

POLICY ISSUE
NOTATION VOTE

RESPONSE SHEET

TO: Carrie M. Safford, Secretary

FROM: Commissioner Marzano

SUBJECT: SECY-25-0020: Rulemaking Plan on Cost Expenditure
Criteria for Research and Development Utilization
Facilities

Approved X Disapproved Abstain Not Participating

COMMENTS: Below Attached X None

Entered in STAR

Yes X
No

Signature
Matthew J. Marzano

Date **04/22/2025**

Commissioner Marzano's Comments on SECY-25-0020, "Rulemaking Plan on Cost Expenditure Criteria for Research and Development Utilization Facilities"

The recent amendment to Section 104c of the AEA made by Section 601 of the ADVANCE Act provides for a greater amount of commercial activity that a research and development utilization facility can perform than is currently allowed under the NRC's regulations. I agree with the proposed revision to 10 CFR to clarify that a utilization facility may be licensed under Section 104c of the AEA if the following two conditions are satisfied: (1) not more than 75 percent of the annual costs of owning and operating the facility are devoted to the sale of nonenergy services, energy, or a combination of these activities (not counting sales of research and development or education and training), and (2) not more than 50 percent of the annual costs of owning and operating the facility are devoted to the sale of energy.

In SECY-25-0020 the staff requests approval to forego the normal notice and comment process and recommends issuing a final rule under the good cause exception to the Administrative Procedure Act (APA). The staff's rationale for this approach is based on the non-discretionary nature of the rulemaking and the efficiencies gained as compared to other mechanisms like traditional notice-and-comment rulemaking or the direct final rule process. I acknowledge that the regulatory changes under consideration here are narrowly tailored to mirror the amendments made to Section 104c of the Atomic Energy Act and therefore provide no room for discretion. For that reason, I approve Alternative 2. I also approve the delegation of signature authority for this action to the Executive Director for Operations and the staff's recommendation that this activity does not need review by the Advisory Committee on Reactor Safeguards, Committee to Review Generic Requirements, or the Advisory Committee on Medical Use of Isotopes.

However, I would be remiss if I did not express my concern with the staff's reliance on "efficiency" as a justification for departing from the agency's typical rulemaking practices—and thereby eliminating opportunity for public engagement—in the absence of any expression from Congress to do so.¹ There are tools available (e.g., the direct final rule process) to meet the agency's efficiency targets that still incorporate opportunities for public engagement and support NRC's Principles of Good Regulation.² While I approve the staff's request to issue a final rule in this case, I am mindful that the good cause exception is to be narrowly construed. I believe the final rule process, particularly based on the "unnecessary" prong of the good cause exception, is to be undertaken sparingly and only after careful consideration and with adequate justification.

¹ In this instance, Congress did not specify a particular date by which the amendments to Section 104c of the AEA are to be implemented. See *generally* ADVANCE Act § 601, 42 U.S.C. § 2134(c). A Congressionally established rulemaking deadline imposed through enabling legislation is one of the relevant circumstances to be considered in deciding the propriety of utilizing the APA's good cause exception. Of note, some courts have evolved a presumption that Congress expects agencies to comply with the APA, even under short statutory time constraints, unless the statute expressly states otherwise. See e.g., *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (citing *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885 (3d Cir. 1982)); see also *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1998) (finding the agency excused from the notice and comment requirement where the statute plainly expressed a congressional intent to depart from normal APA procedures).

² The Administration Conference of the United States recently adopted Recommendation 2024-6, which continues to recommend that agencies use direct final rulemaking in all cases where the "unnecessary" prong of the good cause exception is available. Adoption of Recommendations. 89 Fed. Reg. 106406 (Dec. 30, 2024).