

Recommendation 5: Assess Potential Changes to Current Prohibition on Intervenor Funding, Commitment Related to Adjudicatory Activities, and Rulemaking Considerations

The staff looked to existing Title 10 of the *Code of Federal Regulations* (10 C.F.R.) Part 2 provisions and considered stakeholder input in assessing whether changes to these provisions or related activities might be warranted. The following discussion first addresses adjudicatory activities, and then rulemaking activities.

1. Adjudicatory Activities

This first section considers how the agency addresses EJ in adjudicatory activities. It discusses related adjudicatory provisions and activities, details the comments gathered during the EJ outreach efforts, and provides related recommendations and commitments.

Background

As the Commission stated in the 2004 Part 2 rulemaking, “[o]ne of the cornerstones of the NRC’s regulatory approach has always been ensuring that its review processes and decision-making are open, understandable, and accessible to all interested parties.”¹ The NRC’s rules of practice and procedure for adjudications are outlined in 10 C.F.R. Part 2 and contain provisions that are related to access to and participation in the NRC’s adjudicatory process, which includes access by EJ communities and Tribal nations. For example, under 10 C.F.R. § 2.302, documents filed in Commission adjudicatory proceedings must be electronically transmitted through the NRC’s E-Filing system. However, the regulations state that participants may request an exemption to use an alternative filing method that could include non-electronic options, thus providing a mechanism for access challenges associated with broadband limitations (a concern highlighted by several stakeholders during the outreach effort for this EJ review). The NRC also has an Electronic Filing Help Desk for the public and stakeholders who may need help accessing and using the electronic system.

Part 2 also includes provisions requiring that NRC adjudicatory hearings be conducted in a public forum. For example, 10 C.F.R. § 2.328 requires that “[e]xcept as may be requested under section 181 of the [Atomic Energy Act], all hearings will be public unless otherwise ordered by the Commission.” In addition, contested hearings are transcribed² and are typically conducted in-person and near the vicinity of the related nuclear facility or regulated activity, which provides an opportunity for nearby communities, including EJ communities and members of Tribal nations, to attend.³

¹ Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

² See 10 C.F.R. § 2.327(b) (requiring preparation of an official transcript).

³ See 10 C.F.R. § 2.312(b) (noting that that the time and place of a hearing “will be fixed with due regard for the convenience of the parties or their representative, the nature of the proceeding and the public interest”). In 2020, the NRC staff retained the Harvard Negotiation and Mediation Clinical Program (HNMCP) to evaluate ways in which the NRC could improve upon its existing hearing process for advanced reactors. The HNMCP prepared a report with five recommendations, including a recommendation to continue to require that contested hearings be conducted in-person, on a live record, whenever practicable. See “Publication of Harvard Negotiation and Mediation Clinical Program Report, ‘Moving Toward a Framework for Contested Hearings in the Licensing of Advanced Reactors,’ Prepared for the NRC December 2020 and NRC Staff Response [sic],” June 2021 (ADAMS Accession No. [ML21173A166](#)) (HNMCP Report and NRC Response), at 38, 51. In response, the

In addition, the NRC's rules of practice and procedure in 10 C.F.R. § 2.315(a) include an opportunity for members of the public, who are not a party, to participate by making limited appearance statements in the discretion of a presiding officer. While such statements are not considered as evidence in the proceeding, this allows the public, including members of EJ communities and representatives of Tribal nations, to make an oral or written statement at a hearing or prehearing conference "within the limits and on the conditions" set by the presiding officer.

Further, under 10 C.F.R. § 2.338, parties are encouraged to employ various methods of alternate dispute resolution to address contested issues without the need for adjudicatory proceedings. Identifying and resolving issues early obviates the need for sometimes lengthy and costly litigation, which, as described below, can be a barrier to participation. Under 10 C.F.R. § 2.338(b), parties may request jointly for appointment of a Settlement Judge to convene and preside over settlement negotiations. Parties to a proceeding have the opportunity to submit a proposed settlement of some or all issues to the presiding officer under 10 C.F.R. § 2.338(a). This process is available if there is an admitted contention in the proceeding. The NRC also has an Alternative Dispute Resolution Policy Statement.⁴

Finally, although not specifically addressed in Part 2, there are instances where presiding officers and parties have requested language translation services to support participation. For example, during the hearing on the EJ contention in the Indian Point nuclear power plant license renewal proceeding, the Atomic Safety and Licensing Board helped arrange for a translator for a Spanish-speaking witness.⁵

What the Staff Learned

During its outreach, the staff received a number of comments related to the Part 2 adjudicatory procedures and the need for the NRC to provide more equitable access to the NRC's hearing process. For example, the staff heard that the hearing process is too difficult, complicated, and costly, creating barriers for EJ communities (and others) to participate in adjudicatory proceedings.⁶ During interviews and in written submissions, commenters stated that the 10 C.F.R. Part 2 intervention requirements are applied too stringently and the timing of when intervenors must file contentions is too early—raising litigation expenses as intervenors then need to modify filings as the underlying application evolves. Because of the complexity and expense associated with the NRC's proceedings, commenters suggested that the NRC provide resources for legal and technical assistance to support participation, similar to those provided by

NRC staff agreed, explaining that "the existing rules of practice in 10 C.F.R. Part 2 accommodate this practice." *Id.* at iii.

⁴ Alternative Means of Dispute Resolution; Policy Statement, 57 Fed. Reg. 36,678 (Aug. 14, 1992). In the Harvard report recommendations, the HNMCP recommended that the NRC facilitate discussions among industry members, intervenors, and the NRC staff to identify and resolve issues early. HNMCP Report and NRC Response at 43-47. In its response, the NRC staff updated and clarified the NRC's public website to remind the public of the Commission's Alternative Dispute Resolution Policy Statement and the availability of existing tools; clarifying available processes and tools was another concern the staff heard through its outreach effort for this EJ review. *Id.* at ii-iii.

⁵ See, e.g., "Transcript of 10/23/2012 Hearing Regarding Indian Point, Units 2 and 3," at 2732 ([ML12306A150](#)).

⁶ The HNMCP received similar feedback regarding the complexity and cost of the NRC's hearing process in its recent evaluation of ways in which the NRC could improve its existing hearing process for advanced reactors. See HNMCP Report and NRC Response at 26-27.

other State and Federal organizations. For example, the Federal Energy Regulatory Commission has a statutorily directed Office of Public Participation to assist the public with Commission proceedings. In addition, commenters suggested that the NRC develop specific programs such as creating an Office of Public Counsel, which could report to either the Executive Director for Operations or the Chairman. This program could have the primary function to provide a source of legal and technical counsel to potential or actual intervenors and public interest groups. In addition, commenters suggested that the NRC adopt a citizen or interest group funding program that could permit intervenors who make substantive contributions that would otherwise not have been made, to be compensated for the expenses involved.

Many of the comments and the suggestions the staff received in this area during the EJ review regarding potential changes to the adjudicatory process described in 10 C.F.R. Part 2 were not necessarily restricted to EJ. Stakeholders have raised these concerns over the years, and the existing adjudicatory procedures have been determined to be the best balance to ensure fair adjudications.⁷ In making these determinations, the NRC has had the opportunity to explore these issues in detail and has analyzed the pros and cons of various approaches to litigation as part of the NRC's public rulemaking efforts regarding 10 C.F.R. Part 2. Changes to the NRC's adjudicatory processes would apply to all intervenors and impact all NRC's proceedings, not just those regarding EJ.

Nonetheless, through this review, it became clear that EJ communities and some Tribal nations may be uniquely challenged by aspects of the NRC's adjudicatory procedures that have not been previously analyzed in detail—namely, the issue of the costs associated with the complexity of the NRC's adjudicatory proceedings. Although stakeholders have previously requested the agency assist with the costs associated with participating in litigation before the NRC, Congress has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in the NRC's regulatory or adjudicatory proceedings.⁸ Because

⁷ For example, during a 2004 rulemaking revising the 10 C.F.R. Part 2 adjudicatory procedures, the agency received numerous comments, including those related to public participation and fairness in the adjudicatory process, and at that time, the agency determined that the current regulatory process represented the best path forward to effectively conduct its adjudicatory processes. Changes to Adjudicatory Process, 69 Fed. Reg. at 2186 (noting the adjudicatory "Policy Statement recognizes that there is a need to balance efforts to avoid delay with procedures that will ensure fair and reasonable time frames for taking action in the adjudication. The Commission believes that the guidance in the Policy Statement strikes a proper balance among all these considerations. The Commission also believes that providing more effective hearing processes will result in a better use of all participants' limited resources."). Additionally, in a 2011–2012 rulemaking to amend certain adjudicatory rules of practice to promote fairness, efficiency, and openness, commenters suggested significant changes to Part 2. In response, the Commission stated that wholesale changes to Part 2 were not the intent of that rulemaking effort, and that the NRC may consider making other changes to Part 2 in a future rulemaking. Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,565 (Aug. 3, 2012). Similarly, in a 2013 Commission meeting titled, "Briefing on Public Participation in NRC Regulatory Decision-making," the NRC heard perspectives about the hearing process not being fair and creating barriers to participation. See, e.g., Diane Curran, *Comments on NRC Publication Process*, Commission Meeting: Briefing on Public Participation in NRC Regulatory Decision-Making ([ML13057A979](#)).

⁸ Pub. L. No. 102-377, Title V, § 502, 106 Stat. 1315, 1342 (1992), 5 USC § 504 note ("None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts.").

of this legislative prohibition, when issues regarding intervenor funding have surfaced in the past, the NRC has cited to this statutory prohibition to explain its inability to provide funding to parties intervening in the NRC's adjudicatory process. Thus, unlike the broader issues surrounding the NRC's adjudicatory process, the issue regarding intervenor funding is not an issue the agency has recently explored.

Recommendations and Commitment

A legislative change would be required before the NRC could provide financial support to intervenors in the NRC's adjudicatory proceedings. Such potential funding issues and related legislative considerations raise complex questions for which detailed consideration would require time and resources beyond those allotted for this EJ review. Accordingly, the staff recommends that, to address access to the NRC's adjudicatory process, the Commission consider, at a minimum, directing the NRC staff to undertake a separate assessment and report back on whether the Commission should consider requesting potential changes to the current prohibition on intervenor funding. As part of this assessment, the NRC staff would seek perspectives from external stakeholders. Such an assessment could include reviewing the history of the issue; researching and benchmarking activities by other State and Federal agencies and international organizations; examining related issues with the NRC's fee structure; examining the pros and cons of different approaches to intervenor funding such as direct funding and representational support (e.g., a separate office or Ombudsman); and comparing these to the status quo. Exploration of potential statutory changes related to intervenor funding could help demonstrate the agency's commitment to addressing EJ in its programs, policies, and activities, consistent with the spirit of Executive Orders that address EJ. In addition, it could support the agency's strategic goal to "Inspire Stakeholder Confidence in the NRC."⁹

Because other concerns regarding the NRC's adjudicatory processes raised by commenters during the EJ review were not specific to EJ issues or proceedings involving EJ issues, the staff is not recommending regulatory changes to Part 2 at this time. However, the staff is making a commitment aimed at improving the existing adjudicatory-related activities from an EJ perspective, as discussed next. Also, as part of the Enhanced Outreach recommendation discussed in Enclosure 4, the staff is recommending enhancements to outreach about Part 2 procedures. Should the Commission choose to explore Part 2 rulemaking revisions separate from this effort in the future, the staff recommends that EJ considerations be part of that larger assessment.

In consideration of comments from internal and external stakeholders that the NRC's adjudicatory process is difficult to understand and hard to navigate, especially for those who participate without counsel, the NRC staff commits to improve communicating with EJ communities and Tribal nations about the hearing process. This commitment is focused on increasing understanding of the NRC's hearing process both internally and externally.

⁹ Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 (draft report for comment), at 11 ([ML21260A054](#)) ("To be successful, the NRC must not only excel in carrying out its mission but must do so in a manner that inspires confidence."). The final Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 will be published in April 2022 and will be available at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/index.html> (last visited March 16, 2022).

This commitment will involve providing additional training to the NRC staff on the NRC's hearing process. Training is already under development as part of the NRC staff's response to the Harvard Negotiation and Mediation Clinical Program (HNMCP) Report recommendation to improve general understanding of the contested hearing process.¹⁰ This commitment also involves developing graphics to better communicate information about the hearing process—also something that is already underway as part of the NRC staff's response to the HNMCP Report recommendations. Further, the Office of the General Counsel is in the process of revising the NRC's Practice and Procedure Digest (NUREG-0386), which is a resource summarizing Commission and Atomic Safety and Licensing Board adjudicatory decisions on various legal topics. Consideration of EJ principles will be included in this update to help make sure the information is more accessible to stakeholders, including EJ communities and Tribal nations. Because these activities are already ongoing or planned, resources for implementing this commitment are also already planned.

As discussed further in Enclosure 4, the staff received numerous public comments regarding the benefits of and need for additional outreach to EJ communities and Tribal nations. In addition, the NRC staff highlighted the benefits of early and more frequent outreach, including building trust and relationships, and improving engagement with the public. To assist EJ populations and Tribal nations in better understanding the NRC's hearing process, the staff recommends conducting additional outreach or additional in-person public meetings, for proceedings with significant EJ issues or EJ populations for the purpose of explaining the NRC's hearing process as part of the Enhanced Outreach Recommendation described in Enclosure 4. While the NRC staff frequently conducts additional outreach and public meetings, these practices and activities vary by project. Part of the Enhanced Outreach Recommendation is to improve consistency and institutionalize best practices for considering additional outreach when significant EJ issues or EJ populations are present. Resource considerations for this enhanced outreach are discussed in Enclosure 13.

2. Rulemaking Activities

This section considers how the agency addresses EJ in rulemaking activities. Specifically, the staff considered the rulemaking process in its review of the NRC's Part 2 procedures.

Background

The NRC's regulations provide the public with opportunities to engage in the rulemaking process. Specifically, the regulations provide a petition for rulemaking process in 10 C.F.R. § 2.802 by which any member of the public can request that the NRC develop, modify, or rescind a regulation. According to the NRC's regulations, a person who is interested in filing a petition for rulemaking may consult with the NRC before and after filing a petition for rulemaking. During this consultation, the NRC can describe the process for filing, docketing, tracking, closing, amending, withdrawing, and resolving a petition for rulemaking. The NRC can also clarify an existing NRC regulation and the basis for the regulation; provide procedural assistance for issues of concern to the petitioner to increase transparency of the petition process; and provide status information on a petition for rulemaking. The regulations, and the NRC's website, provide additional detail on the type of information necessary to support a petition, and the process by which the agency reviews the petition.

¹⁰ This training will initially be launched on a pilot basis. Based on feedback, it may be adopted for use on an ongoing basis.

The NRC also affords the public opportunities to comment on proposed rules. In addition to the opportunities being published in the *Federal Register*, the NRC's website also maintains an updated list of public comment opportunities.

What the Staff Learned

During its outreach, the staff heard that traditional efforts often used to solicit input, such as publication of opportunities for comment in the *Federal Register*, are not always effective in reaching EJ communities. While such comments were generic in nature, they can apply equally to the NRC's rulemaking efforts.

Recommendation

The staff did not identify any specific Part 2-related recommendations with respect to rulemaking. Because rulemaking is generic, the outreach improvements described in Enclosure 4 would also apply to the rulemaking process. Accordingly, the staff is not including a recommendation specific to rulemaking; instead, rulemaking considerations are part of the recommendation to enhance outreach and communication about the NRC's processes (see Enclosure 4).