as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this regulation to the contrary.

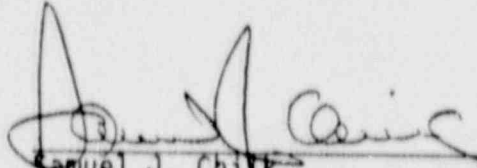
(a) Appeal boards are authorized to decide all appeals and other appellate and related matters (including appeals from initial decisions, interlocutory appeals and motions, certified questions, referrals and petitions for directed certification) pending before an appeal board on \_\_\_\_\_ (the date on which this final rule is published in the Federal Register)

(b) Appeal boards are not authorized to decide appeals and other appellate and related matters filed in the period beginning \_\_\_\_\_ (one day after publication of this final rule in the Federal Register) and ending on the effective date of a final rule in the rulemaking proceeding referred to above unless a filing is closely related to a matter currently pending before an appeal board. Appeals and other appellate and related matters filed in this period will be decided by the Commission under current regulations. Appeal boards should decide in the

first instance whether papers filed with it should be referred to the Commission under the terms of this Note.

Dated at Annapolis, Maryland this 18<sup>th</sup> day of Oct, 1990.

For the Nuclear Regulatory Commission.

  
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Samuel J. Chirk,  
Secretary of the Commission