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**Attachments:** [NEI Comments on NRC Categorical Exclusion ANPR \(07-21-2021\).pdf](#)

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Dear NRC Rulemakings and Adjudications Staff,

Please find attached to this email the Nuclear Energy Institute's comments submitted in response to the NRC's Categorical Exclusions From Environmental Review; Advance Notice of Proposed Rulemaking; Request for Comment, 86 Fed. Reg. 24514 (May 7, 2021). Please confirm receipt of these comments.

Please feel free to contact me by email or phone if you have any questions regarding this submittal. We appreciate the opportunity to submit comments.

Regards,

Martin O'Neill



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July 21, 2021

Secretary of the Commission  
ATTN: Rulemakings and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

*Submitted Via Rulemaking.Comments@nrc.gov*

**Subject:** NEI Comments in Response to Advance Notice of Proposed Rulemaking – Categorical Exclusions From Environmental Review [Docket ID: NRC-2018-0300] [RIN 3150-AK54]

The Nuclear Energy Institute (NEI)<sup>1</sup> is pleased to provide comments in response to the Nuclear Regulatory Commission's (NRC) May 7, 2021 Advance Notice of Proposed Rulemaking (ANPR), which seeks public input on the NRC's plan to amend its regulations on categorical exclusions (10 CFR 51.22) for licensing and other agency actions subject to review under the National Environmental Policy Act (NEPA).<sup>2</sup> Under NEPA, agencies may issue regulations specifying categorical exclusions, i.e., categories of actions that normally do not have significant effects on the human environment, either individually or cumulatively. Absent special circumstances, such actions do not require agency preparation of an environmental assessment (EA) or an environmental impact statement (EIS). As the ANPR explains, "[c]ategorical exclusions streamline the NEPA process, saving time, effort, and resources by eliminating the preparation of EAs for NRC regulatory actions that have no significant effect on the human environment."<sup>3</sup>

**A. Relationship of the Proposed Rulemaking to the NRC's Ongoing Efforts to Further Streamline and Improve Its Environmental Review Process**

NEI wishes to commend the NRC on its numerous initiatives to further streamline and enhance the NRC's environmental review process, as described in recent SECY papers.<sup>4</sup> The efficiency of that process is critical to conducting timely and predictable licensing proceedings for both currently-operating nuclear facilities (e.g., initial and subsequent license renewals) and proposed new facilities (e.g., advanced reactors). Through the Environmental Center of Expertise (EnvCOE) in the Office of Nuclear Materials Safety and Safeguards, the NRC staff has been implementing some process-related

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<sup>1</sup> The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the U.S., nuclear plant designers, major architect/engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

<sup>2</sup> Categorical Exclusions From Environmental Review; Advance Notice of Proposed Rulemaking; Request for Comment, 86 Fed. Reg. 24514 (May 7, 2021) (ANPR).

<sup>3</sup> *Id.* at 24515.

<sup>4</sup> See SECY-20-0020, SECY-20-0065, and SECY-20-0001.

improvements, like those identified in the NEI's March 2020 white paper,<sup>5</sup> in the context of individual licensing actions.<sup>6</sup> Although these measures are yielding tangible benefits in some proceedings, there is still room for further improvement, particularly if the NRC is to meet (and ideally beat) its generic schedule milestones in both reactor and fuel cycle facility licensing (e.g., fuel fabrication, uranium recovery) proceedings.<sup>7</sup>

In addition to these important process improvements, the NRC staff is pursuing potential modifications to its Part 51 regulations and related guidance documents. The current ANPR is one of multiple efforts on this front. Other key activities include the staff's:

- planned update to the Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants (NUREG-1437) and Appendix B (Table B-1) of 10 CFR Part 51 to, among other things, address a perceived ambiguity and clarify that the analyses and findings in the GEIS and Table B-1 apply to subsequent (second) license renewal environmental reviews;<sup>8</sup>
- development of a technology-inclusive GEIS for advanced nuclear reactors (ANR) and a related rulemaking to codify the GEIS findings, as directed by the Commission in SRM-SECY-20-0020;
- issuance of a rulemaking plan (SECY-21-0001) that requests Commission approval to undertake a rulemaking that would streamline and enhance the flexibility of the agency's NEPA review process, update certain provisions in Part 51 to reflect current NRC staff practices as well as consideration of the recent changes to CEQ regulations, and provide greater alignment between the environmental review process and the safety reviews for advanced reactors that may be conducted under the NRC's future 10 CFR Part 53 regulations.
- publication of Interim Staff Guidance (ISG) document COL-ISG-029 to assist the NRC staff in determining the scope and scale of environmental reviews of micro-reactor license applications;
- updating and revising the environmental review guidance for nuclear reactors (NUREG-1555, Revision 1 and NRR Office Instruction LIC-203); for fuel cycle and materials licensing actions (NUREG-1748); and for non-power production and utilization facilities (NPUFs) (NUREG-1537, Parts 1 and 2 and related interim guidance).

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<sup>5</sup> See NEI, *Recommendations for Streamlining Environmental Reviews for Advanced Reactors* (Mar. 2020) (ML20065N155). Such process improvements include early and more effective use of the pre-application process; an enhanced environmental audit process that includes more timely delivery of NRC questions/audit needs and results in comprehensive audit summary reports; earlier and better-defined site tours; and increased use of requests for confirmation of information in lieu of formal requests for additional information. The NRC also has used customized electronic reading rooms to expedite reviews of environmental documents. EnvCOE staff also are taking specific measures to reduce the length of NRC environmental review documents by reorganizing those documents to avoid redundancy and repetition, and by making increased use of use of tiering and incorporation by reference.

<sup>6</sup> See, e.g., NRC, "Best Practices and Lessons Learned from Review of the Clinch River Nuclear Site Early Site Permit Application" (Apr. 2021) (ML19190A078); NRC, "Draft Pre-application Engagement to Optimize Advanced Reactors Application Reviews" (May 2021) (ML21014A267).

<sup>7</sup> See NRC, "Generic Milestone Schedules of Requested Activities of the Commission," <https://www.nrc.gov/about-nrc/generic-schedules.html>.

<sup>8</sup> See NRC, "Environmental Impact Statement Scoping Process Summary Report – Review and Update of the Generic Environmental Impact Statement For License Renewal of Nuclear Plants (NUREG-1437)" (June 2021) (ML21039A574).

As one element of the NRC's multi-pronged strategy to update and enhance its environmental review process, the ANPR should be viewed in that broader context. These activities have multiple drivers, including Title 41 of the FAST Act (FAST-41)<sup>9</sup>, various Executive Orders, the 2019 Nuclear Energy Innovation and Modernization Act (NEIMA)<sup>10</sup>, the Council on Environmental Quality's (CEQ) July 2020 NEPA regulation updates<sup>11</sup>, and the NRC's self-initiated Transformation Initiative. These NRC activities also are consistent with the objectives of several proposed bills introduced in Congress that are aimed at accelerating new reactor siting and licensing, partly through enhancements to the NRC's environmental review process. Those bills include the Modernize Nuclear Reactor Environmental Reviews Act (H.R. 1559), which, among other things, directs the NRC to consider the possible expanded use of categorical exclusions, including mitigated categorical exclusions, categorical exclusions of other agencies, and new categorical exclusions that could be applied to nuclear reactor licensing actions. Other relevant proposed legislation includes the American Nuclear Infrastructure Act of 2021 (S. 2373), Nuclear Licensing Efficiency Act (H.R. 1578), Advanced Nuclear Deployment Act (H.R. 1746), and the McKinley-Schrader Clean Energy Future Through Innovation Act.

## **B. Comments on NRC's Specific Proposed Revisions to 10 CFR 51.22**

NEI agrees that amending 10 CFR 51.22(c) in the manner proposed by the NRC "would increase efficiencies and consistency in the implementation of categorical exclusions and ensure applicable NRC regulatory actions are completed in a more efficient, effective, and timely manner."<sup>12</sup> Section IV of the ANPR list 15 types or examples of proposed revisions to 10 CFR 51.22(c), all of which NEI supports. NEI offers the following comments with regard to those proposed revisions.

### **1. Reorganization and Consolidation of Categorical Exclusions**

The NRC's first proposed revision is to reorganize the list of categorical exclusions to eliminate redundancy and add clarity. NEI fully supports this objective, which is consistent with the "Clarity" pillar of the NRC's Principles of Good Regulation.<sup>13</sup> It also is consistent with one of the major goals of the CEQ's 2020 NEPA regulations: to reduce duplication and promote greater clarity and ease of use through consolidation, reordering, and reorganization.<sup>14</sup>

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<sup>9</sup> 42 USC 4370m-4370m-12

<sup>10</sup> Nuclear Energy Innovation and Modernization Act (NEIMA), P.L. 115-439, 132 Stat. 5565 (Jan. 14, 2019), available at [www.congress.gov/bill/115th-congress/senate-bill/512](http://www.congress.gov/bill/115th-congress/senate-bill/512).

<sup>11</sup> CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act; Final Rule, 85 Fed. Reg. 43304 (July 16, 2020) (2020 CEQ Rule). In accordance with President Biden's Executive Order 13990, issued on January 21, 2021, the CEQ is now conducting a comprehensive review of the 2020 Rule for consistency with the nation's environmental, equity, and economic priorities, and intends to amend the 2020 CEQ Rule. *See* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154 (June 29, 2021).

<sup>12</sup> ANPR, 86 Fed. Reg. at 24515.

<sup>13</sup> NRC, "Values – Principles of Good Regulation", <https://www.nrc.gov/about-nrc/values.html> ("Regulations should be coherent, logical, and practical. There should be a clear nexus between regulations and agency goals and objectives whether explicitly or implicitly stated. Agency positions should be readily understood and easily applied.")

<sup>14</sup> 2020 CEQ NEPA Rule, 85 Fed. Reg. at 43315.

As currently written, 10 CFR 51.22(c) is disjointed. This may reflect the regulation's periodic amendment and expansion over the years. NEI recommends that the NRC could improve the clarity and application of Section 51.22(c) by resequencing and consolidating the individual categorical exclusions (both current and proposed). In doing so, the NRC might consider using a topical approach, with appropriate subheadings or titles in the regulation, similar to the approach used by DOE in its regulations.<sup>15</sup> The table contained in **Attachment 1** to this letter bins the current and newly-proposed categorical exclusions into the following topical categories:

- Agency Operations
- NRC Rulemaking and Guidance Development Activities
- Section 274 Agreements with States – Ministerial Actions
- Exemptions
- Administrative License Amendments (All License Types)
- Licensing Actions and Other Approvals Involving Part 50/52 Reactor Licenses
- Licensing Actions and Other Approvals Involving Materials Licenses
- Approvals Related to Decommissioning Funding Assurance, Decommissioning, License Termination, and Low-Level Waste Disposal
- Radioactive Materials/Spent Fuel Storage and Transportation
- Other Licensing Actions/Approvals

Attachment 1 provides a suggested organizational framework (not an exhaustive list) for the NRC's consideration as it seeks to streamline 10 CFR 51.21(c) and also add new categorical exclusions.

2. Basing Categorical Exclusions on Authorized Activities Rather than Form of Approval

The NRC also proposes to revise 10 CFR 51.22(c) to ensure that categorical exclusions are based on the authorized activities rather than the administrative and legal differences between the different forms of NRC approvals (e.g., license amendments, exemptions and rulemakings). NEI views this approach as both logically and legally sound, given that the principal purpose of NEPA is to ensure that federal agencies analyze the potential *environmental effects* of their decisions. Thus, if the NRC determines that a particular activity or type of action will not normally have significant individual or cumulative effects on the environment, then the specific form of approval is immaterial.

3. Clarification of References to No Significant Hazards Consideration

As noted in the ANPR, the NRC plans to remove or clarify "no significant hazards considerations" criteria in existing categorical exclusions because these criteria are related to a process for reactor license amendments, not environmental reviews, and are not relevant to fuel cycle facility/materials licenses. NEI concurs that the no significant hazards considerations criteria are specific to NRC reactor license amendments. Specifically, 10 CFR 50.92(c) implements a statutory directive, known as the "Sholly

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<sup>15</sup> See 10 CFR 1021, Subpt. D, App. B. DOE's Appendix B categorical exclusions are divided into seven groups relating to (1) facility operation; (2) safety and health; (3) site characterization, monitoring, and general research; (4) electric power and transmission; (5) conservation, fossil, and renewable energy; (6) environmental restoration and waste management; and (7) international activities.

Amendment” to the AEA, authorizing the Commission to issue immediately-effective reactor license amendments upon a no significant hazards consideration determination.

4. Consolidation of Exemption-Related Categorical Exclusions

NEI also supports the NRC’s proposal to consolidate categorical exclusions for exemptions into one categorical exclusion. At present, 10 CFR 51.22(c) addresses exemptions in two separate subsections—(c)(9) and (c)(25), and cites three of the same criteria in both subsections. For example, as noted in the ANPR, the NRC could move the criterion for exemptions related to the installation or use of a facility component located within the restricted area to avoid this type of redundancy.

5. Proposed New Categorical Exclusions for Other Types of NRC Administrative Approvals

Several of the proposed revisions involve what the ANPR describes as “administrative” acts that do not have the potential to affect the environment, and which thus meet the criterion for a categorical exclusion. The ANPR identifies a number of additional agency actions (several of which relate to decommissioning and license termination) that are fundamentally administrative in nature for inclusion in 10 CFR 51.22(c). They include:

- NRC actions during decommissioning that do not authorize changes to physical structures such as changes to administrative, organizational, or procedural requirements;
- license terminations for which no construction or pre-construction activities have occurred, or where all decommissioning activities have been completed and approved and license termination is a final administrative step;
- issuance of new, amended, revised, and renewed certificates of compliance for dry cask designs used for spent fuel storage and transportation;
- NRC’s formal concurrence, under Section 274c. Atomic Energy Act of 1954, as amended (AEA), on termination by an Agreement State of licenses for AEA Section 11e.(2) byproduct material where all decommissioning activities have been completed and approved;
- approval of relief and alternative requests under 10 CFR 50.55a, “Codes and standards”;
- authorizations to revise emergency plans for administrative changes such as reduction in staffing; and
- actions authorizing licensees to delay implementation of certain new NRC requirements when such requirements previously were found to not result in environmental impacts.

NEI agrees that the foregoing actions should be subject to categorical exclusions given their ministerial nature and lack of any associated environmental impacts, as demonstrated by ample operating and decommissioning experience and prior NRC approvals.

6. Categorical Exclusion for Decommissioning Funding Plan Approvals for Materials Licensees

NRC proposes revising 10 CFR 51.22(c) to categorically exclude approvals of decommissioning funding plans (DFP) submitted under 10 CFR Parts 30, 40, 70, and 72. NEI supports this proposed revision because such approvals are ministerial in nature and involve no environmental impacts. The revision also will lend greater clarity to the DFP approval process. NEI notes that the current lack of a clearly-worded categorical exclusion for DFP approvals for materials licensees has engendered some confusion

within the industry. For instance, for some materials licensees (e.g., Part 70), the NRC has invoked a current categorical exclusion when approving initial DFPs or DFP updates. For Part 72 licensees, it has issued EAs and Finding of No Significant Impact (FONSI) determinations that are essentially pro forma in nature.<sup>16</sup> The proposed revision would eliminate this inconsistency by providing a categorical exclusion that applies uniformly to all such DFP approvals.

7. Categorical Exclusion for Alternative Waste Disposal Procedure Approvals under 10 CFR 20.2002

In the ANPR, the NRC also mentions potential revisions to categorically exclude approvals for alternative waste disposal procedures for reactor and materials licenses in accordance with 10 CFR 20.2002, "Method for obtaining approval of proposed disposal procedures." NEI supports modifications that would simplify the 20.2002 approval process for both reactor and materials licensees, including the creation of a new categorical exclusion that eliminates the need to prepare an EA. However, NEI notes that current NRC staff practice and guidance would need to be modified to reflect such a categorical exclusion. NRC's April 2020 guidance on 10 CFR 20.2002 disposal requests (also referred to as alternative disposal requests, or ADRs), states that "NRC approvals of ADRs may require the preparation of an EA."<sup>17</sup> That guidance does, however, state that "Section 20.2002 approvals for materials licensees may fall within the scope of the categorical exclusions (CATEXs) at § 51.22(c)(14) or § 51.22(c)(11), because § 20.2002 approvals for materials licensees are completed by license amendment and those CATEXs apply to amendments to materials licenses."<sup>18</sup> Consistent with our comments above, if based on its experience with prior 20.2002 approvals the NRC concludes that such approvals have no significant environment effects, then it should establish a categorical exclusion, irrespective of the specific form of NRC approval or the type of license held by the waste generator.

In establishing any 20.2002-related categorical exclusion, NEI encourages the NRC to consider relevant Agreement State approvals (and underlying analyses) that already authorize ADRs pursuant to applicable state laws and NRC-compatible state regulations (e.g., via 20.2002-equivalent regulations or exemptions). For example, there are several NRC reactor licensees that have been safely disposing of very low-level waste (VLLW) onsite or in an offsite solid waste disposal facility for many years pursuant to valid Agreement State authorizations. If the NRC decides to make such ADRs subject to a categorical exclusion, it should appropriately consider this operating experience (i.e., the safe disposal of VLLW without adverse environmental impacts pursuant to valid Agreement State authorizations).

**C. Responses to NRC's Additional Questions in the ANPR**

***Question (1): Are there licensing and regulatory actions that do not or have not resulted in environmental impacts that the NRC should consider as a categorical exclusion?"***

**NEI Response:** NEI provides two specific recommendations in response to this question. First, consistent with current CEQ regulations, we recommend that the NRC evaluate other agencies'

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<sup>16</sup> See, e.g., Environmental Assessments and Findings of No Significant Impacts of Independent Spent Fuel Storage Facilities Decommissioning Funding Plans, 85 Fed. Reg. 76614 (Nov. 30, 2020).

<sup>17</sup> See NRC, Division of Decommissioning, Uranium Recovery, and Waste Programs, "Guidance for the Review of Proposed Disposal Procedures and Transfers of Radioactive Material Under 10 CFR 20.2002 and 10 CFR 40.13(a)" at 23 (Apr. 2020) (ML18296A068).

<sup>18</sup> *Id.* n. 31.

categorical exclusion practices for items that may be applicable to the NRC's activities, and consider including a provision in 10 CFR 51.22 that allows the NRC to adopt the categorical exclusions of other agencies when warranted.<sup>19</sup> For example, DOE has considered the following activities, listed in 10 CFR Part 1021, Subpart D, to fall under categorical exclusions:

- B1.13, Pathways, short access roads, and rail lines
- B4.6, Additions and modifications to transmission facilities
- B4.12, Construction of powerlines

Notably, the NRC has expressly excluded these types of activities (among others) from the definition of "construction" in 10 CFR 51.4.

Even if the NRC does not amend 51.22 to allow adoption of other agencies' categorical exclusions, it still should consider those categorical exclusions as part of its ongoing rulemaking efforts. DOE's NEPA-implementing regulations in 10 CFR Part 1021, Subpart D, Appendix B include useful analogues to the types of categorical exclusions envisioned by NEI for the advanced nuclear reactor and micro-reactor sectors. For example, the following categorical exclusions are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment: small-scale renewable energy research and development and pilot projects (B5.15); solar photovoltaic systems (B5.16); solar thermal systems (B5.17); wind turbines (small scale) (B5.18); ground source heat pumps (B5.19); biomass power plants (B5.20); drop-in hydroelectric systems (B5.24); and small-scale renewable energy research and development and pilot projects in aquatic environments (B5.25).

The DOE regulations provide details about the above-listed projects, among others, that would be considered categorically excluded. Many of these projects are of the same scale and size of some proposed advanced reactors (e.g., micro-reactors). The NRC's use of similar categorical exclusions could streamline the environmental review process for such projects by avoiding the need for an EA or EIS. There is considerable experience available from the research and test reactor fleet to demonstrate that the environmental impact from a micro-reactor is negligible and, in some cases, positive. Given the time between updates to 10 CFR 51.22, NEI encourages the NRC draw from this and other relevant experience (including ongoing development of the ANR GEIS), and to think innovatively about developing categorical exclusions for micro-reactors and smaller SMRs or non-LWRs.

Finally, the NRC should consider including licensing actions for small amounts of nuclear fuel across the entire fuel cycle in the list of categorical exclusions. This could encompass, among other actions, NRC approval of the transportation of minimal amounts or quantities of nuclear fuel, including advanced reactor fuels and fuels with enrichment levels exceeding 5 percent (e.g., HALEU).

***Question (2): Are there any categorical exclusions that are listed in 10 CFR 51.22(c) that the NRC should consider modifying or clarifying? For example, are there categorical exclusions that licensees, applicants, or members of the public have found confusing?***

**NEI Response:** As noted above, the NRC's treatment of DFP-related approvals has caused some confusion among materials licensees, insofar as the NRC staff has invoked categorical exclusions in some cases, and prepared brief EAs/FONSI determinations in others. NEI believes that such approvals are administrative in nature and should be uniformly treated as eligible for a categorical exclusion.

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<sup>19</sup> See 40 CFR 1501.4(b) ("Categorical Exclusions"); 40 CFR 1506.4(a), (d) ("Adoption").



One of NEI's members, GE Hitachi Nuclear Energy Americas, LLC (GEH), has identified another aspect of current 10 CFR 51.22(c) that requires clarification. In a separate letter submitted to the NRC on June 17, 2021, GEH described the issue as follows:

The categorical exclusions in 10 CFR 51.22(c)(11) and (c)(12) include a requirement of "no significant construction impact". NUREG-1748 "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs", Section 3.2 "EA Format and Technical Content" states a complex licensing action can include "major changes to existing facilities (e.g. significant new construction) or construction of new facilities". Section 3.3 "EA for Simple Licensing Actions" includes "the construction of a building". These examples appear to be inconsistent with 10 CFR 51.60(b)(2)(i) that uses the term "significant expansion of a site". Differing statements regarding what may be considered a significant construction impact are subject to interpretation and should be clarified.<sup>20</sup>

NEI supports GEH's request for clarification of the term "no significant construction impact" insofar as the NRC retains use of that term in the amended version of 10 CFR 51.22(c).

***Question (3): Are there any current categorical exclusions (§ 51.22(c)) that the NRC should consider removing? For example, are there categorical exclusions that are no longer in use, or are there activities listed that have been shown to have an environmental impact?***

**NEI Response:** NEI has not identified any categorical exclusions that necessarily warrant removal from 10 CFR 51.22(c). However, as discussed in Section B above, NEI concurs with the NRC's proposal to reorganize, consolidate, and clarify certain categorical exclusions within current 10 CFR 51.22(c).

***Question (4): Are there aspects of NRC authorized changes to previously approved programs, such as emergency plans, cybersecurity programs, quality assurance programs, radiation protection programs, or materials control and accounting programs that the NRC should consider categorically excluding?***

**NEI Response:** NEI recommends that the NRC consider categorically excluding programmatic changes to licensing basis documents, including emergency plans, security plans, cybersecurity programs, quality assurance programs, and materials control and accounting programs. In addition, we recommend that the NRC consider categorically excluding exemptions to regulations governing programmatic licensing documents, such as Appendix B (Quality Assurance) and Appendix E (Emergency Planning and Preparedness) to Part 50. With regard to exemptions, this might be accomplished by revising 10 CFR 51.22(c)(25) in the manner described in response to Question 5 below—i.e., to allow for exemptions to be generically considered for categorical exclusion if they meet the performance-based criteria specified in 10 CFR 51.22(c)(25)(i)-(v). Alternatively, if the NRC chooses not to revise 10 CFR 51.22(c)(25) to make it fully performance-based, then it could expand and/or clarify the specific requirements listed in 10 CFR 51.22(c)(25)(vi) to make clear that they include exemptions from requirements governing programmatic licensing documents, such as the QA and EP requirements in Appendices B and E to Part 50, respectively. Either approach could be used to expand

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<sup>20</sup> Letter from S. Murray, GE Hitachi Nuclear Energy Americas, LLC, to NRC, "GEH Comments on Proposed Revisions to NRC Environmental Categorical Exclusion Requirements" (June 17, 2021).

the number of categorical exclusions available for exemptions issued to operating reactors, permanently-shutdown/decommissioning reactors, advanced reactors, and other NRC-licensed facilities.

***Question (5): Is there anything else that the NRC should consider regarding its regulations for categorical exclusions?***

**NEI Response:** NEI has several additional recommendations in response to this question. As explained below, they relate to (1) the categorical exclusion for certain exemptions in 10 CFR 51.22(c)(25); (2) the proposed use of “mitigated categorical exclusions” in NRC licensing actions; and (3) the proposed use of “documented categorical exclusions.” NEI recognizes that the NRC staff may view the second and third recommendations (which are based on practices of other agencies) as outside the scope of the current proposed rulemaking, which the ANPR suggests is focused on changes to 10 CFR 51.22(c). Nevertheless, NEI would like to bring the associated concepts to the NRC’s attention for possible consideration in this or another rulemaking (e.g., the proposed broader Part 51 update).

**Making Categorical Exclusions for Exemptions More “Performance-Based”**

10 CFR 51.22(c)(25)(i)-(v) outline a set of criteria to provide for determination of a categorical exclusion based on impact to the environment. The subsequent provision in 10 CFR 51.22(c)(25)(vi), however, limits the exemptions that can be categorically excluded by specifically listing the exemption types that are allowed under the regulation. The NRC should consider revising the regulation to delete 10 CFR 51.22(c)(25)(vi) and instead allow for exemptions to be generically considered for categorical exclusion if they meet the performance-based criteria specified in 10 CFR 51.22(c)(25)(i)-(v).

Examples of exemptions that should be categorically excluded because they result in no impact to the environment, but which are not categorically excluded based on the current rule language, include, but are not necessarily limited to: (1) exemptions related to postulated or assumed fission product releases for certain new reactor designs; (2) exemptions for suspension of security measures during an emergency or during severe weather; (3) exemptions related to the use of licensed operators.

**Allowing the Use of Mitigated Categorical Exclusions**

NEI suggests that the NRC also consider modifying section 51.22(b) to allow the use of “mitigated categorical exclusions.” As revised in July 2020, 40 CFR 1501.4(b)(1) provides that “[i]f an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.” As the CEQ explained, the use of mitigated categorical exclusions reflects current practice for some agencies and is consistent with a line of court decisions that have upheld the use of this concept.<sup>21</sup>

10 CFR 51.22 and related NRC guidance (NRR Office Instruction LIC-203, Rev. 4) currently do not permit the use of mitigated categorical exclusions. Specifically, 10 CFR 51.22(b) provides that the NRC may apply a categorical exclusion listed in 10 CFR 51.22(c) “[e]xcept in special circumstances.” The NRC should consider modifying Section 51.22(b) to include language similar to the language from 40 CFR 1501.4(b)(1) quoted above. Mitigating circumstances could include such things as design alternatives and best practices that reduce emissions, construction impacts, land disturbances,

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<sup>21</sup> See 85 Fed. Reg. at 43322 (citing 36 CFR 220.6(b)(2)).

aesthetic intrusion, etc. The NRC, like some other agencies, already allows the use of “mitigated FONSI,” a concept that is similar to the mitigated categorical exclusion.<sup>22</sup>

### **Allowing the Use of Documented Categorical Exclusions**

Given the relative infrequency with which the NRC amends 10 CFR 51.22, and the time required for the rulemaking process, the NRC should consider including a documented categorical exclusion (DCE) provision in its regulations to increase flexibility and expand the scope of available categorical exclusions. Federal Highway Administration (FHWA) regulations, for example, permit the use of DCEs in appropriate circumstances, and could provide a reference point for the NRC.

FHWA regulations provide essentially two broad categories of categorical exclusions.<sup>23</sup> As set forth in 23 CFR 771.117(c), the first category consists of a list of 30 different actions that are deemed as a matter of course to meet the general requirements of 40 CFR 1508.4 and 23 CFR 771.117(a) without any further administrative approvals or NEPA documentation.<sup>24</sup> As set forth in 23 CFR 771.117(d), the second category includes additional actions that may be designated as categorical exclusions after receiving administrative review and approval. Such approval requires the submission of documentation by the applicant demonstrating that: (1) the general requirements of 40 CFR 1508.4 and 23 CFR 771.117(a), discussed above, are satisfied; and (2) significant environmental effects will not result from the proposed action. The FHWA regulations provide a non-exclusive list of the types of actions that may qualify under this second category (i.e., a DCE), an approach that federal courts have found acceptable when applied properly by the agency.<sup>25</sup>

Again, NEI recognizes that the proposed rulemaking, as described in the ANPR, is focused on potential revisions and additions to 10 CFR 51.22(c) that largely involve administrative, organizational, or procedural actions applicable to currently-operating and decommissioning facilities. However, NEI urges the NRC to continue a recent trend of regulatory innovation by considering all available procedural tools, including documented categorical exclusions. Such tools serve to “reduce cumbersome regulatory barriers, expedite the environmental review process, and enable market deployment of innovative nuclear technologies,” as well as “demonstrate NRC’s commitment to transform and innovate.”<sup>26</sup>

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<sup>22</sup> See NRR Office Instruction LIC-203, Rev. 4, at 7 (“If the EA demonstrates that the proposed action will, or has the potential to, significantly affect the environment, but can be mitigated to the point where the action will no longer have a significant impact, ... this scenario may involve the preparation of a ‘mitigated’ FONSI[.]”).

<sup>23</sup> See 23 CFR 771.115(b).

<sup>24</sup> 23 CFR 771.117(a) states that categorical exclusions are actions that meet the definition contained in 40 CFR 1508.4 and, based on FHWA’s past experience with similar actions, do not involve significant environmental impacts. They are actions that “do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.”

<sup>25</sup> See, e.g., *Fla. Keys Citizens Coal., Inc. v. Army Corps of Eng’rs*, 374 F. Supp. 2d 1116 (S.D. Fla. 2005).

<sup>26</sup> Letter from U.S. Senators John Barrasso and Mike Braun to NRC Chairman Kristine Svinicki at 2 (June 25, 2019) (ML19176A444).

Notably, when industry encouraged the NRC to take a performance-based, consequence-oriented, and technology-inclusive bounding approach to achieve a broadly-scoped GEIS for advanced reactors, the staff responded positively.<sup>27</sup> This is evidenced by the staff's decision to develop performance-based parameters, assumptions, and mitigation measures that will maximize the usefulness of the generic impact analyses in the ANR GEIS. Thus, drawing from substantial industry operating experience and NRC regulatory knowledge, the staff should evaluate the possibility of developing DCEs using criteria appropriate for NRC licensing actions. Indeed, the DCE approach might be used for licensing actions involving the types of facilities identified in response to ANPR Question 1 (i.e., micro-reactors, smaller SMRs, non-LWRs) and licensing actions for small amounts of nuclear fuel across the entire fuel cycle.

NEI appreciates this opportunity to comment on the ANPR and hopes these comments help inform the NRC's rulemaking efforts. If you have questions concerning this letter, please contact me at 202.739.8139 or mjo@nei.org.

Sincerely,

*Martin J. O'Neill*

Martin J. O'Neill  
NEI Associate General Counsel

Attachment 1: Suggested Organizational Framework for Revised 10 CFR 51.22(c)

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<sup>27</sup> See Letter from M. Nichol, NEI, to NRC, "NEI Comments on Scoping of an Advanced Nuclear Reactor Generic Environmental Impact Statement" (June 30, 2020) (ML20183A009); NRC, *Environmental Impact Statement Scoping Process Summary Report – The Advanced Nuclear Reactor Generic Environmental Impact Statement Public Scoping Period* (Sept. 2020) (ML20269A317); Staff Requirements Memorandum (SRM) SECY-20-0020 (Sept. 21, 2020) (ML20265A112).

## ATTACHMENT 1 – Suggested Organizational Framework for Revised 10 CFR 51.22(c)

Current or Proposed Categorical Exclusion (ANPR Proposed Categorical Exclusions Shown in Red)	Relevant Paragraph of 10 CFR 51.22(c)
<b>Agency Operations</b>	
Procurement of general equipment and supplies	(c)(5)
Procurement of technical assistance and research	(c)(6)
Personnel actions	(c)(7)
NRC mission-related higher education grants (scholarships, fellowships, stipends)	(c)(24)
<b>NRC Rulemaking and Guidance Development Activities</b>	
Amendments to NRC non-licensing regulations and related petition for rulemaking (PRM) actions	(c)(1)
Amendments to NRC regulations that are corrective, minor or non-substantive	(c)(2)
Amendments to NRC licensing regulations and related PRM actions	(c)(3)
Issuance of and revisions to NRC guidance and informational documents	(c)(16)
<b>AEA Section 274 Agreements with States – Ministerial Actions</b>	
Entrance into or amendment, suspension, or termination of AEA Section 274 Agreements	(c)(4)
Concurrence on Agreement State termination of AEA 11e.(2) byproduct material licenses upon completion and approval of all decommissioning activities	Proposed in ANPR
<b>Exemptions</b>	
Exemptions issued to Part 50/52 reactor licensees related to installation or use of facility components located within the restricted area	(c)(9)
Exemptions from administrative, managerial, or organizational requirements of the type specified in 10 CFR 51.22(c)(25)(vi)(A)-(I) (all license types)	(c)(25)
Issuance of exemptions to low-level waste disposal sites for the storage and disposal of special nuclear material regulated by Agreement States	Proposed in ANPR
<b>Administrative License Amendments (All License Types)</b>	
Administrative license amendments of the types specified in 10 CFR 51.22(c)(i)-(v) (e.g., changes to surety, insurance and/or indemnity requirements; changes to recordkeeping, reporting, or administrative procedures or requirements; changes to licensee contact information and officer information; editorial/other corrections)	(c)(10)
<b>Licensing Actions and Other Approvals Involving Part 50/52 Reactor Licenses</b>	
Issuance of amendment to a Part 50/52 permit or license that changes a requirement with respect to (1) installation or use of a facility component located within the restricted area or (2) an inspection or surveillance	(c)(9)
License amendments or orders authorizing resumed operations (when based solely on determination/redetermination that applicable EP requirements are met)	(c)(18)
Issuance of a standard design approval under 10 CFR Part 52	(c)(22)
Issuance of a 10 CFR 52.103(g) final ITAAC completion finding	(c)(23)
Approvals of direct or indirect transfers of NRC-issued licenses and any associated license amendments to reflect NRC approval of such transfers	(c)(21)
Approval of code relief and alternative requests under 10 CFR 50.55a	Proposed in ANPR
Approval of administrative changes to emergency plans (e.g., staffing reductions)	Proposed in ANPR

Current or Proposed Categorical Exclusion (ANPR Proposed Categorical Exclusions Shown in Red)	Relevant Paragraph of 10 CFR 51.22(c)
<b>Licensing Actions and Other Approvals Involving Materials Licenses</b>	
Issuance of license amendments for fuel cycle plants and radioactive waste disposal sites, and amendments to materials licenses identified in 10 CFR 51.60(b)(1), which are administrative, organizational, or procedural in nature, or which result in a change in process operations or equipment	(c)(11)
Issuance, amendment, or renewal of materials licenses issued pursuant to 10 CFR Parts 30, 31, 32, 33, 34, 35, 36, 39, 40 or 70 authorizing the activities specified in 10 CFR 51.22(c)(22)(i)-(xvi)	(c)(14)
Approvals of direct or indirect transfers of NRC-issued licenses and any associated license amendments to reflect NRC approval of such transfers	(c)(21)
<b>Approvals Related to Decommissioning Funding Assurance, Decommissioning, License Termination, and Low-Level Waste Disposal</b>	
Decommissioning of sites where licensed operations have been limited to the use of radioactive materials specified in current 10 CFR 51.22(c)(20)(i)-(iii)	(c)(20)
Approval of decommissioning funding plans under 10 CFR Parts 30, 40, 70, or 72	Proposed in ANPR
Approval of certain long-term surveillance plans for decommissioned uranium mills	Proposed in ANPR
Approvals for alternative waste disposal procedures for reactor and material licenses in accordance with 10 CFR 20.2002	Proposed in ANPR
NRC actions during decommissioning that do not authorize changes to physical structures (e.g., changes to administrative, organizational, or procedural requirements) and which therefore do not result in environmental impacts	Proposed in ANPR
License terminations that are administrative acts and do not have the potential to affect the environment (e.g., termination of licensees for which no construction or pre-construction activities have occurred, or where all decommissioning activities have been completed and approved)	Proposed in ANPR
<b>Radioactive Materials/Spent Fuel Storage and Transportation</b>	
Approval of package designs for packages to be used for the transportation of licensed materials pursuant to 10 CFR Part 71	(c)(13)
Issuance of new, amended, revised, and renewed certificates of compliance for dry cask designs used for spent fuel storage and transportation (issued as amendments to 10 CFR 72.214, "List of approved spent fuel storage casks")	Proposed in ANPR
<b>Other Licensing Actions/Approvals</b>	
Issuance, amendment, or renewal of operators' licenses under 10 CFR Part 55	(c)(8)
Issuance of license amendments related solely to safeguards matters or issuance of an approval of a safeguards plan (if no significant construction impacts and limited to the matters/activities specified in 10 CFR 51.22(c)(12)(i)-(iv))	(c)(12)
Issuance, amendment, or renewal of licenses for import of nuclear facilities and materials under 10 CFR Part 110 (excluding import of spent power reactor fuel)	(c)(15)
Issuance of an amendment to a permit or license under 10 CFR Parts 30, 40, 50, 52, or 70 that deletes any limiting condition of operation or monitoring requirement in connection with the Federal Water Pollution Control Act	(c)(17)
Issuance, amendment, modification, or renewal of a certificate of compliance of gaseous diffusion enrichment facilities pursuant to 10 CFR Part 76	(c)(19)
Actions authorizing licensees to delay implementation of new NRC requirements (e.g., when new requirements were found to not result in environmental impacts)	Proposed in ANPR