

Enclosure 7: Rulemaking Plan

Title

Implementation of Fiscal Responsibility Act of 2023—National Environmental Policy Act Amendments

Regulation

Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, “Agency Rules of Practice and Procedure,” and 10 CFR Part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions”

Regulatory Issue

Section 321 of the Fiscal Responsibility Act of 2023 (FRA) includes amendments to the National Environmental Policy Act of 1969 (NEPA). The amendments became effective immediately. The U.S. Nuclear Regulatory Commission (NRC) staff analyzed the new NEPA requirements to understand how they affect the NRC’s environmental review regulations in 10 CFR Part 51 and related guidance, processes, and policies. The staff’s analysis was informed by the NRC’s current regulations, processes, and best practices from the staff’s previous environmental reviews, and the Council on Environmental Quality’s (CEQ’s) rulemaking effort addressing the new amendments.¹

This rulemaking would focus on revising 10 CFR Part 51 to update how the staff conducts NEPA environmental reviews for licensing and regulatory actions consistent with the FRA NEPA amendments, including the information required from applicants. Some sections of 10 CFR Part 2 may also need to be revised. The rulemaking would address (1) the scope of, the purpose and need for, and the evaluation of a reasonable range of alternatives to the proposed agency action, (2) the procedure for determination of level of NEPA review (environmental impact statement (EIS) or environmental assessment (EA)), (3) preparation of EISs and EAs by applicants (project sponsors), (4) additional recommendations to streamline and enhance the efficiency of the environmental review process, and (5) administrative changes to 10 CFR Part 51 to remove inconsistencies. In addition, the staff would consider the CEQ’s recent rulemaking activities, expected to be finalized shortly, for potential revisions to the NRC’s NEPA implementing regulations. This rulemaking would include development of a regulatory basis.

The staff anticipates regulatory changes to address the following high-level policy topics and potentially affected regulations; however, the staff will further evaluate and identify affected regulations during the regulatory basis stage:

- proposed agency action and reasonable range of alternatives
 - sections in 10 CFR Part 51 including, but not limited to, 10 CFR 51.2, 51.14, 51.20, 51.21, 51.25, 51.27, 51.30, 51.31, 51.45-68, 51.70, 51.71, 51.75, 51.76, 51.80, 51.85, 51.90, 51.92, 51.95, 51.103, and appendix A

¹ The CEQ published in the *Federal Register* (FR) its notice of final rule for NEPA Implementing Regulations Revisions Phase 2 (89 FR 35442; May 1, 2024).

- procedure for determination of level of review
 - sections in 10 CFR Part 51 including, but not limited to, 10 CFR 51.1, 51.2, 51.4, 51.14, 51.20, 51.21, and 51.25
- project sponsor preparation of environmental documents
 - potential new sections in 10 CFR Part 51; current sections in 10 CFR Part 51 including, but not limited to, 10 CFR 51.40–68, 51.70, 51.72, 51.75, 51.80, 51.85, 51.86, 51.109, and Appendix A, and some sections in 10 CFR Part 2
- additional recommendations to streamline and enhance efficiency
 - potential new sections in 10 CFR Part 51 and some sections in 10 CFR Part 2
- administrative changes
 - potential new sections in 10 CFR Part 51 and current sections in 10 CFR Part 51 including, but not limited to, 10 CFR 51.14, 51.22, 51.26, 51.27, 51.30, 51.32, 51.71, 51.75, 51.92, 51.95, and 51.116

Entities potentially affected include all applicants for new, renewed, or amended licenses except those that are categorically excluded from the requirement to submit an environmental report and applicants for export or import licenses within the scope of 10 CFR Part 110.

Existing Regulatory Framework

Enclosures 1, 2, 3, and 6 provide a detailed description of the existing regulatory framework for the following topics:

- proposed agency action and reasonable range of alternatives (enclosure 1)
- procedure for determination of level of review (enclosure 2)
- project sponsor preparation of environmental documents (enclosure 3)
- additional recommendations to streamline and enhance efficiency (enclosure 6)

Explanation of Why Rulemaking Is the Preferred Alternative

The topics proposed to be addressed through the rulemaking will likely garner significant stakeholder interest and diverse perspectives. The rulemaking process provides the most open and efficient way for the NRC staff to engage stakeholders through a structured and inclusive decision-making process. A Part 51 rulemaking in response to the new NEPA provisions would provide the Commission an opportunity to make, and codify, generally applicable policy decisions on how the agency will implement the new statutory provisions. Further, implementing these changes through rulemaking increases transparency, regulatory stability, and regulatory certainty.

The FRA NEPA amendments became effective immediately, and while they did not mandate rulemaking, the staff is recommending rulemaking to improve efficiency and streamline the NEPA environmental review process consistent with the amendments. While the NRC has taken action to ensure compliance with the new requirements, there are areas of misalignment between 10 CFR Part 51 and NEPA as amended by the FRA. Rulemaking is the preferred and most effective way to bring the NRC regulations into better alignment with NEPA and to ensure

that the process and options described in 10 CFR Part 51 are effective and efficient considering the new provisions in NEPA.

Enclosures 1, 2, 3, and 6 explain why rulemaking is the preferred alternative for each of these high-level policy topics.

Description of Rulemaking: Scope

The rulemaking scope, as recommended by the staff, would include the following five areas:

(1) Proposed Agency Action and Reasonable Range of Alternatives

The staff recommends revising 10 CFR Part 51, as detailed in Option 1.b in enclosure 1, to generally limit the proposed agency action to the regulatory or licensing decision (e.g., whether or not to issue an operating license). Thus, the scope of the NRC's NEPA review would typically be limited to addressing the reasonably foreseeable environmental effects of the proposed agency action and the no action alternative (including any negative environmental impacts of the no action alternative). Reasonably foreseeable effects of the no action alternative could include consideration of the environmental impacts from, for example, termination of operation and decommissioning, energy conservation, energy imports, other sources of power generation, and alternative nuclear material production, processing, and storage. Other alternatives such as locating the proposed action at alternative sites would not be considered. Revising the scope of the NEPA review would improve efficiency.

(2) Procedure for Determination of Level of Review

The staff recommends revising 10 CFR Part 51 to reflect NEPA section 106(b), as detailed in Option 2.b in enclosure 2. In 10 CFR 51.20(b), the NRC requires an EIS for licensing and regulatory actions. Preparing an EA instead of an EIS for an action that is listed in 10 CFR 51.20(b) would require an exemption. This rulemaking would examine eliminating the requirement in 10 CFR 51.20(b) to automatically require an EIS, except where an EIS is required by statute, and revising it to reflect the new procedures in NEPA section 106 for determining the level of NEPA review (EA or EIS). These revisions would provide greater flexibility in allowing the staff to prepare EAs rather than EISs, where appropriate, and avoid the need for an exemption when the staff determines that an EIS is not necessary based on NEPA section 106. The staff would also revise the definition of categorical exclusion in 10 CFR 51.14(a) to align with the definition in NEPA section 111(1) and explore whether any additional actions are eligible for categorical exclusions.

Rulemaking would ensure that 10 CFR Part 51 aligns with the new procedures in NEPA section 106 promoting openness and clarity, potentially decreases staff time and effort for NEPA reviews, and reduces burden on applicants and licensees (e.g., to process exemption requests to allow EAs in place of EISs).

(3) Project Sponsor Preparation of Environmental Documents

The staff recommends revising the regulations, as detailed in Option 3.b in enclosure 3, to address applicant preparation of environmental reports versus EAs and EISs. While the exact revisions would be determined through the rulemaking process, the staff anticipates a range of possibilities that vary based on the extent to which preparation of

these environmental documents might be voluntary versus mandatory. The staff would also consider certain regulatory areas that bear directly on the integrity, quality, and timeliness of the NEPA review process. These areas can include acceptance reviews, preapplication interactions, preparation of the EA or EIS under the NRC's supervision, the applicant's involvement in the scoping process and consultations, and timing of applicant's submittal.

Rulemaking to implement the new requirement in NEPA section 107(f) to allow applicant preparation of EAs and EISs would promote regulatory stability and openness and increase clarity and reliability.

(4) Additional Recommendations to Streamline and Enhance Efficiency

The staff recommends considering the following issues in the regulatory basis phase of the rulemaking, as detailed in enclosure 6. The staff would include discussion with stakeholders of whether these issues should be resolved through guidance or rulemaking.

- How to identify the start and end points for the preparation of EAs and EISs to comply with the 1-year and 2-year NEPA-mandated deadlines for EAs and EISs, respectively. The staff would also consider a process for extending EA and EIS schedules to reduce potential ambiguities, increase regulatory certainty, and promote reliability.
- The timing of submittals to address bifurcated applications (i.e., allowing applicants to submit the safety analysis ahead of the environmental information or vice versa). The staff would also explore how to set schedules in consultation with the applicant for bifurcated applications.
- Establishing clear acceptance criteria for docketing environmental information to provide clarity, consistency, and regulatory certainty as well as help the staff meet NEPA-mandated deadlines. The staff would seek input from stakeholders regarding information needs and timing for compliance with the other environmental statutes that are usually completed in coordination with the NEPA process. Codifying acceptance review criteria for information that is needed to comply with other statutes, such as National Historic Preservation Act (NHPA) and Endangered Species Act (ESA) consultations and outreach to environmental justice communities, could facilitate completion of the staff's consultation activities before publication of the final environmental document.
- Opportunities for preapplication engagement to improve the quality and technical sufficiency of submittals. Additional actions during preapplication engagement could also include preparation for NHPA and ESA consultations and outreach to environmental justice communities.

(5) Administrative Changes

The staff recommends revisions to 10 CFR Part 51 to address the new NEPA requirements and ensure that the NRC's implementing regulations in 10 CFR Part 51 remain consistent with NEPA, as amended, including the following:

- NEPA section 107(b) requires that each notice of intent to prepare an EIS includes a “request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action.”
- NEPA section 107(d) requires agencies to include in EISs, EAs, and findings of no significant impact “a statement of purpose and need that briefly summarizes the underlying purpose and need for the proposed agency action.”
- NEPA section 107(e) requires EAs and EISs not to exceed 75 and 150 pages, respectively, not including citations or appendices, except for proposed agency actions of extraordinary complexity, for which EISs must not exceed 300 pages.
- NEPA section 107(g) requires agencies to complete EAs within 1 year and EISs within 2 years or the sooner of (1) the date an agency determines that an EA or EIS is required or (2) the date the agency issues a notice of intent to prepare an EA or EIS.
- NEPA section 109 allows agencies to “adopt a categorical exclusion listed in another agency’s NEPA procedures for a category of proposed agency actions for which the categorical exclusion was established consistent with” the four requirements listed in the same NEPA section.
- NEPA section 111 provides definitions for terms including “cooperating agency,” “Council,” “environmental assessment,” “environmental document,” “environmental impact statement,” “finding of no significant impact,” “participating federal agency,” “lead agency,” and “special expertise.”
- Other conforming and clarifying changes include (1) incorporating terms like “technically and economically feasible” when addressing reasonable alternatives and evaluating negative environmental impacts from the no action alternative, (2) addressing the concept of “reasonably foreseeable significant effect,” (3) inserting the term “agency” between “proposed” and “action,” (4) inserting the term “Federal” before “resources,” and (5) updating references to specific NEPA sections and CEQ regulations.
- Other administrative changes relate to document distribution, indexing, and electronic notification.

Description of Rulemaking: Preliminary Backfitting and Issue Finality Analysis

The staff will conduct a case-by-case analysis of the proposed revisions to 10 CFR Part 2 and 10 CFR Part 51 to determine whether they would constitute backfitting as defined in 10 CFR 50.109, 10 CFR 70.76, or 10 CFR 72.62, all titled “Backfitting,” and whether they would be consistent with the applicable issue finality provisions in 10 CFR Part 52. Further, the staff will consult with the NRC’s Backfitting and Forward Fitting Community of Practice and Committee to Review Generic Requirements, as necessary. Additionally, for revisions affecting applicants or licensees under 10 CFR Part 30, “Rules of General Applicability to Domestic Licensing of Byproduct Material,” and 10 CFR Part 40, “Domestic Licensing of Source Material,” the Commission’s backfitting and issue finality provisions in 10 CFR Parts 50, 52, 70, 72, and 76 do not apply. However, it is unlikely that any proposed changes would be a backfit because the

topics are focused on information in the application process. Staff would continue to analyze and consider these issues throughout the rulemaking process.

Description of Rulemaking: Estimated Schedule

The following estimated schedule was informed by prior complex rulemakings. Given the scope of the rulemaking, wide range of stakeholders (e.g., applicants, the public, other Federal agencies, State agencies, Indian tribes, industry, nongovernmental organizations), and anticipated high level of stakeholder interest, the staff plans to conduct extensive stakeholder engagement and public meetings throughout the rulemaking process. For example, the staff would plan to hold two public meetings and several interagency meetings during the regulatory basis stage. The staff would also plan to send letters to tribal counterparts and hold at least one tribal interaction during development of the regulatory basis. The staff would also provide periodic updates to the Commission on the status of the rulemaking.

- Deliver draft regulatory basis to the Commission: 12 months after the Commission issues its staff requirements memorandum.
- Deliver the proposed rule to the Commission: 16 months after the regulatory basis comment period closes.
- Deliver the final rule to the Commission: 16 months after the proposed rule comment period closes.

Description of Rulemaking: Preliminary Recommendation on Priority

Based on the Common Prioritization of Rulemaking methodology (Agencywide Documents Access and Management System Accession No. ML23018A148), the preliminary priority for this rulemaking activity is medium. This rulemaking is estimated to score 23 out of 45 points (medium priority) because (1) it would be a low contributor toward the NRC's Strategic Plan Safety and Security Strategic Objectives 1 and 2 (provide quality licensing and oversight of nuclear facilities and radioactive materials, and ensure the safe and secure use of radioactive materials), (2) it would be a medium contributor to implementing the Principles of Good Regulation, (3) it would be a high contributor to Government priority because the rulemaking would update NRC regulations consistent with the amendments to NEPA, and (4) it would be a high contributor to the NRC's Strategic Plan Stakeholder Confidence Objectives 1 and 2 because of the potential regulatory burden reduction and improving confidence through engagement with stakeholders (public, license applicants and licensees, nongovernment organizations). This estimate is consistent with the priority assigned to rulemakings that do not raise an immediate safety, environmental, or security concern. The priority for a rulemaking activity can change over time. Common reasons for a change in priority are new Commission or senior management direction or changes in the rulemaking scope.

Description of Rulemaking: Estimate of Resources

The proposed action is estimated to involve a high magnitude of costs to conduct the rulemaking; however, the policy changes should result in a high level of savings after implementation. Enclosure 8 (not publicly available) includes an estimate of the resources needed to complete this rulemaking. As discussed in enclosures 1, 2, 3 and 6, the recommended actions are estimated to provide the following benefits: (1) ensuring 10 CFR Part 51 is consistent with NEPA as amended by the FRA, (2) adding regulatory certainty for industry

and clarity for public stakeholders, (3) improving efficiency and streamlining the NEPA environmental review process, (4) likely requiring fewer resources to prepare NEPA documents, and (5) increasing transparency, regulatory stability, and regulatory certainty. As part of the regulatory basis and proposed rule stage, the staff would develop a more detailed cost-benefit analysis that would consider the quantitative costs of developing and implementing the rule, as well as benefits in the form of efficiencies and averted costs.

If the Commission directs the staff to pursue the options that only involve guidance revisions (e.g., Options 3.a, 4.a, and 5.a), the overall resource expenditure (full-time equivalents and contract support) would be less due to reduced scope. However, the same number of guidance documents would need to be updated, and some of the efficiencies anticipated from revising guidance as part of a rulemaking would be lost. Pursuing the options that involve guidance revisions only would not address the topics in enclosure 2 related to determining the level of review. In addition, the staff would pursue the development of guidance associated with the recommendations discussed in enclosure 6 of this paper. While the estimated resource expenditure is lower for pursuing the options involving only guidance revision, this savings would be offset by the exemption requests that the staff anticipates would be necessary to enable some of the activities related to the FRA. The staff expects that the number of exemption requests needed (from staff and applicants)—combined with the level of effort associated with certain types of exemption requests—would be significant enough to essentially overcome the differences in resource expenditure between the recommendations and the options that only involve guidance revisions. Therefore, the staff recommends the rulemaking actions instead because they would result in greater clarity, regulatory certainty and efficiency, and public confidence with a similar net expenditure of resources.

Cumulative Effects of Regulation

The staff plans to request stakeholder input, including Tribal considerations and engagement (e.g., government-to-government meetings) on this issue during the development of the regulatory basis, proposed rule and final rule phases.

Agreement State Considerations

NEPA applies only to Federal agencies. As such, the regulations in 10 CFR Part 51 are not applicable in the Agreement States, and the procedures in 10 CFR Part 2 are not matters of adequacy and compatibility for Agreement States. Therefore, Agreement States will not need to make conforming changes to their regulations, and the recommended rule would have no impacts to Agreement States.

Guidance

This rulemaking would affect the following guidance documents and internal procedures:

- NUREG-1555, “Environmental Standard Review Plan: Standard Review Plans for Environmental Reviews for Nuclear Power Plants,” issued October 1999
- NUREG-1555, Supplement 1, Revision 1, “Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal,” issued June 2013 (Revision 2 was issued for public comment in February 2023)

- Regulatory Guide 4.2, Revision 3, "Preparation of Environmental Reports for Nuclear Power Stations," issued September 2018
- Regulatory Guide 4.2, Supplement 1, Revision 1, "Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications," issued June 2018
- Regulatory Guide 4.7, Revision 4, "General Site Suitability Criteria for Nuclear Power Stations," issued February 2024
- "Interim Staff Guidance Augmenting NUREG-1537, Part 1, 'Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors: Format and Content,' for Licensing Radioisotope Production Facilities and Aqueous Homogeneous Reactors," dated October 17, 2021
- "Interim Staff Guidance Augmenting NUREG-1537, Part 2, 'Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors: Standard Review Plan and Acceptance Criteria,' for Licensing Radioisotope Production Facilities and Aqueous Homogeneous Reactors," dated October 17, 2021
- NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," issued August 2003
- Office of Nuclear Reactor Regulation Office Instruction LIC-203, Revision 4, "Procedural Guidance for Categorical Exclusions, Environmental Assessments, and Considering Environmental Issues," dated July 7, 2020
- Management Directive 5.1, "Consultation and Coordination with Governments and Indian Tribes," dated July 6, 2020

Advisory Committee on Reactor Safeguards Review

The staff would determine whether actions in this rulemaking fall within the scope of the Advisory Committee on Reactor Safeguards charter as the requirements and guidance are developed.

Committee to Review Generic Requirements Review

The staff will consult with the Committee to Review Generic Requirements, as necessary, to determine whether the proposed revisions to 10 CFR Part 2 and 10 CFR Part 51 constitute backfitting. However, it is unlikely that the staff will consider any changes that could be a backfit because the topics are focused on information in the application process.

Advisory Committee on the Medical Use of Isotopes Review

Because this rulemaking would not have any impact on the medical uses of materials regulated under NRC's byproduct material regulations, which are categorically excluded under 10 CFR 51.22(c)(14), the staff recommends that the Advisory Committee on the Medical Use of Isotopes not conduct a review.

Analysis of Legal Matters

Enclosure 9 includes the Office of the General Counsel's analysis of legal matters associated with this rulemaking, among other matters, and is not publicly available.

COMMITMENT:

If the Commission approves initiation of the rulemaking, in accordance with SECY-16-0042, "Recommended Improvements for Rulemaking Tracking and Reporting," dated April 4, 2016 (ADAMS Accession No. ML16075A070), the staff will add the rulemaking activity to the agency's rulemaking tracking tool.

RECOMMENDATION:

The NRC staff recommends that the Commission approve initiation of a rulemaking to revise 10 CFR Part 51 and related regulations to update NEPA implementing regulations consistent with the NEPA amendments.

RESOURCES:

Enclosure 8 includes an estimate of the resources needed to complete this rulemaking. The resource estimates in enclosure 8 are not publicly available.

COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and has no concerns with the estimated resources in enclosure 8.