ORAL ARGUMENT SCHEDULED 05/02/2012

NO. 11-1271

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: AIKEN COUNTY, *et al*., Petitioners.

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and GREGORY B. JACZKO, Chairman of the United States
Nuclear Regulatory Commission, Respondents.

On Petition for Writ of Mandamus (Agency Action Unreasonably Withheld)

FINAL BRIEF OF INTERVENOR, THE STATE OF NEVADA

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February 10, 2012

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and Amici.

Nevada agrees with the petitioners' statement of the parties, intervenors, and *amici* in this case.

II. Rulings under Review.

Nevada agrees this is an original action.

III. Related Cases.

There are no related cases. The case cited by petitioners, *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011), raised different issues and was dismissed for lack of jurisdiction.

Respectfully submitted,

Martin G. Malsch
Egan, Fitzpatrick, Malsch & Lawrence, PLLC

Dated: February 10, 2012

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

DOE	United States Department of Energy
NRC	United States Nuclear Regulatory Commission
SER	Safety Evaluation Report
TER	Technical Evaluation Report
TSPA	Total System Performance Assessment
YMRP	Yucca Mountain Review Plan

PERTINENT STATUTES, REGULATIONS, LEGISLATIVE HISTORY MATERIALS, AND OTHER ADMINISTRATIVE AGENCY MATERIALS

Copies of the pertinent statutes, regulations, legislative history materials, and other administrative agency materials are included in the attached addendum.

STATEMENT OF ISSUES

A. Has the U.S. Nuclear Regulatory Commission (NRC) unreasonably delayed its consideration of the Department of Energy's (DOE's) application for a construction authorization for the Yucca Mountain repository?

B. Assuming for argument purposes the NRC has unreasonably delayed, is petitioners' proposed remedy necessary, non-arbitrary, lawful and reasonable?

STATEMENT OF FACTS

A. The Yucca Mountain Application.

By letter dated June 3, 2008, the DOE tendered to the NRC an application seeking authorization to construct a facility to dispose of high-level radioactive waste (including spent or used nuclear fuel) in Yucca Mountain, Nevada, about ninety miles north of Las Vegas. *See* "Yucca Mountain; Notice of Receipt and Availability of Application," 73 Fed. Reg. 34348 (June 17, 2008) (JA000312-JA000313); corrected 73 Fed. Reg. 40,883 (July 16, 2008) (JA000314-JA000315). Under long-standing NRC rules, this tendering of an application did not trigger the commencement of any formal NRC safety review or licensing proceeding.[1] Instead, the safety review commenced on September 8, 2008, after the NRC Staff determined that the application was sufficiently complete, at least to begin the review, and the proceeding commenced on October 22, 2008, when the

[1] *See* 10 C.F.R. § 2.101(e)(1) and (e)(2).

Commission published a notice of hearing. *See* "*Department of Energy; Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain*," 73 Fed. Reg. 63029 (Oct. 22, 2008) (JA001632-JA001636).

The docketing of the application and the publication of the Notice of Hearing marked the beginning of one of the most complex, if not the most complex, licensing proceeding in NRC's history. The application sought approval to construct the first geologic repository in the United States. The application itself numbered about 8,600 pages and included over 100,000 pages of reference documents, which were supported further by millions of pages of studies, reports, and related materials. *See U.S. Department of Energy (High-Level Waste Repository)*, LBP-10-11, 71 NRC ___, 2010 NRC LEXIS 52 (2010) (JA000540-JA000592) and *U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters)*, CLI-08-18, 68 NRC 246 (2008) (JA001637-JA001643). The most important part of the application, a "Total System Performance Assessment" ("TSPA"), evaluated the ability of the repository to prevent or limit releases of radioactive materials to the environment over the next one million years – so-called "post closure safety." The TSPA consisted of hundreds of linked mathematical models purporting to predict for Yucca Mountain (1) the future

patterns of climate change, (2) the future spatial and temporal distributions of precipitation, (3) the future infiltration of water below the mountain surface, (4) the future erosion of the mountain, (5) the future flow of water through the upper part of the unsaturated zone, above the tunnels in the mountain where the wastes were to be emplaced, (6) the future geochemistry of the unsaturated zone, (7) the future magnitude of seepage of water into the tunnels, (8) the future geochemistry of the waters and deposits in the tunnels, (9) the future corrosion of the drip shields and waste packages, (10) the future dissolution of the wastes from liquids entering into corroded waste packages, (11) the future movement of the wastes below the tunnels through the lower unsaturated zone and saturated zone, (12) the probabilities and effects of earthquakes and volcanic eruptions, and (13) the nature and magnitude of future radioactive releases and doses.[2]

In NRC practice, the safety review of an application proceeds along two essentially parallel tracks: an adjudicatory proceeding before an administrative judge or Atomic Safety and Licensing Board (Licensing Board) to hear and resolve formally contested issues; and an informal review by NRC Staff technical experts. The first track typically produces initial decisions subject to Commission appellate review and (sometimes) judicial review; the second track ends with the issuance of

[2] The application is too voluminous to reference here, but the index to *The State of Nevada's Petition to Intervene as a Full Party*, December 19, 2008 (JA001661-JA001676) provides an accurate summary of the technical issues addressed in the TSPA.

Safety Evaluation Reports (SERs). The two tracks are related because, in complex cases like Yucca Mountain, the NRC Staff participates in the adjudicatory proceeding as a full party and its testimony comes after and is in accord with its SERs.

B. Track 1 – The Adjudicatory Proceeding.

Twelve petitions to intervene in the adjudicatory proceeding were filed in response to the Notice of Hearing. Each petition included allegations and arguments to establish standing to intervene and contentions. *See* 10 C.F.R. § 2.309. Each contention amounted to a separate challenge to the application and every technical challenge was supported by the near equivalent of an expert report under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Three hundred and seventeen contentions were filed and almost all were admitted as presenting sufficient facts and expert opinions to create a genuine issue. The petitions and contentions, answers to petitions and contentions, replies to answers, and rulings thereon comprise over 12,000 pages. *See U.S. Department of Energy (High-Level Waste Repository)*, CLI-09-14, 69 NRC 580 (2008) (JA000480-JA000520). Nevada was admitted as a party opposing the application with over two hundred admitted contentions. Nye County was also admitted as a party, but with only five admitted contentions. None of the other petitioners in this mandamus case bothered to intervene at this point. *Id.*

Under the NRC's rules, the admission of a contention enables the party to obtain discovery thereon (including depositions, admissions, and document production), move for summary disposition where appropriate, and present its case by examination and cross-examination of witnesses at an oral hearing, as in a formal trial-type hearing conducted under sections 556 and 557 of the Administrative Procedure Act. *See* 10 C.F.R. Part 2, Subparts C, G and J.

By March 3, 2010, when DOE moved to withdraw its application, a comprehensive case management order had been issued addressing discovery and related schedules and considerable progress had been made in organizing related contentions, identifying testifying witnesses, and scheduling depositions.[3] The parties identified 103 expert witnesses for deposition, just for the first phase of the proceeding (primarily addressing post-closure (disposal) safety).[4] Deposition schedules had been agreed to for about half of the witnesses.[5] The experts' fields of expertise reflected the complexity of the TSPA, and the deposition list included

[3] *See* CAB Case Management Order #2, September 30, 2008 (JA001644-JA001660).
[4] *See U.S. Department of Energy (High Level Waste Repository)*, DOE Motion to Renew Temporary Suspension of the Proceeding, January 21, 2011, at note 14 (JA001265). DOE's motion was denied by the Licensing Board. *See U.S. Department of Energy (High Level Waste Repository)*, Order and Memorandum (Denying Motion to Renew Temporary Suspension of the Proceeding) (Feb. 25, 2011). (JA000602-JA000604)
[5] *Id*.

experts in climate change, hydrology, geochemistry, corrosion, waste transport, radioactive dose calculations, volcanism, and performance assessment.

When DOE announced its intention to withdraw its application, the presiding Licensing Board stayed the proceeding without objection from any party (including Nye County) to avoid potentially unnecessary expenditure of resources. *See U.S. Department of Energy (High-Level Waste Repository),* Order Granting Stay of Proceeding, (Feb. 16, 2010) (JA001283-JA001284). That stay continued until June 29, 2010, when the Licensing Board admitted additional parties to the proceeding (including four of the petitioners in this mandamus case – Aiken County, South Carolina, the State of South Carolina, the State of Washington, and NARUC) and denied DOE's motion to withdraw its application. *See U.S. Department of Energy (High-Level Waste Repository),* LBP-10-11, 71 NRC ___, 2010 NRC LEXIS 52 (2010) (JA00000540-JA000592). At that point, the stay expired by its own terms.

On June 30, 2010, the Commission invited the parties to submit briefs as to whether the Commission should review, and reverse or uphold, the Licensing Board's decision denying DOE's motion to withdraw. The Commission did not stay the ongoing licensing proceedings before the Licensing Board. *See U.S. Department of Energy (High-Level Waste Repository)* (unpublished order from the Secretary of the Commission) (June 30, 2010) (JA000593).

Because of uncertainties associated with (1) Licensing Board and Commission consideration of DOE's motion to withdraw, (2) the closely related case (then) pending before this Court in *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011) (filed on April 2, 2010 and decided July 1, 2011), and (3) whether the Congress would appropriate sufficient funds for both the NRC and DOE to make meaningful progress on the application, the parties chose for the most part not to engage in expensive deposition discovery or other hearing preparation after early 2010, notwithstanding that the proceeding before the Licensing Board was not stayed.[6] However, other activities continued before the Licensing Board. For example, ten important post-closure legal issues were briefed, argued and resolved, and petitions for rule waivers were denied. *See U.S. Department of Energy (High-Level Waste Repository)*, LBP-10-22, 72 NRC ___, (slip op.) (Dec. 14, 2010) (JA001224-JA001260).

On September 9, 2011, the Commission issued a Memorandum and Order announcing it was evenly divided (2-2) on whether to take the affirmative action of

[6] We say "for the most part" because in May 2011 Nevada noticed the depositions of some DOE witnesses because it was concerned about a looming discovery deadline previously set by the Licensing Board and still in effect. Nevada did not object to DOE's motion for a protective order quashing the deposition notices because it did not wish to engage in expensive activities that could prove to be wasteful. Nevada was satisfied with the Licensing Board's decision effectively suspending normal deposition discovery. *See U.S. Department of Energy (High-Level Waste Repository)*, Licensing Board Memorandum and Order Granting Motion for Protective Order (May 20, 2011) (JA001285-JA001288).

overturning or upholding the Licensing Board. *See U.S. Department of Energy (High-Level Waste Repository)*, CLI-11-07, 74 NRC___, (slip op.) (2011) (JA000635-JA000636). The 2-2 split was possible because one of the five Commissioners (Dr. George Apostolakis) had voluntarily recused himself. *Id.* at note 3 (slip op. at 2) (JA000636). In the same Memorandum and Order, because of budget limitations, the Commission ordered the Licensing Board to "by the close of the current fiscal year, complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding." *See U.S. Department of Energy (High-Level Waste Repository)*, CLI-11-07, 74 NRC___, (slip op. at 1) (2011) (JA000635-JA000636). The Commission decision was unanimous (4-0).

Accordingly, on September 30, 2011, the Licensing Board documented the history of the proceeding and formally suspended the adjudicatory proceeding "because both future appropriated NWF [Nuclear Waste Fund] dollars and FTEs [full-time equivalent personnel positions] for this proceeding are uncertain." *See U.S. Department of Energy (High-Level Waste Repository)*, LBP-11-24, 74 NRC___, (slip op. at 2) (2011) (JA000639). Two-hundred and eighty-eight contentions remained outstanding when the suspension took effect. *Id.* No party (including four of the Petitioners in this mandamus case) asked the Licensing

Board to reconsider its suspension or asked the Commission to direct the Licensing Board to revive the proceeding.

C. Track 2 – The SER.

The NRC Staff issued Volume 1 of the SER on August 23, 2010, addressing general information topics. No other SERs have been issued. However the Staff's safety review continued through September 2011, and culminated in the issuance of three additional volumes of comprehensive reports entitled "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository Application: Post Closure Volume: Repository Safety After Permanent Closure (NUREG-2107)" (1354 pages) (JA001351-JA001353), "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository Application: Pre- Closure Volume: Repository Safety Before Permanent Closure (NUREG-2108)" (513 pages) (JA001354-JA001356), and "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository Application: Administrative and Programmatic Volume (NUREG-2109)" (89 pages) (JA001357-JA001359). These three Technical Evaluation Reports (TERs) document the results of the NRC Staff's safety review of DOE's application as supplemented by DOE's responses to Staff requests for additional information. The three reports reach ultimate conclusions whether the application and other material submitted by DOE comply

with the Staff's "Yucca Mountain Review Plan (NUREG-1804, Rev. 2) " ("YMRP") (JA001677-JA001683), but do not reach any express conclusions whether DOE has complied with the Commission's regulations.[7]

STANDARD OF REVIEW

Nevada agrees with the standard of review set forth in Respondent NRC's Brief.

SUMMARY OF ARGUMENT

The NRC has not unreasonably delayed its consideration of DOE's Yucca Mountain application. With respect to the NRC adjudicatory proceeding, the petitioners focus on the fourteen month period between June 29, 2010, when the Licensing Board denied DOE's motion to withdraw its application, and September 9, 2011, when the Commission announced it was evenly divided (2-2) on the merits of the Licensing Board's denial. However the Commission was prevented from deciding the merits of the Licensing Boards decision by a provision in the Energy Reorganization Act of 1974 which provides that a 2-2 split prevents any decision from being made. The Commission reasonably delayed announcing its 2-

[7] *E.g.*, "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository Application: Post Closure Volume: Repository Safety After Permanent Closure (NUREG-2107)" at 21-1 "Conclusions" ("NRC Staff notes that (i) the repository design is composed of multiple barriers and (ii) the results of the performance assessments for individual protection, human intrusion, and separate groundwater protection calculations are consistent with applicable YMRP guidance.") (JA001685)

2 split until September 9, 2011 to allow time for individual Commissioners to reconsider their views and possibly reach a decision about the future course of the licensing proceeding that would be supported by a majority of Commissioners.

As far as the informal safety review of NRC Staff is concerned (the SER review), the petitioners simply have not established that there has been any significant delay in progress toward completing the Yucca Mountain SERs. In fact, the Yucca Mountain SERs are nearly complete.

If the Court agrees with the petitioners that the NRC has unreasonably delayed consideration of the Yucca Mountain license application, petitioners ask the Court to, among other things, order the NRC to "approve or disapprove the application within 14 months." Such an order would be unnecessary, arbitrary, unreasonable, and unlawful. It would be unnecessary because no statutory timetable for a Commission decision is currently in effect. It would be arbitrary because the 14-month period bears no logical relation to the time needed to complete the proceeding. It would be unreasonable because 14 months is a manifestly inadequate amount of time to complete an adjudicatory hearing involving hundreds of incredibly complex and novel scientific and technical questions and over 100 expert witnesses. It would be unlawful because a 14-month deadline could not be met without trampling on the parties' procedural rights granted by the Atomic Energy Act of 1954 and the NRC's Rules of Practice.

If this proceeding must continue, only the NRC is in a position to propose a reasonable schedule, after consultation with the parties.

ARGUMENT

A. There Has Been No Unreasonable Delay.

Nevada agrees with the NRC's arguments (Respondents' Brief at 38-60) that the suspension of the Yucca Mountain adjudicatory proceeding and the orderly close-out of the NRC Staff's technical safety review were reasonable in light of various Congressional decisions on appropriations and that mandamus relief is not warranted. Nevada offers the following additional reasons why the Commission has not unreasonably delayed its consideration of DOE's Yucca Mountain application.

(1) The Adjudicatory Proceeding.

Petitioners' complaint is that the NRC has done nothing to further its review of the application for nearly a year and one-half since the Licensing Board denied DOE's motion to withdraw. Petitioners' Brief at 41. Petitioners focus in particular on the fourteen-month period between June 29, 2010, when the Licensing Board denied DOE's motion to withdraw its application, and September 9, 2011, when the Commission announced its 2-2 split on review of the Licensing Board's decision. Petitioners' Brief at 54. By comparison, the median time interval from filing to final disposition of administrative agency appeals in the U.S. Courts of

Appeal (excluding the Federal Circuit), during the 12-month period ending September 30, 2010, was 16.7 months. *See* 2010 Annual Report of the Director, Administrative Office of the United States Courts, at Table B-4C.

Of course the NRC operates within a different legal context than the U.S. Courts of Appeal and an unqualified comparison of decision statistics would be inappropriate. But that different NRC context tended to drive the NRC in opposing directions. On the one hand, if we assume for argument purposes that the NRC was operating under a statutory mandate in section 114(d) of the Nuclear Waste Policy Act, 42 U.S.C. §10134(d), to reach a final decision on the merits of the Yucca Mountain application within three years (four years if requested), some reasonable expedition was called for.[8] On the other hand, as explained below, the Energy Reorganization Act of 1974 placed effective and practical obstacles to expedition in this case.

If petitioners are correct that by October 29, 2010 all four participating NRC Commissioners had formulated individual opinions on whether the Licensing Board's decision was correct and were prepared to vote (Petitioners' Brief at 11), but that vote would be 2-2, the Commission at that point was effectively paralyzed

[8] We do not here address the question whether section 114 (d) prevents DOE from withdrawing its application. The Licensing Board's decision denying DOE's motion to withdraw is currently the law of the case and, therefore, the question is moot. Petitioners concede that the Licensing Board's decision is the law of the case. Petitioners' Brief at 37-38.

as a decision-making body by the operation of section 201(a)(1) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5841(a)(1). This section provides that "[a]ction of the Commission shall be determined by a majority vote of the members present." Therefore, as a matter of law, a 2-2 split prevented the Commission from taking any action, whether to affirm or to overturn the Licensing Board. And it is important to note here that, unlike in the case of some other regulatory commissions, Congress did not provide in the Energy Reorganization Act of 1974 that an evenly split vote constituted denial of a petition or appeal.[9] Instead Congress provided that an evenly split Commission vote signified no decision at all, leaving the matter in complete limbo.[10]

This Court holds that the existence of a statutory timetable is merely one of the factors to be considered in deciding whether a petitioner is entitled to relief from an agency's delay, and that a statutory deadline merely provides context for

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[9] Appendix 5 of the "Internal Commission Procedures" provides that a 2-2 vote will "result in" a denial of review of a Licensing Board decision, but this must be understood in the context of Section 201(a) (1) of the Energy Reorganization Act of 1974. Because, by statute, a 2-2 vote cannot result in any Commission action (or decision), the denial of review referred to in the "Internal Commission Procedures" is properly understood as the necessary result of Commission inaction (or non-decision) in the circumstance where Commission action would be required to review and reverse a Licensing Board decision.

[10] *Sprint Nextel Corporation v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), involved a split 2-2 vote where the applicable statute provided that a split 2-2 vote resulted in denial of a petition. The FCC action was held to be unreviewable because the petition denial that resulted was the consequence of Congressional, not agency, action.

the application of a rule of reason. *E.g., Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). A no-action (or no-decision) outcome in the high-profile Yucca Mountain case was undesirable, especially considering that the Licensing Board had not been delegated any final decision authority over any aspect of the adjudicatory proceeding. It was manifestly reasonable for the NRC to take additional time beginning in the fall of 2010 to determine whether any compromise was even remotely possible so that some Commission decision could be issued, if not about the merits of the Licensing Board decision under review, then at least about the proper course of the licensing proceeding assuming the Commission was evenly divided on whether DOE could withdraw its application.

Delay with a view to a possible majority decision – even a multiple month delay – was especially reasonable here considering that an early (and possibly premature) announcement of a 2-2 split on or about October, 2010 would not necessarily have prompted the parties to suddenly engage in expensive deposition discovery and make substantial progress toward a merits decision on all admitted contentions. For some of the period the 2010-2011 *In re Aiken County* case was still pending, posing the possibility this Court might decide DOE was entitled to withdraw its application, there was uncertainty whether the Congress would ever appropriate sufficient funds to complete the proceeding, and simply announcing a

2-2 split at an early date (on or about October 2010), but saying nothing about the future course of the proceeding, would just have prompted the parties to speculate whether there could be a future Commission 3-1 or even 4-0 vote to reverse the Licensing Board.

The Commission could in theory have directed the parties to proceed, but such a direction was presumably foreclosed by the absence of a Commission majority favoring such a course. This Commission inaction was entirely reasonable under the circumstances. Why would a Commissioner vote to direct the resumption of a complex, expensive and burdensome proceeding given the uncertainties? In fact, the very same Licensing Board that denied DOE's withdrawal motion ruled on May 20, 2011 that deposition discovery should not be pursued because of "Congressional funding and other uncertainties." *See U.S. Department of Energy (High-Level Waste Repository)*, Licensing Board Memorandum and Order (Granting Motion for Protective Order) (May 20, 2011) (JA001285-JA001288).

In sum the delay in Commission action after October 2010 (when the informal Commissioner votes were cast) resulted from the provision in the Energy Reorganization Act of 1974 specifying that a 2-2 split vote prevents any Commission action from being taken. The delay under these difficult circumstances was entirely reasonable. In any event, the delay had little or no

bearing on whether a statutory decision deadline could or would be met because the Commission's inaction had little or no effect on the progress of the proceeding before the Licensing Board.

The Commission never could reach any majority view on the merits of the Licensing Board's decision denying DOE's motion to withdraw the application. But, as indicated, the Commission (including the two Commissioners who believed the Licensing Board was right in deciding the application could not be withdrawn) eventually reached a unanimous agreement that the adjudicatory proceeding should be suspended because of budgetary limitations.

(2) The Safety Evaluation.

Petitioners have not established that there has been any significant delay in progress toward completing the Yucca Mountain SERs. In fact, the Yucca Mountain SER is nearly complete.

One SER volume is completed, and three TER volumes are also completed. The three TERs document the results of the NRC Staff's safety review of DOE's application as supplemented by DOE's responses to Staff requests for additional information. There is no evidence that the completion of these TERs was significantly delayed by any Commission or Commissioner action.

As indicated above, the TERs reach ultimate NRC Staff conclusions whether the application and other material submitted by DOE comply with the Staff's

"Yucca Mountain Review Plan (NUREG-1804, Rev. 2)" (JA001677-JA001683). There are only two apparent differences between the set of documents comprising Volume 1 of the SER and the three TERs and a complete set of SERs. First, the TERs document and reach ultimate conclusions regarding compliance with the Yucca Mountain Review Plan, while a comprehensive set of SERs would document and reach ultimate conclusions regarding compliance with the Commission's safety regulations. Second, the TERs do not recommend license conditions, while the last SER volume would recommend license conditions flowing from the review conclusions. However these differences are trivial in the context of this mandamus case for the following reasons.

First, the Yucca Mountain Review Plan includes "acceptance criteria" based on assuring compliance with the NRC's safety regulations.[11] Therefore when the NRC Staff concludes in its TERs that DOE has complied with the Yucca Mountain Review Plan it has also concluded that it has complied with a comprehensive collection of "acceptance criteria" intended to satisfy the safety regulations. Second, license conditions cannot be meaningfully addressed until the license is about to be issued following the conclusion of the adjudicatory hearings. Until then the absence of an SER volume addressing license conditions is of academic interest only.

[11] E.g., NUREG 1804, Rev. 2 (YMRP) at xv, 1-4, and 1-5 (JA001679, JA001682, and JA001683).

In sum, while SER work was halted after the one volume was completed, the actual safety review continued and culminated in issuance of three additional comprehensive safety evaluations that are the near equivalent of a complete set of SERs. Petitioners have not established that there has been any significant delay in progress toward completing the Yucca Mountain SERs.

B. Petitioners Proposed Remedy is Unnecessary, Arbitrary, Unlawful and Unreasonable.

If the Court agrees with the petitioners that the NRC has unreasonably delayed consideration of the Yucca Mountain license application, petitioners ask the Court to, among other things, order the NRC to "approve or disapprove the application within 14 months." Petitioners' Brief at 54. Such an order would be unnecessary, arbitrary, unlawful and unreasonable.

(1) Such an Order Would Be Unnecessary Because No NRC Decision Deadline is In Effect.

Petitioners' proposed remedy presumes that the NRC is still obligated to decide the merits of the Yucca Mountain application within three years (four years if requested). However, as explained below, no statutory decision deadline is currently in effect.

While repeals by implication are not favored, Congress is not required to make an express statutory statement in order to modify an existing statute via a subsequent appropriations law. A positive repugnancy between the existing statute

and the appropriations statute is sufficient. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-190 (1978). Thus, for example, Congress may suspend operation of a statute by restricting use of appropriated funds. *United States v. Dickerson*, 310 U.S. 554, 561 (1940). This is what has occurred in our case.

The recently-enacted Consolidated Appropriations Act, 2012 (Public Law No. 112-74) (Act) unambiguously rejected all efforts to further fund the NRC licensing proceeding or review, or to advance the Yucca Mountain Project in any way.[12] The legislative history of the Act is remarkably clear. The United States House of Representatives originally proposed to give DOE $25 million in FY 2012 to advance the Yucca Mountain Project. The House Appropriations Committee Report (H.R. Rep. No. 112-118, 112th Congress, 1st Sess., June 24, 2011) explained (at 115) that it included this funding "to provide necessary expenses in the event that ongoing litigation requires the Administration to reconstitute its license application team."

The House originally proposed to give NRC $ 10 million in FY 2012. The House Appropriations Committee Report (H.R. Report 112-118, 112th Congress, 1st Sess., June 24, 2011) explained (at 190) that "[t]his funding may only be used to continue the Yucca Mountain license application." The House Appropriations

[12] The appropriations for DOE's and the NRC's activities are in Division B of the Act, entitled the "Energy and Water Development Appropriations Act, 2012." DOE appropriations are in Title III and NRC appropriation are in Title IV.

Committee explained further that it included "[a] general provision . . . to prohibit any funding in this bill from being used to bring the Yucca Mountain license application to a close until the Commission reverses the Atomic Safety and Licensing Board decision LBP-10-11" (*id.*).

However the Congress ultimately rejected the House proposals. The Joint Explanatory Statement of the Committee of Conference on the Act (H.R. Report 112-331, 112th Congress, 1st Sess., Dec. 15, 2011) explains in pertinent part as follows (at 850-51, 855, and 881-82):

> Multiple geologic repositories will ultimately be required for the long-term disposition of the nation's spent fuel and nuclear waste; the Department should build upon its current knowledge base to fully understand all repository media and storage options and their comparative advantages, and the conferees direct the Department to focus, within available funds, $3,000,000 on development of models for potential partnerships to manage spent nuclear fuel and high level waste, and $7,000,000 on characterization of potential geologic repository media. The Department is directed to preserve all documentation relating to Yucca Mountain, including technical information, records, and other documents, as well as scientific data and physical material.
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> ***
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> The conference agreement provides [DOE] $0 for nuclear waste disposal, as proposed by the Senate, instead of $25,000,000 as proposed by the House.
>
> ***
>
> The conference agreement does not include $20,000,000 [for NRC] to be made available from the Nuclear Waste Fund to support the

> geological repository for nuclear fuel and waste, as proposed by the House. The Senate proposed no similar provision.

The text quoted above confirms that no additional funds will be provided to the NRC to continue the NRC Staff licensing review or to restart the adjudicatory licensing proceeding for Yucca Mountain.[13] And, by funding DOE efforts to "build upon its current knowledge base to fully understand all repository media and storage options and their comparative advantages," the Conference Report suggests that Congress believes it is time to move on beyond Yucca Mountain to look at other disposal and storage options.

It is especially telling that Congress considered but ultimately rejected the House Appropriations Committee's two complimentary proposals that DOE Yucca Mountain activities should be funded if "ongoing litigation requires the Administration to reconstitute its license application team" and that the NRC should be prohibited from "bring[ing] the Yucca Mountain license application to a close" unless the Commission reversed the CABs denial of DOE motion to withdraw its license application. This shows clearly that the Congress denied funding with full knowledge of both the status of the NRC adjudicatory proceeding and of the possibility that a decision in on-going judicial litigation might hold that

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[13] The House added $10 million to the Appropriations Committee's recommendation of $10 million for NRC Yucca Mountain activities (for a total NRC Yucca Mountain appropriation of $20 million). 112th Congress, 1st Sess. Cong. Rec. H5011, June 13, 2011.

the application cannot be withdrawn. The Congress's specific rejection of the House of Representatives' funding proposals is completely repugnant to the continued effectiveness of an enforceable statutory deadline for NRC to complete its review or proceeding. The Congress cannot possibly expect the NRC to continue to strive to meet a decision deadline when the funds required to do so are denied. However the Congress's express refusal to fund the NRC (or DOE) is completely consistent with the NRC's action to suspend the proceeding.

In sum, there is no statutory deadline in effect, and any relief that may be granted in this case should be formulated without regard for any statutory deadline. Moreover the Commission's decision to, in effect, direct the Licensing Board to suspend the proceeding because of budget limitations, and the Licensing Board's decision doing just that, were completely in accord with Congressional expectations and were reasonable and lawful.

(2) Such an Order Would Be Arbitrary.

Petitioners base their proposed fourteen-month decision period on the fourteen-month period between the Licensing Board's decision denying DOE's motion to withdraw and the Commission's announcement it was evenly divided on whether to take the affirmative action of overturning or upholding the Licensing Board's decision. Petitioners' Brief at 54. This is arbitrary, even perverse logic. There is no logical relation between the time the Commission took to consider the

Licensing Board's decision and the time reasonably required to complete the proceeding. By petitioners' logic, if the Commission had devoted zero time to the Licensing Board's decision, zero time would be allotted to the Commission to approve or disapprove of the application.

(3) Such an Order Would Be Unreasonable and Unlawful.

Fourteen months is not nearly enough time for the Commission to reach a final and fair decision whether DOE's application should be granted or denied.

If we were to reset the clock back to the time before DOE moved to withdraw its application and pretend no such motion was ever filed, and also pretend the Congress supported both DOE and NRC with sufficient appropriated funds to continue the proceeding, discovery (primarily deposition discovery) of Phase 1 contentions (mostly post-closure safety issues), which had begun in the fall of 2009, was scheduled to be completed in November 2010, at the earliest. This would have been a prodigious feat, considering that 103 experts had been identified for deposition. Discovery of Phase 1 issues would have been followed by discovery on the remaining issues, which would have required at least another six months. Despite best efforts, discovery would not have been completed until about May 2011 (30 months after publication of the Notice of Hearing), meaning that the proceeding would then have been at least ten months behind the schedule

set forth in 10 C.F.R. Part 2, Appendix D (discovery to be completed on day 608 (about 20 months) after publication of the Notice of Hearing).

At this pace (a one-month schedule slip for every two months in the Appendix D schedule), which was controlled by case management orders issued by the presiding Licensing Board, the Commission's final decision would not have been rendered until about month 54, four and one-half years after publication of the Notice of Hearing. Petitioners are in no position to complain about this pace, or about the case management orders influencing it. The individual petitioners are not even parties to the proceeding. The other petitioners (except Nye County) chose not to seek intervention until after case management orders had been issued and discovery schedules had been set and, therefore, took the proceeding as they found it. Nye County participated in the development of the case management orders and did not object to them. *See* Case Management Order #2, September 30, 2009, at 2 (JA001644).

Fifty-four months from Notice of Hearing to final decision is in excess of the schedule set out in Appendix D. However, 10 C.F.R. § 2.1026 provides that the schedule milestones in Appendix D may be extended by the Licensing Board or the Commission and, under the circumstances, extensions were inevitable. It is simply not reasonable to expect that any final decision in this extraordinarily complex case can be issued fourteen months from the date of a Court decision in this case.

Fifty-four months is also in excess of the three- year (four- year if requested) decision deadline in the Nuclear Waste Policy Act. However neither the number of contentions that were admitted (nearly 300) nor the complexity of the issues (more than one-million pages of technical materials and more than 100 testifying experts) could possibly have been anticipated when the Congress set the deadline back in 1982. In short, Congress asked for what in the current circumstances is impossible, even assuming adequate appropriations are provided. This happens all too frequently in other fields of administrative law, and highlights the wisdom of this Court's holding in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984), that statutory deadlines merely provide context for the application of a rule of reason.

Finally, any remedy this Court may order must be consistent with the parties' procedural rights granted by section 189a(1)(A) of the Atomic Energy Act of 1954, 42 U.S.C § 2239a(1)(A), and the NRC's Rules of Practice in 10 C.F.R. Part 2, Subparts C, G and J. Section 189a(1)(A) of the Atomic Energy Act of 1954 grants interested persons (like Nevada) the right to a hearing in a licensing proceeding and the NRC's Rules of Practice flesh this out by providing for discovery (including depositions), cross-examination of opposing witnesses at an oral hearing before a Licensing Board, and a decision based on the administrative record. The hearing process had reached the pre-hearing discovery stage when

DOE moved to withdraw. The parties' rights must be respected in any revived proceeding. Any reasonable decision schedule must offer sufficient time for the parties to complete discovery and to participate in a meaningful hearing, and offer the Licensing Board and the Commission a reasonable time to study the record and render a thoughtful and thorough decision. Petitioners' proposed schedule would not allow sufficient time for these important process steps to be completed and, in fact, almost certainly could not be achieved without some substantial curtailment of the parties' procedural rights.

C. The Court Should Rely on NRC Expertise.

In *Oil, Chemical and Atomic Workers International Union v. Zeger, Assistant Secretary of Labor*, 768 F. 2d 1480, 1487-88 (D.C. Cir. 1985), the petitioners requested that the agency be required to complete a rulemaking process begun five years before within eighteen months (for a total of six and one-half years). The Court deferred instead to an agency schedule whereby proceedings would be completed within an additional two years (for a total of seven years) and declined to issue an order compelling agency action unreasonably delayed because of the complexity of the scientific and technical issues and the corresponding appropriateness of a rulemaking process with an extra step to facilitate public participation.

The scientific and technical issues presented in DOE's application are far more complex than those presented in *Oil, Chemical and Atomic Workers International Union.* Moreover, *Oil, Chemical and Atomic Workers International Union* addressed the need for a decision in an informal rulemaking, while the instant case addresses the need for a decision in a much more time and resource consuming and unpredictable on-the-record adjudication. The Court stated in *Oil, Chemical and Atomic Workers International Union* (at 1488) that "the difficulty and uncertainty inherent in the venture caution us against second-guessing [the agency's] judgment" in regard to the decision process to be followed. So too here, the complexity, difficulty and uncertainty inherent in a review and hearing on a first-time- ever geologic repository requires this Court to defer to any reasonable schedule and decision process set by the NRC.

If the Court is inclined to grant relief, Nevada submits that the Court is in no position to set a decision schedule without input from the NRC. The NRC has conducted and completed numerous adjudicatory hearings on complex nuclear safety issues and can bring its expertise to bear in developing a schedule. Moreover the NRC is in a position to assess what can be accomplished with the very limited resources that are available. If this Court were to decide that relief is warranted in this case, it should ask the NRC to propose a reasonable decision timetable, after consultation with the parties.

CONCLUSION

Petitioners' request for relief should be denied. If, however, the Court decides relief is warranted, the NRC should be asked to propose a new decision schedule that respects the parties' rights and is reasonable and appropriate considering the novelty and complexity of the issues.

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February 10, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Courts' November 4, 2011 Order because it contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word in 14 pt. Times New Roman format.

CERTIFICATE OF SERVICE

I certify that on February 10, 2012, the *Final Brief of Intervenor, State of Nevada* was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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ADDENDUM

PERTINENT STATUTES, REGULATIONS, LEGISLATIVE HISTORY MATERIALS, AND OTHER ADMINISTRATIVE AGENCY MATERIALS

1. Atomic Energy Act of 1954, Section 189a(1)(A), 42 U.S.C § 2239a(1)(A)

2. Energy Reorganization Act of 1974, Section 201(a)(1), 42 U.S.C. § 5841(a)(1)

3. Nuclear Waste Policy Act, Section 114(d), 42 U.S.C. §10134(d)

4. 10 C.F.R. § 2.101(e)(1) and (e)(2)

5. 10 C.F.R. § 2.1026

6. 10 C.F.R § 2.309

7. 10 C.F.R. Part 2, Subparts C, G and J

8. 10 C.F.R. Part 2, Appendix D

9. NUREG 1804, Rev. 2 ("Yucca Mountain Review Plan") at xv, 1-4, and 1-5

10. Excerpts from the Consolidated Appropriations Act, 2012 (Public Law No. 112-74 (Act), Division B, Titles III and IV

11. Excerpts from the House Appropriations Committee Report (H.R. Report 112-118, 112th Congress, 1st Sess., June 24, 2011) at 115, 190

12. Excerpts from the Joint Explanatory Statement of the Committee of Conference on the Act (H.R. Report 112-331, 112th Congress, 1st Sess., Dec. 15, 2011) at 850-851, 855, and 880-881

13. Cong. Rec. H5010-11, July 13, 2011, 112th Congress, 1st Sess.

14. 2010 Annual Report of the Director, Administrative Office of the United States Courts, Table B-4C

42 USC 2239. Hearings and judicial review.

Sec. 189. Hearings And Judicial Review

a. (1)(A) In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under section 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.[324]

Federal Register Publication.

(B)(i) Not less than 180 days before the date schedules for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185b., the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the

[324]P.L. 87-615 section 2, (76 Stat. 409) (1962), amended this section. Before amendment, it read:
SEC. 189. HEARINGS AND JUDICIAL REVIEW.–

a. In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under section 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 103 or 104b. for a license for a facility, and on any application under section 104c. for a license for a testing facility.

P.L. 85-256, § 7, 71 Stat. 576 (1957), had previously amended section 189a by adding the last sentence thereof.

P.L. 102-486, 106 Stat. 3120, added a subparagraph designator (A), to section 189a(1) and added a new subsection (B)(i).

request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).[325]

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

Notice publication.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

Regulations establishing standards, criteria, and procedures.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which

[325]P.L. 102-486, 106 Stat. 3121 (1992), amends section 189a(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2239 (a)(2)) by inserting "or any amendment to a combined construction and operating license" after "any amendment to an operating license" each time it occurs.

*Note: Sections 185b and 189a(1)(b) of the Atomic Energy Act of 1954, as added by sections 2801 and 2802 of this Act, shall apply to all proceedings involving a combined license for which an application was filed after May 8, 1991, under such sections.

criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.[326]

42 USC 2239(b).

b. The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, United States Code, and chapter 7 of title 5, United States Code:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act.

(4) Any final determination under section 1701(c) relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.[327]

42 USC 2240.

Sec. 190. Licensee Incident Reports

No report by any licensee of any incident arising out of or in connection with a licensed activity made pursuant to any requirement of the Commission shall be admitted as evidence in any suit or action for damages growing out of any matter mentioned in such report.[328]

42 USC 2241.
Atomic Safety and Licensing Board

Sec. 191. Atomic Safety And Licensing Board

a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder.[329]

5 USC 556.
5 USC 557.

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[326]P.L. 97-415, § 12, 96 Stat. 2067 (1983), amended section 189 by inserting (1) after subsection (a) designation and by adding at end thereof new paragraph (2)(A)(B)(C).

[327]P.L. 104-134, Title III, Ch. 1, Subch. A, § 3116(c), 110 Stat. 1321-349 (1996), substituted subsection (b) for one which read:

(b) Any final order entered in any proceeding of the kind specified in subsection (a) above or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (Ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.

[328]Section 190 was added by P.L. 87-206, § 16, 75 Stat. 475 (1961).

[329]P.L. 91-560, § 10, 84 Stat. 1472 (1970), amended the first sentence of subsection191a. Before amendment, it read as follows:

Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each composed of three members, two of whom shall be technically qualified and one of whom shall be qualified in the conduct of administrative proceedings, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued hereunder.

and capital equipment" may be merged with amounts appropriated for "Operating expenses."

(f) When so specified in an appropriation Act, amounts appropriated pursuant to any annual authorization Act for "Operating expenses" or for "Plant and capital equipment" may remain available until expended.

Construction design services.

(g) The Administrator is authorized to perform construction design services for any administration construction project whenever (1) such construction project has been included in a proposed authorization bill transmitted to the Congress by the Administration, and (2) the Administration determines that the project is of such urgency in order to meet the needs of national defense or protection of life and property or health and safety that construction of the project should be initiated promptly upon enactment of legislation appropriating funds for its construction.

(h) When so specified in appropriation Acts, any moneys received by the Administration may be retained and used for operating expenses, and may remain available until expended, notwithstanding the provisions of section 3617 of the Revised Statutes (31 USC 484); except that–

(1) this subsection shall not apply with respect to sums received from disposal of property under the Atomic Energy Community Act of 1955 or the Strategic and Critical Materials Stockpiling Act, as amended, or with respect to fees received for tests or investigations under the Act of May 16, 1910, as amended (42 USC 2301; 50 USC 98h; 30 USC 7); and

(2) revenues received by the Administration from the enrichment of uranium shall (when so specified) be retained and used for the specific purpose of offsetting costs incurred by the Administration in providing uranium enrichment service activities.

Funds transfer.

(i) When so specified in an appropriation Act, transfers of sums from the "Operating expenses" appropriation made pursuant to an annual authorization Act may be made to other agencies of the Government for the performance of the work for which the appropriation is made, and in such cases the sums so transferred may be merged with the appropriations to which they are transferred.[6]

Title II–Nuclear Regulatory Commission; Nuclear Whistleblower Protection[7]

42 USC 5841. Members and Chairman.

Sec. 201. Establishment And Transfers

(a)(1)[8] There is established an independent regulatory commission to be known as the Nuclear Regulatory Commission which shall be composed of five members, each of whom shall be a citizen of the United States. The President shall designate one member of the Commission as Chairman thereof to serve as such during the pleasure of the President. The Chairman may from time to time designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all meetings of the Commission and a quorum for the transaction of business shall consist of at least three

[6] P.L. 95-238, section 201, 92 Stat. 56 (1978), added section 111; as amended, P.L. 103-437, section 15(c)(7), 108 Stat. 4592 (1994).
[7] P.L. 102-486, 106 Stat. 3124 (1992) created this new Title heading.
[8] P.L. 94-79, § 201, 89 Stat. 413 (1975), added "(1)" immediately after section 201(a).

members present. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information relating to the performance of his duties or responsibilities, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or Acting Chairman in the absence of the Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, persons, or the public, and on behalf of the Commission, shall see to the faithful execution of the policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct. The Commission shall have an official seal which shall be judicially noticed.

Seal. Commission Chairman. Functions.

(2) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission, including functions of the commission with respect to (a) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman, and except as otherwise provided in the Energy Reorganization Act of 1974), (b) the distribution of business among such personnel and among administrative units of the Commission, and (c) the use and expenditure of funds.

42 USC 5801 note.

(3) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(4) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(5) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.[9]

(b) (1) Members of the Commission shall be appointed by the President, by and with the advice and consent of the Senate.

(2) Appointments of members pursuant to this subsection shall be made in such a manner that not more than three members of the Commission shall be members of the same political party.

42 USC 5841. Term of Office.

(c) Each member shall serve for a term of five years, each such term to commence on July 1, except that of the five members first appointed to the Commission, one shall serve for one year, one for two years, one for three years, one for four years, and one for five years, to be designated by the President at the time of appointment; and except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term. For the purpose of determining the expiration date of the terms of office of the five members first appointed to the

[9]Public Law 94-79, section 201, 89 Stat. 413 (1975), amended subsection 201(a) by adding new subparagraphs (2) through (5).

Nuclear Regulatory Commission, each such term "shall" be deemed to have begun July 1, 1975.[10]

Submission of appointments to Senate.

(d) Such initial appointments shall be submitted to the Senate within sixty days of the signing of this Act. Any individual who is serving as a member of the Atomic Energy commission at the time of the enactment of this Act, and who may be appointed by the President to the Commission, shall be appointed for a term designated by the President, but which term shall terminate not later than the end of his present term as a member of the Atomic Energy Commission, without regard to the requirements of subsection (b)(2) of this section. Any subsequent appointment of such individuals shall be subject to the provisions of this section.

(e) Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. No member of the Commission shall engage in any business, vocation, or employment other than that of serving as member of the Commission.

Transfer of AEC functions and personnel Additional transfers.

(f) There are hereby transferred to the Commission all the licensing and related regulatory functions of the Atomic Energy Commission, the Chairman and member of the Commission, the General Counsel, and other officers and components of the Commission–which functions, officers, components, and personnel are excepted from the transfer to the Administrator by section 104(c) of this Act.

(g) In addition to other functions and personnel transferred to the Commission, there are also transferred to the Commission–

(1) the functions of the Atomic Safety and Licensing Board Panel and the Atomic Safety and Licensing Appeal Board;

(2) such personnel as the Director of the Office of Management and Budget determines are necessary for exercising responsibilities under section 205, relating to, research, for the purpose of confirmatory assessment relating to licensing and other regulation under the provisions of the Atomic Energy Act of 1954, as amended, and of this Act.[11]

42 USC 5842.

Sec. 202. Licensing And Related Regulatory Functions Respecting Selected Administration Facilities

42 USC 2071-2112.
42 USC 2131-2140.

Notwithstanding the exclusions provided for in section 110 a. or any other provisions of the Atomic Energy Act of 1954, as amended (42 USC 2140(a)), the Nuclear Regulatory Commission shall, except as otherwise specifically provided by section 110 b. of the Atomic Energy Act of 1954, as amended (42 USC 2140(b)), or other law, have licensing and related regulatory authority pursuant to chapters 6, 7, 8, and 10 of the Atomic Energy Act of 1954, as amended, as to the following facilities of the Administration:

(1) Demonstration Liquid Metal Fast Breeder reactors when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.

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[10]P.L. 94-79, §§ 202 and 203, 89 Stat. 413 (1975), amended subsection 201(c). Prior to amendment, this subsection read as follows:

(c) Each member shall serve for a term of five years, each such term to commence on July 1, except that of the five members first appointed to the Commission, one shall serve for one year, one for two years, one for three years, one for four years, and one for five years, to be designated by the President at the time of appointment.

[11]P.L. 95-209, § 2, 91 Stat. 1482 (1977), added a new subsection h, which was subsequently deleted by P.L. 99-386, 100 Stat. 822 (1986).

U.S. Department of Energy
Office of Civilian Radioactive
Waste Management
Washington, D.C. 20585

March 2004

Nuclear Waste Policy Act AS AMENDED

WITH APPROPRIATIONS ACTS APPENDED

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under subtitle F [42 U.S.C. 10173 et seq.] with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

(4) [Deleted]

(d) Preliminary activities. Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be considered a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)], or require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act [42 U.S.C. 4332(2)(E), (F)]. [42 U.S.C.10133]

SITE APPROVAL AND CONSTRUCTION AUTHORIZATION

Sec. 114. (a) Hearings and Presidential recommendation.

(1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site, under section 113 [42 U.S.C. 10133], the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 113 [42 U.S.C. 10133] and this section, including the information described in subparagraph (A) through subparagraph (G). Together with any recommendation of a site under this paragraph, the

(3) (A) The President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)], or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act [42 U.S.C. 4332(2)(E), (F)].

(b) Submission of application. If the President recommends to the Congress the Yucca Mountain site under subsection (a) and the site designation is permitted to take effect under section 115 [42 U.S.C. 10135], the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada a copy of such application.

(c) Status report on application. Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b), and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of—

(1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

(d) Commission action. The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2). The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of

such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to subtitle C of this Act, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

(e) Project decision schedule.

(1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository within the time periods specified in this subtitle. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) Environmental impact statement.

(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]. A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], compliance with the procedures and

within the scope of Section 147 of the Atomic Energy Act of 1954, as amended, the unauthorized disclosure of which, as determined by the Commission through order or regulation, could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of sabotage or theft or diversion of source, byproduct, or special nuclear material.

Secretary means the Secretary to the Commission.

Except as redefined in this section, words and phrases which are defined in the Act and in this chapter have the same meaning when used in this part.

[27 FR 377, Jan. 13, 1962]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §2.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§2.8 Information collection requirements: OMB approval.

This part contains no information collection requirements and therefore is not subject to requirements of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

[61 FR 43408, Aug. 22, 1996]

Subpart A—Procedure for Issuance, Amendment, Transfer, or Renewal of a License, and Standard Design Approval

§2.100 Scope of subpart.

This subpart prescribes the procedure for issuance of a license; amendment of a license at the request of the licensee; transfer and renewal of a license; and issuance of a standard design approval under subpart E of part 52 of this chapter.

[72 FR 49470, Aug. 28, 2007]

§2.101 Filing of application.

(a)(1) An application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval, shall be filed with the Director, Office of New Reactors, the Director, Office of Nuclear Reactor Regulation, the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as prescribed by the applicable provisions of this chapter. A prospective applicant may confer informally with the NRC staff before filing an application.

(2) Each application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee will be assigned a docket number. However, to allow a determination as to whether an application for a limited work authorization, construction permit, operating license, early site permit, standard design approval, combined license, or manufacturing license for a production or utilization facility is complete and acceptable for docketing, it will be initially treated as a tendered application. A copy of the tendered application will be available for public inspection at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC PDR. Generally, the determination on acceptability for docketing will be made within a period of 30 days. However, in selected applications, the Commission may decide to determine acceptability based on the technical adequacy of the application as well as its completeness. In these cases, the Commission, under §2.104(a), will direct that the notice of hearing be issued as soon as practicable after the application has been tendered, and the determination of acceptability will be made generally within a period of 60 days. For docketing and other requirements for applications under part 61 of this chapter, see paragraph (g) of this section.

(3) If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Program, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, determines that a tendered application for a construction permit or operating license for a production or utilization facility, and/or any environmental report required pursuant to subpart A of part 51 of this chapter, or part thereof as provided in paragraphs (a)(5) or (a–1)

of an application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except that for applications pursuant to part 61 of this chapter, paragraph (g) of this section applies to the Governor or other appropriate official of the State in which the facility is to be located or the activity is to be conducted and will publish in the FEDERAL REGISTER a notice of docketing of the application which states the purpose of the application and specifies the location at which the proposed activity would be conducted.

(e)(1) Each application for construction authorization for a HLW repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, and each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, and any environmental impact statement required in connection therewith pursuant to subpart A of part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

(3) If the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, determines that the tendered document is complete and acceptable for docketing, a docket number will be assigned and the applicant will be notified of the determination. If it is determined that all or any part of the tendered document is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination and the respects in which the document is deficient.

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in part 60 or 63 and subpart A of part 51 of this chapter require; serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation); and make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter, and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients are responsible for inserting the revised pages.

(6) The tendered document will be formally docketed upon receipt by the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, of the required additional copies. The date of docketing shall be the date when the required copies are received by the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate. Within ten (10) days after docketing, the applicant shall submit to the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, a written statement that distribution of the additional copies to Federal, State, Indian Tribe, and local officials has been completed in accordance with requirements of this chapter and written instructions furnished to the applicant by the Director, Office of Nuclear Material

will be deemed to be admitted unless controverted by the statement required to be filed by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The Presiding Officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the Presiding Officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

(b) Affidavits must set forth those facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. The Presiding Officer may permit affidavits to be supplemented or opposed by further affidavits. When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, must be rendered.

(c) The Presiding Officer shall render the decision sought if the filings in the proceeding show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.

[56 FR 7798, Feb. 26, 1991]

§ 2.1026 Schedule.

(a) Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.

(b)(1) Pursuant to § 2.307, the presiding officer may approve extensions of no more than fifteen (15) days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforseen circumstances, requests for extensions of more than fifteen (15) days must be filed no later than five (5) days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

(2) Extensions beyond 15 days must be referred to the Commission. If the Commission does not disapprove the extension within 10 days of receiving the request, the extension will be effective. If the Commission disapproves the extension, the date which was the subject of the extension request will be set for 5 days after the Commission's disapproval action.

(c)(1) The Presiding Officer may delay the issuance of an order up to thirty days beyond the time set forth for the issuance in appendix D.

(2) If the Presiding Officer anticipates that the issuance of an order will not occur until after the thirty day extension specified in paragraph (c)(1) of this section, the Presiding Officer shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

[56 FR 7798, Feb. 26, 1991, as amended at 69 FR 2266, Jan. 14, 2004]

§ 2.1027 Sua sponte.

In any initial decision in a proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Presiding Officer, other than the Commission, shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties and determined to be litigable issues in the proceeding.

[69 FR 2266, Jan. 14, 2004]

the service method used to deliver the entire document, excluding courtesy copies, to all of the other participants in the proceeding. The presiding officer may determine the calculation of additional days when a participant is not entitled to receive an entire filing served by multiple methods.

(4) In mixed service proceedings when all participants are not using the same filing and service method, the number of days for service will be determined by the presiding officer based on considerations of fairness and efficiency.

(c) To be considered timely, a document must be served:

(1) By 5 p.m. Eastern Time for a document served in person or by expedited service; and

(2) By 11:59 p.m. Eastern Time for a document served by the E-Filing system.

[72 FR 49151, Aug. 28, 2007]

§ 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to safeguards information (as defined in §73.2 of this chapter) or to sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 10980, Feb. 29, 2008]

§ 2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under §2.313(a) to rule on the matter.

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) *General requirements.* Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors

in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing*. Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

(3) In proceedings for which a FEDERAL REGISTER notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) *Nontimely filings*. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) *Standing*. (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the

proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)–(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) *Discretionary Intervention*. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) *Contentions.* (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are

data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures.* A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) *Answers to requests for hearing and petitions to intervene.* Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene—

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) *Decision on request/petition.* In all proceedings other than a proceeding under 10 CFR 52.103, the presiding officer shall, within 45 days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission. The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 CFR 52.103. The Commission's decision may not be the subject of any appeal under 10 CFR 2.311.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49474, Aug. 28, 2007; 73 FR 44620, July 31, 2008]

§ 2.310 Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses

formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

[39 FR 12353, Apr. 5, 1974, as amended at 42 FR 36240, July 14, 1977; 45 FR 73466, Nov. 5, 1980; 52 FR 31608, Aug. 21, 1987; 53 FR 43419, Oct. 27, 1988; 64 FR 48948, Sept. 9, 1999; 68 FR 58799, Oct. 10, 2003; 69 FR 2236, Jan. 14, 2004; 69 FR 41749, July 12, 2004; 74 FR 62679, Dec. 1, 2009]

Subpart C—Rules of General Applicability: Hearing Requests, Petitions To Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings

SOURCE: 69 FR 2236, Jan. 14, 2004, unless otherwise noted.

§ 2.300 Scope of subpart C.

The provisions of this subpart apply to all adjudications conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR Part 2, unless specifically stated otherwise in this subpart.

§ 2.301 Exceptions.

Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that the conduct of military or foreign affairs functions is involved.

§ 2.302 Filing of documents.

(a) Documents filed in Commission adjudicatory proceedings subject to this part shall be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption permitting an alternative filing method or unless the filing falls within the scope of paragraph (g)(1) of this section.

(b) Upon an order from the Commission or presiding officer permitting alternative filing methods, or as otherwise set forth in Guidance for Electronic Submissions to the NRC, documents may be filed by:

(1) First-class mail: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff; or

(2) Courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention: Rulemakings and Adjudications Staff.

(c) All documents offered for filing must be accompanied by a certificate of service stating the names and addresses of the persons served as well as the manner and date of service.

(d) Filing is considered complete:

(1) By electronic transmission when the filer performs the last act that it must perform to transmit a document, in its entirety, electronically;

(2) By first-class mail as of the time of deposit in the mail;

(3) By courier, express mail, or expedited delivery service upon depositing the document with the provider of the service; or

(4) If a filing must be submitted by two or more methods, such as a filing that the Guidance for Electronic Submission to the NRC indicates should be transmitted electronically as well as physically delivered or mailed on optical storage media, the filing is complete when all methods of filing have been completed.

(e) For filings by electronic transmission, the filer must make a good faith effort to successfully transmit the entire filing. Notwithstanding paragraph (d) of this section, a filing will not be considered complete if the filer knows or has reason to know that the entire filing has not been successfully transmitted.

(f) *Digital ID Certificates.* (1) Through digital ID certificates, the NRC permits participants in the proceeding to access the E-Filing system to file documents, serve other participants, and retrieve documents in the proceeding.

(2) Any participant or participant representative that does not have a digital ID certificate shall request one from the NRC before that participant or representative intends to make its first electronic filing to the E-Filing system. A participant or representative may apply for a digital ID certificate on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

(3) Group ID Certificate. A participant wishing to obtain a digital ID certificate valid for several persons may obtain a group digital ID certificate. A Group ID cannot be used to file documents. The Group ID provides access to the E-Filing system for the individuals specifically identified in the group's application to retrieve documents recently received by the system. The Group ID also enables a group of people, all of whom may not have individual digital ID certificates, to be notified when a filing has been made in a particular proceeding.

(g) *Filing Method Requirements*—(1) *Electronic filing*. Unless otherwise provided by order, all filings must be made as electronic submissions in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*. If a filing contains sections of information or electronic formats that may not be transmitted electronically for security or other reasons, the portions not containing those sections will be transmitted electronically to the E-Filing system. In addition, optical storage media (OSM) containing the entire filing must be physically delivered or mailed. In such cases, the submitter does not need to apply to the Commission or presiding officer for an exemption to deviate from the requirements in paragraph (g)(1) of this section.

(2) *Electronic transmission exemption*. Upon a finding of good cause, the Commission or presiding officer can grant an exemption from electronic transmission requirements found in paragraph (g)(1) of this section to a participant who is filing electronic documents. The exempt participant is permitted to file electronic documents by physically delivering or mailing an OSM containing the documents. A participant granted this exemption would still be required to meet the electronic formatting requirement in paragraph (g)(1) of this section.

(3) *Electronic document exemption*. Upon a finding of good cause, the Commission or presiding officer can exempt a participant from both the electronic (computer file) formatting and electronic transmission requirements in paragraph (g)(1) of this section. A participant granted such an exemption can file paper documents either in person or by courier, express mail, some other expedited delivery service, or first-class mail, as ordered by the Commission or presiding officer.

(4) *Requesting an exemption*. A filer seeking an exemption under paragraphs (g)(2) or (g)(3) of this section must submit the exemption request with its first filing in the proceeding. In the request, a filer must show good cause as to why it cannot file electronically. The filer may not change its formats or delivery methods for filing until a ruling on the exemption request is issued. Exemption requests under paragraphs (g)(2) or (g)(3) of this section sought after the first filing in the proceeding will be granted only if the requestor shows that the interests of fairness so require.

[72 FR 49149, Aug. 28, 2007]

§ 2.303 Docket.

The Secretary shall maintain a docket for each proceeding conducted under this part, commencing with either the initial notice of hearing, notice of proposed action, order, request for hearing or petition for leave to intervene, as appropriate. The Secretary shall maintain all files and records of proceedings, including transcripts and video recordings of testimony, exhibits, and all papers, correspondence, decisions and orders filed or issued. All documents, records, and exhibits filed in any proceeding must be filed with the Secretary as described in §§ 2.302 and 2.304.

§ 2.304 Formal requirements for documents; signatures; acceptance for filing.

(a) *Docket numbers and titles.* Each document filed in an adjudication to which a docket number has been assigned must contain a caption setting forth the docket number and the title of the proceeding and a description of the document (e.g., motion to quash subpoena).

(b) *Paper documents.* In addition to the requirements in this part, paper documents must be stapled or bound on the left side; typewritten, printed, or otherwise reproduced in permanent form on good unglazed paper of standard letterhead size; signed in ink by the participant, its authorized representative, or an attorney having authority with respect to it; and filed with an original and two conforming copies.

(c) *Format.* Each page in a document must begin not less than one inch from the top, with side and bottom margins of not less than one inch. Text must be double-spaced, except that quotations may be single-spaced and indented. The requirements of this paragraph do not apply to original documents, or admissible copies, offered as exhibits, or to specifically prepared exhibits.

(d) *Signatures.* The original of each document must be signed by the participant or its authorized representative, or by an attorney having authority with respect to it. The document must state the capacity of the person signing; his or her address, phone number, and e-mail address; and the date of signature. The signature of a person signing a pleading or other similar document submitted by a participant is a representation that the document has been subscribed in the capacity specified with full authority, that he or she has read it and knows the contents, that to the best of his or her knowledge, information, and belief the statements made in it are true, and that it is not interposed for delay. The signature of a person signing an affidavit or similar document, which should be submitted in accord with the form outlined in 28 U.S.C. 1746, is a representation that, under penalty of perjury, the document is true and correct to the best of that individual's knowledge and belief. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be struck.

(1) An electronic document must be signed using a participant's or a participant representative's digital ID certificate. Additional signatures can be added to the electronic document, including to any affidavits that accompany the document, by a typed-in designation that indicates the signer understands and acknowledges that he or she is assenting to the representations in paragraph (d) of this section.

(i) When signing an electronic document using a digital ID certificate, the signature page for the electronic document should contain a typed signature block that includes the phrase "Signed (electronically) by" typed onto the signature line; the name and the capacity of the person signing; the person's address, phone number, and e-mail address; and the date of signature.

(ii) If additional individuals need to sign an electronic document, including any affidavits that accompany the document, such individuals must sign by inserting a typed signature block in the electronic document that includes the phrase "Executed in Accord with 10 CFR 2.304(d)" or its equivalent typed on the signature line as well as the name and the capacity of the person signing; the person's address, phone number, and e-mail address; and the date of signature to the extent any of these items are different from the information provided for the digital ID certificate signer.

(2) Paper documents must be signed in ink.

(e) *Designation for service.* The first document filed by any participant in a proceeding must designate the name and address of a person on whom service may be made. This document must also designate the e-mail address, if any, of the person on whom service may be made.

(f) *Acceptance for filing.* Any document that fails to conform to the requirements of this section may be refused acceptance for filing by the Secretary or the presiding officer and may be returned with an indication of the reason for nonacceptance. Any document that is not accepted for filing will

not be entered on the Commission's docket.

(g) *Pre-filed written testimony and exhibits*. In any instance in which a participant submits electronically through the E-Filing system written testimony or hearing exhibits in advance of a hearing, the written testimony of each individual witness or witness panel and each individual exhibit shall be submitted as an individual electronic file.

[72 FR 49150, Aug. 28, 2007]

§ 2.305 Service of documents; methods; proof.

(a) *Service of documents by the Commission*. Except for subpoenas, the Commission shall serve all orders, decisions, notices, and other documents to all participants, by the same delivery method those participants use to file and accept service.

(b) *Who may be served*. Any document required to be served upon a participant shall be served upon that person or upon the representative designated by the participant or by law to receive service of documents. When a participant has appeared by attorney, service shall be made upon the attorney of record.

(c) *Method of service accompanying a filing*. Service must be made electronically to the E-Filing system. Upon an order from the Commission or presiding officer permitting alternative filing methods under §2.302(g)(4), service may be made by personal delivery, courier, expedited delivery service, or by first-class, express, certified or registered mail. As to each participant that cannot serve electronically, the Commission or presiding officer shall require service by the most expeditious means permitted under this paragraph that are available to the participant, unless the Commission or presiding officer finds that this requirement would impose undue burden or expense on the participant.

(1) Unless otherwise provided in this section, a participant will serve documents on the other participants by the same method by which those participants filed.

(2) A participant granted an exemption under §2.302(g)(2) will serve the presiding officer and the participants in the proceeding that filed electronically by physically delivering or mailing optical storage media containing the electronic document.

(3) A participant granted an exemption under §2.302(g)(3) will serve the presiding officer and the other participants in the proceeding by physically delivering or mailing a paper copy.

(4) To provide proof of service, any paper served upon participants to the proceeding as may be required by law, rule, or order of the presiding officer must be accompanied by a signed certificate of service stating the names and addresses of the persons served as well as the method and date of service.

(d) *Method of service not accompanying a filing*. Service of demonstrative evidence, e.g., maps and other physical evidence, may be made by first-class mail in all cases, unless the presiding officer directs otherwise or the participant desires to serve by a faster method. In instances when service of a document, such as a discovery document under §2.336, will not accompany a filing with the agency, the participant may use any reasonable method of service to which the recipient agrees.

(e) *Service on the Secretary*. (1) All motions, briefs, pleadings, and other documents must be served on the Secretary of the Commission by the same or equivalent method, such as by electronic transmission or first-class mail, that they are served upon the presiding officer, so that the Secretary will receive the filing at approximately the same time that it is received by the presiding officer to which the filing is directed.

(2) When pleadings are personally delivered to a presiding officer conducting proceedings outside the Washington, DC area, service on the Secretary may be accomplished electronically to the E-Filing system, as well as by courier, express mail, or expedited delivery service.

(3) Service of demonstrative evidence (e.g., maps and other physical exhibits) on the Secretary of the Commission may be made by first-class mail in all cases, unless the presiding officer directs otherwise or the participant desires to serve by a faster method. All pre-filed testimony and exhibits shall

be served on the Secretary of the Commission by the same or equivalent method that it is served upon the presiding officer to the proceedings, i.e., electronically to the E-Filing system, personal delivery or courier, express mail, or expedited delivery service.

(4) The addresses for the Secretary are:

(i) Internet: The E-Filing system at *http://www.nrc.gov*.

(ii) First-class mail: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff; and

(iii) Courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemakings and Adjudications Staff.

(f) *When service is complete.* Service upon a participant is complete:

(1) By the E-Filing system, when filing electronically to the E-Filing system is considered complete under § 2.302(d).

(2) By personal delivery, upon handing the document to the person, or leaving it at his or her office with that person's clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place in the office, or if the office is closed or the person to be served has no office, leaving it at his or her usual place of residence with some person of suitable age and discretion then residing there;

(3) By mail, upon deposit in the United States mail, properly stamped and addressed;

(4) By expedited service, upon depositing the document with the provider of the expedited service; or

(5) When service cannot be effected by a method provided by paragraphs (f)(1)–(4) of this section, by any other method authorized by law.

(6) When two or more methods of service are required, service is considered complete when service by each method is complete under paragraphs (f)(1)–(4) of this section.

(g) *Service on the NRC staff.* (1) Service shall be made upon the NRC staff of all documents required to be filed with participants and the presiding officer in all proceedings, including those proceedings where the NRC staff informs the presiding officer of its determination not to participate as a party. Service upon the NRC staff shall be by the same or equivalent method as service upon the Office of the Secretary and the presiding officer, e.g., electronically, personal delivery or courier, express mail, or expedited delivery service.

(2) If the NRC staff decides not to participate as a party in a proceeding, it shall, in its notification to the presiding officer and participants of its determination not to participate, designate a person and address for service of documents.

[72 FR 49150, Aug. 28, 2007]

§ 2.306 Computation of time.

(a) In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday or Sunday, a Federal legal holiday at the place where the action or event is to occur, or a day upon which, because of an emergency closure of the Federal government in Washington, DC, NRC Headquarters does not open for business, in which event the period runs until the end of the next day that is not a Saturday, Sunday, Federal legal holiday, or emergency closure.

(b) Whenever a participant has the right or is required to do some act within a prescribed period after the service of a notice or other document upon him or her, no additional time is added to the prescribed period except in the following circumstances:

(1) If a notice or document is served upon a participant, by first-class mail only, three (3) calendar days will be added to the prescribed period for all the participants in the proceeding.

(2) If a notice or document is served upon a participant, by express mail or other expedited service only, two (2) calendar days will be added to the prescribed period for all the participants in the proceeding.

(3) If a document is to be served by multiple service methods, such as partially electronic and entirely on optical storage media, the additional number of days is computed according to

the service method used to deliver the entire document, excluding courtesy copies, to all of the other participants in the proceeding. The presiding officer may determine the calculation of additional days when a participant is not entitled to receive an entire filing served by multiple methods.

(4) In mixed service proceedings when all participants are not using the same filing and service method, the number of days for service will be determined by the presiding officer based on considerations of fairness and efficiency.

(c) To be considered timely, a document must be served:

(1) By 5 p.m. Eastern Time for a document served in person or by expedited service; and

(2) By 11:59 p.m. Eastern Time for a document served by the E-Filing system.

[72 FR 49151, Aug. 28, 2007]

§ 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to safeguards information (as defined in §73.2 of this chapter) or to sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 10980, Feb. 29, 2008]

§ 2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under §2.313(a) to rule on the matter.

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) *General requirements.* Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors

in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing.* Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

(3) In proceedings for which a FEDERAL REGISTER notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) *Nontimely filings.* (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) *Standing.* (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the

proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)–(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) *Discretionary Intervention*. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) *Contentions.* (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are

data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures.* A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) *Answers to requests for hearing and petitions to intervene.* Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene—

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) *Decision on request/petition.* In all proceedings other than a proceeding under 10 CFR 52.103, the presiding officer shall, within 45 days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission. The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 CFR 52.103. The Commission's decision may not be the subject of any appeal under 10 CFR 2.311.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49474, Aug. 28, 2007; 73 FR 44620, July 31, 2008]

§ 2.310 Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses

or permits subject to parts 30, 32 through 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 of this chapter may be conducted under the procedures of subpart L of this part.

(b) Proceedings on enforcement matters must be conducted under the procedures of subpart G of this part, unless all parties agree and jointly request that the proceedings be conducted under the procedures of subpart L or subpart N of this part, as appropriate.

(c) Proceedings on the licensing of the construction and operation of a uranium enrichment facility must be conducted under the procedures of subpart G of this part.

(d) In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

(e) Proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant must be conducted under the procedures of subpart L of this part, unless a party requests that the proceeding be conducted under the procedures of subpart K of this part, or if all parties agree and jointly request that the proceeding be conducted under the procedures of subpart N of this part.

(f) Proceedings on an application for initial construction authorization for a high-level radioactive waste repository at a geologic repository operations area noticed pursuant to §§2.101(f)(8) or 2.105(a)(5), and proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area must be conducted under the procedures of subparts G and J of this part. Subsequent amendments to a construction authorization for a high-level radioactive geologic repository, and amendments to a license to receive and possess high level radioactive waste at a high level waste geologic repository may be conducted under the procedures of subpart L of this part, unless all parties agree and jointly request that the proceeding be conducted under the procedures of subpart N of this part.

(g) Proceedings on an application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes or pursuant to a license condition shall be conducted under the procedures of subpart M of this part, unless the Commission determines otherwise in a case-specific order.

(h) Except as determined through the application of paragraphs (b) through (g) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32 through 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 of this chapter, and proceedings on an application for the direct or indirect transfer of control of an NRC license may be conducted under the procedures of subpart N of this part if—

(1) The hearing itself is expected to take no more than two (2) days to complete; or

(2) All parties to the proceeding agree that it should be conducted under the procedures of subpart N of this part.

(i) In design certification rulemaking proceedings under part 52 of this chapter, any informal hearing held under §52.51 of this chapter must be conducted under the procedures of subpart O of this part.

(j) Proceedings on a Commission finding under 10 CFR 52.103(c) and (g) shall be conducted in accordance with the procedures designated by the Commission in each proceeding.

(k) In proceedings where the Commission grants a petition filed under §2.335(b), the Commission may, in its discretion, conduct a hearing under the procedures of subpart O of this part to assist the Commission in developing a

record on the matters raised in the petition.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49475, Aug. 28, 2007]

§ 2.311 Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information.

(a) An order of the presiding officer, or if a presiding officer has not been designated, of the Chief Administrative Judge, or if he or she is unavailable, of another administrative judge, or of an administrative law judge with jurisdiction under § 2.318(a), may be appealed to the Commission with respect to:

(1) A request for hearing;

(2) A petition to intervene; or

(3) A request for access to sensitive unclassified non-safeguards information (SUNSI), including, but not limited to, proprietary, confidential commercial, and security-related information, and Safeguards Information (SGI). An appeal to the Commission may also be taken from an order of an officer designated to rule on information access issues.

(b) These appeals must be made as specified by the provisions of this section, within ten (10) days after the service of the order. The appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief. Any party who opposes the appeal may file a brief in opposition to the appeal within ten (10) days after service of the appeal. The supporting brief and any answer must conform to the requirements of § 2.341(c)(2). No other appeals from rulings on requests for hearings are allowed.

(c) An order denying a petition to intervene, and/or request for hearing, or a request for access to the information described in paragraph (a) of this section, is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.

(d) An order granting a petition to intervene, and/or request for hearing, or granting a request for access to the information described in paragraph (a) of this section, is appealable by a party other than the requestor/petitioner on the question as to:

(1) Whether the request for hearing or petition to intervene should have been wholly denied; or

(2) Whether the request for access to the information described in paragraph (a)(3) of this section should have been denied in whole or in part. However, such a question with respect to SGI may only be appealed by the NRC staff, and such a question with respect to SUNSI may be appealed only by the NRC staff or by a party whose interest independent of the proceeding would be harmed by the release of the information.

(e) An order selecting a hearing procedure may be appealed by any party on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in § 2.310. The appeal must be filed with the Commission no later than ten (10) days after issuance of the order selecting a hearing procedure.

[73 FR 12631, Mar. 10, 2008]

§ 2.312 Notice of hearing.

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) A statement describing the specific hearing procedures or subpart that will be used for the hearing.

(b) The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding and the public interest.

§ 2.313 Designation of presiding officer, disqualification, unavailability, and substitution.

(a) *Designation of presiding officer*. The Commission may provide in the notice of hearing that one or more members of the Commission, an administrative

law judge, an administrative judge, an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the matter, shall be the presiding officer. The Commission alone shall designate the presiding officer in a hearing conducted under subpart O. If the Commission does not designate the presiding officer for a hearing under subparts G, J, K, L, M, or N of this part, then the Chief Administrative Judge shall issue an order designating:

(1) An Atomic Safety and Licensing Board appointed under Section 191 of the Atomic Energy Act of 1954, as amended, or an administrative law judge appointed pursuant to 5 U.S.C. 3105, for a hearing conducted under subparts G, J, K, L, or N of this part; or

(2) An Atomic Safety and Licensing Board, an administrative law judge, or an administrative judge for a hearing conducted under subpart M of this part.

(b) *Disqualification.* (1) If a designated presiding officer or a designated member of an Atomic Safety and Licensing Board believes that he or she is disqualified to preside or to participate as a board member in the hearing, he or she shall withdraw by notice on the record and shall notify the Commission or the Chief Administrative Judge, as appropriate, of the withdrawal.

(2) If a party believes that a presiding officer or a designated member of an Atomic Safety and Licensing Board should be disqualified, the party may move that the presiding officer or the Licensing Board member disqualify himself or herself. The motion must be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the Licensing Board member does not disqualify himself, the motion must be referred to the Commission. The Commission will determine the sufficiency of the grounds alleged.

(c) *Unavailability.* If a presiding officer or a designated member of an Atomic Safety and Licensing Board becomes unavailable during the course of a hearing, the Commission or the Chief Administrative Judge, as appropriate, will designate another presiding officer or Atomic Safety and Licensing Board member. If he or she becomes unavailable after the hearing has been concluded, then:

(1) The Commission may designate another presiding officer;

(2) The Chief Administrative Judge or the Commission, as appropriate, may designate another Atomic Safety and Licensing Board member to participate in the decision;

(3) The Commission may direct that the record be certified to it for decision.

(d) *Substitution.* If a presiding officer or a designated member of an Atomic Safety and Licensing Board is substituted for the one originally designated, any motion predicated upon the substitution must be made within five (5) days after the substitution.

§ 2.314 Appearance and practice before the Commission in adjudicatory proceedings.

(a) *Standards of practice.* In the exercise of their functions under this subpart, the Commission, the Atomic Safety and Licensing Boards, Administrative Law Judges, and Administrative Judges function in a quasi-judicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) *Representation.* A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation, or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law if the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance. The notice must state his or her name, address, telephone number, and facsimile number and email address, if any; the name and address of the person or entity on whose behalf he or she appears; and, in the case of an attorney-at-law, the

basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) *Reprimand, censure or suspension from the proceeding.* (1) A presiding officer, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who refuses to comply with its directions, or who is disorderly, disruptive, or engages in contemptuous conduct.

(2) A reprimand, censure, or a suspension that is ordered to run for one day or less must state the grounds for the action in the record of the proceeding, and must advise the person disciplined of the right to appeal under paragraph (c)(3) of this section. A suspension that is ordered for a longer period must be in writing, state the grounds on which it is based, and advise the person suspended of the right to appeal and to request a stay under paragraphs (c)(3) and (c)(4) of this section. The suspension may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined under this section may file an appeal with the Commission within ten (10) days after issuance of the order. The appeal must be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Commission shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Commission may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Commission provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. The hearing must begin as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Commission, as appropriate, shall notify the State bar(s) to which the attorney is admitted. The notification must include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Commission.

(4) A suspension exceeding one (1) day is not effective for seventy-two (72) hours from the date the suspension order is issued. Within this time, a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension must be stayed until the reviewing tribunal rules on the motion. The stay request must be in writing and contain the information specified in § 2.342(b). The Commission shall rule on the stay request within ten (10) days after the filing of the motion. The Commission shall consider the factors specified in § 2.342(e)(1) and (e)(2) in determining whether to grant or deny a stay application.

§ 2.315 Participation by a person not a party.

(a) A person who is not a party (including persons who are affiliated with or represented by a party) may, in the discretion of the presiding officer, be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues at any session of the hearing or any prehearing conference within the limits and on the conditions fixed by the presiding officer. However, that person may not otherwise participate in the proceeding. Such statements of position shall not be considered evidence in the proceeding.

(b) The Secretary will give notice of a hearing to any person who requests it before the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. If a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under §2.309, a reasonable opportunity to participate in a hearing. Each State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request to participate in a hearing, each designate a single representative for the hearing. The representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under §2.341 with respect to the admitted contentions. The representative shall identify those contentions on which it will participate in advance of any hearing held.

(d) If a matter is taken up by the Commission under §2.341 or *sua sponte,* a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "*amicus curiae.*" Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.

§2.316 Consolidation of parties.

On motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

§2.317 Separate hearings; consolidation of proceedings.

(a) *Separate hearings.* On motion by the parties or upon request of the presiding officer for good cause shown, or on its own initiative, the Commission may establish separate hearings in a proceeding if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

(b) *Consolidation of proceedings.* On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings, or may hold joint hearings with interested States and/or other Federal agencies on matters of concurrent jurisdiction, if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

§2.318 Commencement and termination of jurisdiction of presiding officer.

(a) Unless the Commission orders otherwise, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If a presiding officer has not been designated, the Chief Administrative Judge has jurisdiction or, if he or she is unavailable, another administrative judge or administrative law judge has jurisdiction. A proceeding commences when a notice of hearing or a notice of proposed action under §2.105 is issued. When a notice of hearing provides that the presiding officer is to be an administrative judge or an administrative law judge, the Chief Administrative Judge will designate by order the administrative judge or administrative law judge, as appropriate, who

is to preside. The presiding officer's jurisdiction in each proceeding terminates when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest.

(b) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or the Director, Office of Nuclear Material Safety and Safeguards, as appropriate, may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 5716, Jan. 31, 2008]

§ 2.319 Power of the presiding officer.

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law, including subpoenas requested by a participant for the attendance and testimony of witnesses or the production of evidence upon the requestor's showing of general relevance and reasonable scope of the evidence sought;

(c) Consolidate parties and proceedings in accordance with §§ 2.316 and 2.317 and/or direct that common interests be represented by a single spokesperson;

(d) Rule on offers of proof and receive evidence. In proceedings under this part, strict rules of evidence do not apply to written submissions. However, the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.

(e) Restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments;

(f) Order depositions to be taken as appropriate;

(g) Regulate the course of the hearing and the conduct of participants;

(h) Dispose of procedural requests or similar matters;

(i) Examine witnesses;

(j) Hold conferences before or during the hearing for settlement, simplification of contentions, or any other proper purpose;

(k) Set reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules;

(l) Certify questions to the Commission for its determination, either in the presiding officer's discretion, or on motion of a party or on direction of the Commission;

(m) Reopen a proceeding for the receipt of further evidence at any time before the initial decision;

(n) Appoint special assistants from the Atomic Safety and Licensing Board Panel under § 2.322;

(o) Issue initial decisions as provided in this part;

(p) Dispose of motions by written order or by oral ruling during the course of a hearing or prehearing conference. The presiding officer should ensure that parties not present for the oral ruling are notified promptly of the ruling;

(q) Issue orders necessary to carry out the presiding officer's duties and responsibilities under this part; and

(r) Take any other action consistent with the Act, this chapter, and 5 U.S.C. 551–558.

§ 2.320 Default.

If a party fails to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading, to appear at a hearing or prehearing conference, to comply with any prehearing order entered by the presiding officer, or to comply with any discovery order entered by the presiding officer, the Commission or the presiding officer may make any orders in regard to the failure that are just, including, among others, the following:

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter the order as appropriate; or

(b) Proceed without further notice to take proof on the issues specified.

§ 2.321 Atomic Safety and Licensing Boards.

(a) The Commission or the Chief Administrative Judge may establish one or more Atomic Safety and Licensing Boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom have such technical or other qualifications as the Commission or the Chief Administrative Judge determines to be appropriate to the issues to be decided. The members of an Atomic Safety and Licensing Board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission. In proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, the Atomic Safety and Licensing Board shall perform the adjudicatory functions that the Commission determines are appropriate.

(b) The Commission or the Chief Administrative Judge may designate an alternate qualified in the conduct of administrative proceedings, or an alternate having technical or other qualifications, or both, for an Atomic Safety and Licensing Board established under paragraph (a) of this section. If a member of a board becomes unavailable, the Commission or the Chief Administrative Judge may constitute the alternate qualified in the conduct of administrative proceedings, or the alternate having technical or other qualifications, as appropriate, as a member of the board by notifying the alternate who will, as of the date of the notification, serve as a member of the board. If an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or Chief Administrative Judge may appoint a member of the Atomic Safety and Licensing Board Panel who is qualified in the conduct of administrative proceedings or a member having technical or other qualifications, as appropriate, as a member of the Atomic Safety and Licensing Board by notifying the appointee who will, as of the date of the notification, serve as a member of the board.

(c) An Atomic Safety and Licensing Board has the duties and may exercise the powers of a presiding officer as granted by § 2.319 and otherwise in this part. Any time when a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Judge may be exercised with respect to the proceeding by the chairman of the board having jurisdiction over it. Two members of an Atomic Safety and Licensing Board constitute a quorum if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.322 Special assistants to the presiding officer.

(a) In consultation with the Chief Administrative Judge, the presiding officer may, at his or her discretion, appoint personnel from the Atomic Safety and Licensing Board Panel established by the Commission to assist the presiding officer in taking evidence and preparing a suitable record for review. The appointment may occur at any appropriate time during the proceeding but must, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.313. The special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. The interrogators shall study the written testimony and sit with the presiding officer to hear the presentation and, where permitted in the proceeding, the cross-examination by the parties of all witnesses on the issues of the interrogators' expertise. The interrogators shall take a leading role in examining the witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, special masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to

prepare a report that would become part of the record. Special masters may rule on evidentiary issues brought before them, in accordance with § 2.333. Appeals from special masters' rulings may be taken to the presiding officer in accordance with procedures established in the presiding officer's order appointing the special master. Special masters' reports are advisory only; the presiding officer retains final authority with respect to the issues heard by the special master;

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer retains final authority on the issue for which the alternate member was designated; or

(4) Discovery master to rule on the matters specified in § 2.1018(a)(2).

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues that the presiding officer might otherwise have difficulty in quickly grasping. These briefings take place before the hearing on the subject involved and supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in § 2.313.

§ 2.323 Motions.

(a) *Presentation and disposition.* All motions must be addressed to the Commission or other designated presiding officer. A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises. All written motions must be filed with the Secretary and served on all parties to the proceeding.

(b) *Form and content.* Unless made orally on-the-record during a hearing, or the presiding officer directs otherwise, or under the provisions of subpart N of this part, a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

(c) *Answers to motions.* Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

(d) *Accuracy in filing.* All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party.

(e) *Motions for reconsideration.* Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. A motion must be filed within ten (10) days of the action for which reconsideration is requested. The motion and any responses to the motion are limited to ten (10) pages.

(f) *Referral and certifications to the Commission.* (1) If, in the judgment of the presiding officer, prompt decision

is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity, the presiding officer may refer the ruling promptly to the Commission. The presiding officer must notify the parties of the referral either by announcement on-the-record or by written notice if the hearing is not in session.

(2) A party may petition the presiding officer to certify an issue to the Commission for early review. The presiding officer shall apply the alternative standards of §2.341(f) in ruling on the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

(g) *Effect of filing a motion, petition, or certification of question to the Commission.* Unless otherwise ordered, neither the filing of a motion, the filing of a petition for certification, nor the certification of a question to the Commission stays the proceeding or extends the time for the performance of any act.

(h) *Motions to compel discovery.* Parties may file answers to motions to compel discovery in accordance with paragraph (c) of this section. The presiding officer, in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone, the presiding officer shall issue a written order on the motion summarizing the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter effective at the time of the ruling, if the terms of the ruling are incorporated in the subsequent written order.

§ 2.324 Order of procedure.

The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.325 Burden of proof.

Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof.

§ 2.326 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in §2.309(c).

§ 2.327 Official recording; transcript.

(a) *Recording hearings.* A hearing will be recorded stenographically or by other means under the supervision of the presiding officer. If the hearing is recorded on videotape or some other video medium, before an official transcript is prepared under paragraph (b) of this section, that video recording will be considered to constitute the record of events at the hearing.

(b) *Official transcript.* For each hearing, a transcript will be prepared from the recording made in accordance with paragraph (a) of this section that will be the sole official transcript of the hearing. The transcript will be prepared by an official reporter who may be designated by the Commission or may be a regular employee of the Commission. Except as limited by section 181 of the Act or order of the Commission, the transcript will be available for inspection in the agency's public records system.

(c) *Availability of copies.* Copies of transcripts prepared in accordance with paragraph (b) of this section are available to the parties and to the public from the official reporter on payment of the charges fixed therefor. If a hearing is recorded on videotape or other video medium, copies of the recording of each daily session of the hearing may be made available to the parties and to the public from the presiding officer upon payment of a charge specified by the Chief Administrative Judge.

(d) *Transcript corrections.* Corrections of the official transcript may be made only in the manner provided by this paragraph. Corrections ordered or approved by the presiding officer must be included in the record as an appendix. When so incorporated, the Secretary shall make the necessary physical corrections in the official transcript so that it will incorporate the changes ordered. In making corrections, pages may not be substituted but, to the extent practicable, corrections must be made by running a line through the matter to be changed without obliteration and writing the matter as changed immediately above. If the correction consists of an insertion, it must be added by rider or interlineation as near as possible to the text which is intended to precede and follow it.

§ 2.328 Hearings to be public.

Except as may be requested under section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

§ 2.329 Prehearing conference.

(a) *Necessity for prehearing conference; timing.* The Commission or the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter or a testing facility, shall direct the parties or their counsel to appear at a specified time and place for a conference or conferences before trial. A prehearing conference in a proceeding involving a construction permit or operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter must be held within sixty (60) days after discovery has been completed or any other time specified by the Commission or the presiding officer.

(b) *Objectives.* The following subjects may be discussed, as directed by the Commission or the presiding officer, at the prehearing conference:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) Discouraging wasteful prehearing activities;

(4) Improving the quality of the hearing through more thorough preparation, and;

(5) Facilitating the settlement of the proceeding or any portions of it.

(c) *Other matters for consideration.* As appropriate for the particular proceeding, a prehearing conference may be held to consider such matters as:

(1) Simplification, clarification, and specification of the issues;

(2) The necessity or desirability of amending the pleadings;

(3) Obtaining stipulations and admissions of fact and the contents and authenticity of documents to avoid unnecessary proof, and advance rulings

from the presiding officer on the admissibility of evidence;

(4) The appropriateness and timing of summary disposition motions under subparts G and L of this part, including appropriate limitations on the page length of motions and responses thereto;

(5) The control and scheduling of discovery, including orders affecting disclosures and discovery under the discovery provisions in subpart G of this part.

(6) Identification of witnesses and documents, and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence, including the establishment of reasonable limits on the time allowed for presenting direct and, where permitted, cross-examination evidence;

(7) The disposition of pending motions;

(8) Settlement and the use of special procedures to assist in resolving any issues in the proceeding;

(9) The need to adopt special procedures for managing potentially difficult or protracted proceedings that may involve particularly complex issues, including the establishment of separate hearings with respect to any particular issue in the proceeding;

(10) The setting of a hearing schedule, including any appropriate limitations on the scope and time permitted for cross-examination where cross-examination is permitted; and

(11) Other matters that the Commission or presiding officer determines may aid in the just and orderly disposition of the proceeding.

(d) *Reports.* Prehearing conferences may be reported stenographically or by other means.

(e) *Prehearing conference order.* The presiding officer shall enter an order that recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and the issues or matters in controversy to be determined in the proceeding. Any objections to the order must be filed by a party within five (5) days after service of the order. Parties may not file replies to the objections unless the presiding officer so directs. The filing of objections does not stay the decision unless the presiding officer so orders. The presiding officer may revise the order in the light of the objections presented and, as permitted by § 2.319(l), may certify for determination to the Commission any matter raised in the objections the presiding officer finds appropriate. The order controls the subsequent course of the proceeding unless modified for good cause.

§ 2.330 Stipulations.

Apart from any stipulations made during or as a result of a prehearing conference, the parties may stipulate in writing at any stage of the proceeding or orally during the hearing, any relevant fact or the contents or authenticity of any document. These stipulations may be received in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. These stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

§ 2.331 Oral argument before the presiding officer.

When, in the opinion of the presiding officer, time permits and the nature of the proceeding and the public interest warrant, the presiding officer may allow, and fix a time for, the presentation of oral argument. The presiding officer will impose appropriate limits of time on the argument. The transcript of the argument is part of the record.

§ 2.332 General case scheduling and management.

(a) *Scheduling order.* The presiding officer shall, as soon as practicable after consulting with the parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that establishes limits for the time to file motions, conclude discovery, commence the oral phase of the hearing (if applicable), and take other actions in the proceeding. The scheduling order may also include:

(1) Modifications of the times for disclosures under §§ 2.336 and 2.704 and of the extent of discovery to be permitted;

(2) The date or dates for prehearing conferences; and

(3) Any other matters appropriate in the circumstances of the proceeding.

(b) *Model milestones*. In developing the scheduling order under paragraph (a) of this section, the presiding officer shall utilize the applicable model milestones in Appendix B to this part as a starting point. The presiding officer shall make appropriate modifications based upon all relevant information, including but not limited to, the number of contentions admitted, the complexity of the issues presented, relevant considerations which a party may bring to the attention of the presiding officer, the NRC staff's schedule for completion of its safety and environmental evaluations (paragraph (e) of this section), and the NRC's interest in providing a fair and expeditious resolution of the issues sought to be adjudicated by the parties in the proceeding.

(c) *Objectives of scheduling order*. The scheduling order must have as its objectives proper case management purposes such as:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) Discouraging wasteful prehearing activities;

(4) Improving the quality of the hearing through more thorough preparation; and

(5) Facilitating the settlement of the proceeding or any portions thereof, including the use of Alternative Dispute Resolution, when and if the presiding officer, upon consultation with the parties, determines that these types of efforts should be pursued.

(d) *Effect of NRC staff's schedule on scheduling order*. In establishing a schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. Hearings on safety issues may be commenced before publication of the NRC staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS. In addition, discovery against the NRC staff on safety or environmental issues, respectively, should be suspended until the staff has issued the SER or EIS, unless the presiding officer finds that the commencement of discovery against the NRC staff (as otherwise permitted by the provisions of this part) before the publication of the pertinent document will not adversely affect completion of the document and will expedite the hearing.

[69 FR 2236, Jan. 14, 2004, as amended at 70 FR 20461, Apr. 20, 2005]

§ 2.333 Authority of the presiding officer to regulate procedure in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer:

(a) May limit the number of witnesses whose testimony may be cumulative;

(b) May strike argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence;

(c) Shall require each party or participant who requests permission to conduct cross-examination to file a cross-examination plan for each witness or panel of witnesses the party or participant proposes to cross-examine;

(d) Must ensure that each party or participant permitted to conduct cross-examination conducts its cross-examination in conformance with the party's or participant's cross-examination plan filed with the presiding officer;

(e) May take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and

(f) May impose such time limitations on arguments as the presiding officer determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

§ 2.334 Implementing hearing schedule for proceeding.

(a) Unless the Commission directs otherwise in a particular proceeding,

the presiding officer assigned to the proceeding shall, based on information and projections provided by the parties and the NRC staff, take appropriate action to maintain the hearing schedule established by the presiding officer in accordance with 10 CFR 2.332(a) of this part for the completion of the evidentiary record and, as appropriate, the issuance of its initial decision.

(b) *Modification of hearing schedule.* A hearing schedule may not be modified except upon a finding of good cause by the presiding officer or the Commission. In making such a good cause determination, the presiding officer or the Commission should take into account the following factors, among other things:

(1) Whether the requesting party has exercised due diligence to adhere to the schedule;

(2) Whether the requested change is the result of unavoidable circumstances; and

(3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.

(c) The presiding officer shall provide written notification to the Commission any time during the course of the proceeding when it appears that there will be a delay of more than forty-five (45) days in meeting any of the dates for major activities in the hearing schedule established by the presiding officer under 10 CFR 2.332(a), or that the completion of the record or the issuance of the initial decision will be delayed more than sixty (60) days beyond the time specified in the hearing schedule established under 10 CFR 2.332(a). The notification must include an explanation of the reasons for the projected delay and a description of the actions, if any, that the presiding officer or the Board proposes to take to avoid or mitigate the delay.

[70 FR 20461, Apr. 20, 2005]

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima*

facie showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

§ 2.336 General discovery.

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this part shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and provide:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion;

(2)(i) A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (e.g., books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http: //www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing.

(3) A list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(b) Except for proceedings conducted under subpart J of this part or as otherwise ordered by the Commission, the presiding officer, or the Atomic Safety and Licensing Board assigned to the proceeding, the NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

(1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;

(4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status)

representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and

(5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(c) Each party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it. A party, including the NRC staff, is not excused from making the required disclosures because it has not fully completed its investigation of the case, it challenges the sufficiency of another entity's disclosures, or that another entity has not yet made its disclosures. All disclosures under this section must be accompanied by a certification (by sworn affidavit) that all relevant materials required by this section have been disclosed, and that the disclosures are accurate and complete as of the date of the certification.

(d) The duty of disclosure under this section is continuing, and any information or documents that are subsequently developed or obtained must be disclosed within fourteen (14) days.

(e)(1)The presiding officer may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action, or the use of the discovery provisions in subpart G of this part against the offending party, for the offending party's continuing unexcused failure to make the disclosures required by this section.

(2) The presiding officer may impose sanctions on a party that fails to provide any document or witness name required to be disclosed under this section, unless the party demonstrates good cause for its failure to make the disclosure required by this section. A sanction that may be imposed by the presiding officer is prohibiting the admission into evidence of documents or testimony of the witness proffered by the offending party in support of its case.

(f)(1) In the event of a dispute over disclosure of documents and records including Safeguards Information referred to in Sections 147 and 181 of the Atomic Energy Act of 1954, as amended, the presiding officer may issue an order requiring disclosure if—

(i) The presiding officer finds that the individual seeking access to Safeguards Information to participate in an NRC adjudication has the requisite "need to know", as defined in 10 CFR 73.2;

(ii) The individual has undergone an FBI criminal history records check, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable, by submitting fingerprints to the NRC Office of Administration, Security Processing Unit, Mail Stop T–6E46, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and otherwise following the procedures in 10 CFR 73.57(d) for submitting and processing fingerprints. However, before a final adverse determination by the NRC Office of Administration on an individual's criminal history records check is made, the individual shall be afforded the protections provided by 10 CFR 73.57; and

(iii) The NRC Office of Administration has found, based upon a background check, that the individual is trustworthy and reliable, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable. In addition to the protections provided by 10 CFR 73.57 for adverse determinations based on criminal history records checks, the Office of Administration must take the following actions before making a final adverse determination on an individual's background check for trustworthiness and reliability. The Office of Administration will:

(A) For the purpose of assuring correct and complete information, provide to the individual any records, in addition to those required to be provided under 10 CFR 73.57(e)(1), that were considered in the trustworthiness and reliability determination;

(B) Resolve any challenge by the individual to the completeness or accuracy of the records described in § 2.336(f)(1)(iii)(A). The individual may make this challenge by submitting information and/or an explanation to the

Office of Administration. The challenge must be submitted within 10 days of the distribution of the records described in §2.336(f)(1)(iii)(A), and the Office of Administration must promptly resolve any challenge.

(iv) Individuals seeking access to Safeguards Information to participate in an NRC adjudication for whom the NRC Office of Administration has made a final adverse determination on trustworthiness and reliability may submit a request to the Chief Administrative Judge for review of the adverse determination. Upon receiving such a request, the Chief Administrative Judge shall designate an officer other than the presiding officer of the proceeding to review the adverse determination. For purposes of review, the adverse determination must be in writing and set forth the grounds for the determination. The request for review shall be served on the NRC staff and may include additional information for review by the designated officer. The request must be filed within 15 days after receipt of the adverse determination by the person against whom the adverse determination has been made. Within 10 days of receipt of the request for review and any additional information, the NRC staff will file a response indicating whether the request and additional information has caused the NRC Office of Administration to reverse its adverse determination. The designated officer may reverse the Office of Administration's final adverse determination only if the officer finds, based on all the information submitted, that the adverse determination constitutes an abuse of discretion. The designated officer's decision must be rendered within 15 days after receipt of the staff filing indicating that the request for review and additional information has not changed the NRC Office of Administration's adverse determination.

(2) The presiding officer may include in an order any protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to prevent the unauthorized disclosure of Safeguards Information.

(3) When Safeguards Information protected from unauthorized disclosure under Section 147 of the Atomic Energy Act of 1954, as amended, is received and possessed by anyone other than the NRC staff, it must also be protected according to the requirements of §73.21 and the requirements of §73.22 or §73.23 of this chapter, as applicable.

(4) The presiding officer may also prescribe additional procedures to effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

(5) In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order may be subject to a civil penalty imposed under §2.205.

(6) For the purpose of imposing the criminal penalties contained in Section 223 of the Atomic Energy Act of 1954, as amended, a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order issued pursuant to this paragraph is considered to be issued under Section 161b of the Atomic Energy Act of 1954, as amended.

(7) If a presiding officer has yet to be appointed, the authority to take the actions described in paragraphs (f)(1) to (f)(6) of this section resides in the officer with jurisdiction under §2.318(a).

(g) The disclosures required by this section constitute the sole discovery permitted for NRC proceedings under this part unless there is further provision for discovery under the specific subpart under which the hearing will be conducted or unless the Commission provides otherwise in a specific proceeding.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 63567, Oct. 24, 2008]

§2.337 Evidence at a hearing.

(a) *Admissibility.* Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(b) *Objections.* An objection to evidence must briefly state the grounds of objection. The transcript must include

the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on-the-record.

(c) *Offer of proof.* An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.

(d) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(e) *Official record.* An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(f) *Official notice.* (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.

(g) *Proceedings involving applications*—(1) Facility construction permits. In a proceeding involving an application for construction permit for a production or utilization facility, the NRC staff shall offer into evidence any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act, any safety evaluation prepared by the NRC staff, and any environmental impact statement prepared in the proceeding under subpart A of part 51 of this chapter by the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee.

(2) *Other applications where the NRC staff is a party.* In a proceeding involving an application for other than a construction permit for a production or utilization facility, the NRC staff shall offer into evidence:

(i) Any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act;

(ii) At the discretion of the NRC staff, a safety evaluation prepared by the NRC staff and/or NRC staff testimony and evidence on the contention/controverted matter prepared in advance of the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention/controverted matter provided to the presiding officer under §§ 2.1202(a); and

(iv) Any environmental impact statement or environmental assessment prepared in the proceeding under subpart A of part 51 of this chapter by the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee if there is any, but only if there are contentions/controverted matters with respect to the adequacy of the environmental impact statement or environmental assessment.

(3) *Other applications where the NRC staff is not a party.* In a proceeding involving an application for other than a construction permit for a production or utilization facility, the NRC staff shall

offer into evidence, and (with the exception of an ACRS report) provide one or more sponsoring witnesses, for:

(i) Any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act;

(ii) At the discretion of the NRC staff, a safety evaluation prepared by the NRC staff and/or NRC staff testimony and evidence on the contention/controverted matter prepared in advance of the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention/controverted matter under § 2.1202(a); and

(iv) Any environmental impact statement or environmental assessment prepared in the proceeding under subpart A of part 51 of this chapter by the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee if there is any, but only if there are contentions/controverted matters with respect to the adequacy of the environmental impact statement or environmental assessment.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 5716, Jan. 31, 2008]

§ 2.338 Settlement of issues; alternative dispute resolution.

The fair and reasonable settlement and resolution of issues proposed for litigation in proceedings subject to this part is encouraged. Parties are encouraged to employ various methods of alternate dispute resolution to address the issues without the need for litigation in proceedings subject to this part.

(a) *Availability.* The parties shall have the opportunity to submit a proposed settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under paragraph (b) of this section.

(b) *Settlement judge; alternative dispute resolution.* (1) The presiding officer, upon joint motion of the parties, may request the Chief Administrative Judge to appoint a Settlement Judge to conduct settlement negotiations or remit the proceeding to alternative dispute resolution as the Commission may provide or to which the parties may agree. The order appointing the Settlement Judge may confine the scope of settlement negotiations to specified issues. The order must direct the Settlement Judge to report to the Chief Administrative Judge at specified time periods.

(2) If a Settlement Judge is appointed, the Settlement Judge shall:

(i) Convene and preside over conferences and settlement negotiations between the parties and assess the practicalities of a potential settlement;

(ii) Report to the Chief Administrative Judge describing the status of the settlement negotiations and recommending the termination or continuation of the settlement negotiations; and

(iii) Not discuss the merits of the case with the Chief Administrative Judge or any other person, or appear as a witness in the case.

(3) Settlement negotiations conducted by the Settlement Judge terminate upon the order of the Chief Administrative Judge issued after consultation with the Settlement Judge.

(4) No decision concerning the appointment of a Settlement Judge or the termination of the settlement negotiation is subject to review by, appeal to, or rehearing by the presiding officer or the Commission.

(c) *Availability of parties' attorneys or representatives.* The presiding officer (or Settlement Judge) may require that the attorney or other representative who is expected to try the case for each party be present and that the parties, or agents having full settlement authority, also be present or available by telephone.

(d) *Admissibility in subsequent hearing.* No evidence, statements, or conduct in settlement negotiations under this section will be admissible in any subsequent hearing, except by stipulation of the parties. Documents disclosed may not be used in litigation unless obtained through appropriate discovery or subpoena.

(e) *Imposition of additional requirements.* The presiding officer (or Settlement Judge) may impose on the parties and persons having an interest in the outcome of the adjudication additional requirements as the presiding officer (or Settlement Judge) finds necessary

for the fair and efficient resolution of the case.

(f) *Effects of ongoing settlement negotiations.* The conduct of settlement negotiations does not divest the presiding officer of jurisdiction and does not automatically stay the proceeding. A hearing must not be unduly delayed because of the conduct of settlement negotiations.

(g) *Form.* A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.

(h) *Content of settlement agreement.* The proposed settlement agreement must contain the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;

(3) A statement that the order has the same force and effect as an order made after full hearing; and

(4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

(i) *Approval of settlement agreement.* Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement or compromise must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

§ 2.339 Expedited decisionmaking procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered under paragraph (a) of this section is subject to review by the Commission on its own motion within forty (40) days after its date.

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter, when:

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance of a limited work authorization under 10 CFR 50.10, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization, a combined license under subpart C of part 52 of this chapter, or a manufacturing license under subpart F of part 52.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49475, Aug. 28, 2007]

§ 2.340 Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses.

(a) *Initial decision—production or utilization facility operating license.* In any initial decision in a contested proceeding on an application for an operating license (including an amendment to or renewal of an operating license) for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, any matter designated by the Commission to be decided by the presiding officer, and any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer. Depending on the resolution of those matters, the Commission, the Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

(b) *Initial decision—combined license under 10 CFR part 52.* In any initial decision in a contested proceeding on an application for a combined license (including an amendment to or renewal of a combined license) under subpart C of part 52 of this chapter, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and any matter designated by the Commission to be decided by the presiding officer. Depending on the resolution of those matters, the Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

(c) *Initial decision on finding under 10 CFR 52.103 with respect to acceptance criteria in nuclear power reactor combined licenses.* In any initial decision under § 52.103(g) of this chapter with respect to whether acceptance criteria have been or will be met, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties shall be referred to the Commission for its determination. The Commission may, in its discretion, treat the matter as a request for action under § 2.206 and process the matter in accordance with § 52.103(f) of this chapter. Depending on the resolution of those matters, the Commission, the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate, will make the finding under § 52.103 of this chapter, or appropriately condition that finding.

(d) *Initial decision—manufacturing license under 10 CFR part 52.* In any initial decision in a contested proceeding on an application for a manufactured license (including an amendment to or renewal of a combined license) under subpart C of part 52 of this chapter, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and any matter designated by the Commission to be decided by the presiding officer. Depending on the resolution of those matters, the Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the manufacturing license.

(e) *Initial decision—other proceedings not involving production or utilization facilities.* In proceedings not involving production or utilization facilities, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties must be referred to the Director of Nuclear Material Safety and Safeguards, or the Director of the Office of Federal and State Materials and Environmental Management Programs, as appropriate. Depending on the resolution of those matters, the Director of

Nuclear Material Safety and Safeguards or the Director of the Office of Federal and State Materials and Environmental Management Programs, as appropriate, after making the requisite findings, will issue, deny, revoke or appropriately condition the license, or take other action as necessary or appropriate.

(f) *Immediate effectiveness of certain decisions.* An initial decision directing the issuance or amendment of a limited work authorization under 10 CFR 50.10, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under part 50 of this chapter, a combined license under subpart C of part 52 of this chapter, a manufacturing license under subpart F of part 52 of this chapter, or a license under 10 CFR part 72 to store spent fuel in an independent spent fuel storage facility (ISFSI) or a monitored retrievable storage installation (MRS), an initial decision directing issuance of a license under part 61 of this chapter, or an initial decision under 10 CFR 52.103(g) that acceptance criteria in a combined license have been met, is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective.

(g)–(h) [Reserved]

(i) *Issuance of authorizations, permits, and licenses—production and utilization facilities.* The Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate, shall issue a limited work authorization under 10 CFR 50.10, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under part 50 of this chapter, a combined license under subpart C of part 52 of this chapter, or a manufacturing license under subpart F of part 52 of this chapter within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the authorization, permit or license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

(j) *Issuance of finding on acceptance criteria under 10 CFR 52.103.* The Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate, shall make the finding under 10 CFR 52.103(g) that acceptance criteria in a combined license have been, or will be met, within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made the finding under § 52.103(g) that acceptance criteria have been, or will be met, for those acceptance criteria which are not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

(k) *Issuance of other licenses.* The Commission or the Director of Nuclear Material Safety and Safeguards, or the Director of the Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue a license, including a license under 10 CFR part 72 to store spent fuel in either an independent spent fuel storage facility (ISFSI) located away from a reactor site or at a monitored retrievable storage installation (MRS), within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

[72 FR 49475, Aug. 28, 2007, as amended at 73 FR 5717, Jan. 31, 2008]

§ 2.341 Review of decisions and actions of a presiding officer.

(a)(1) Except for requests for review or appeals under § 2.311 or in a proceeding on the high-level radioactive waste repository (which are governed by § 2.1015), review of decisions and actions of a presiding officer are treated under this section, provided, however, that no party may request a further Commission review of a Commission determination to allow a period of interim operation under 10 CFR 52.103(c).

(2) Within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than twenty-five (25) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within five (5) days of service of any answer. This reply brief may not be longer than five (5) pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) (1) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(2) Unless the Commission orders otherwise, any briefs on review may not exceed thirty (30) pages in length, exclusive of pages containing the table of contents, table of citations, and any

addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of ten (10) pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) *Interlocutory review.* (1) A question certified to the Commission under § 2.319(l), or a ruling referred or issue certified to the Commission under § 2.323(f), will be reviewed if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49476, Aug. 28, 2007]

§ 2.342 Stays of decisions.

(a) Within ten (10) days after service of a decision or action of a presiding officer, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay may be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties must be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer may not be longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. Further replies to answers will not be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the

Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by electronic or facsimile transmission message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

§ 2.343 Oral argument.

In its discretion, the Commission may allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative.

§ 2.344 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material issue; and

(4) The appropriate ruling, order, or denial of relief, with the effective date.

§ 2.345 Petition for reconsideration.

(a)(1) Any petition for reconsideration of a final decision must be filed by a party within ten (10) days after the date of the decision.

(2) Petitions for reconsideration of Commission decisions are subject to the requirements in § 2.341(d).

(b) A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid. The petition must state the relief sought. Within ten (10) days after a petition for reconsideration has been served, any other party may file an answer in opposition to or in support of the petition.

(c) Neither the filing nor the granting of the petition stays the decision unless the Commission orders otherwise.

§ 2.346 Authority of the Secretary.

When briefs, motions or other documents are submitted to the Commission itself, as opposed to officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary is authorized to:

(a) Prescribe procedures for the filing of briefs, motions, or other pleadings, when the schedules differ from those prescribed by the rules of this part or when the rules of this part do not prescribe a schedule;

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the Commission later then the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule or regulation of the Commission unless good cause is shown for the late filing;

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission;

(e) Extend the time for the Commission to rule on a petition for review under §§ 2.311 and 2.341;

(f) Extend the time for the Commission to grant review on its own motion under § 2.341;

(g) Direct pleadings improperly filed before the Commission to the appropriate presiding officer for action;

(h) Deny a request for hearings, where the request fails to comply with

the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further proceedings;

(i) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Judge, as appropriate requests for hearing not falling under § 2.104, where the requestor is entitled to further proceedings; and

(j) Take action on minor procedural matters.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49152, Aug. 28, 2007]

§ 2.347 Ex parte communications.

In any proceeding under this subpart—

(a)(1) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

(2) For purposes of this section, *merits of the proceeding* includes:

(i) A disputed issue;

(ii) A matter which a presiding officer seeks to be referred to the Commission under 10 CFR 2.340(a); and

(iii) A matter for which the Commission has approved examination by the presiding officer under § 2.340(a).

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any *ex parte* communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it, and any responses to the communication, are promptly served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e) (1) The prohibitions of this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section cease to apply to *ex parte* communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.341, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to—

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(5) Communications, in contested proceedings and uncontested mandatory proceeding, regarding an undisputed issue.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49476, Aug. 28, 2007]

§ 2.348 Separation of functions.

(a) In any proceeding under this part, any NRC officer or employee engaged in the performance of any investigative or litigating function in the proceeding or in a factually related proceeding

with respect to a disputed issue in that proceeding, may not participate in or advise a Commission adjudicatory employee about the initial or final decision with respect to that disputed issue, except—

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on-the-record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to—

(1) Communications to or from any Commission adjudicatory employee regarding—

(i) The status of a proceeding;

(ii) Matters for which the communications are specifically permitted by statute or regulation;

(iii) NRC participation in matters pending before a court or another agency; or

(iv) Generic issues involving public health and safety or other statutory responsibilities of the NRC (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding—

(i) Initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) Supervision of NRC staff to ensure compliance with the general policies and procedures of the agency;

(iii) NRC staff priorities and schedules or the allocation of agency resources; or

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.

(3) None of the communications permitted by paragraph (b)(2) (i) through (iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it, and any responses to the communication, are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d)(1) The prohibitions in this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(iii) A matter which a presiding officer seeks to be referred to the Commission under 10 CFR 2.340(a); and

(iv) A matter for which the Commission has approved examination by the presiding officer under § 2.340(a).

(2) The prohibitions of this section cease to apply to the disputed issues pertinent to a full or partial initial decision when the time has expired for Commission review of the decision in accordance with § 2.341.

(3) Separation of functions does not apply to uncontested proceedings, or to an undisputed issue in contested initial licensing proceedings.

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.347.

(f) If an initial or final decision is stated to rest in whole or in part on

fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion before the decision is filed, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49477, Aug. 28, 2007]

§ 2.390 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), (e), and (f) of this section, final NRC records and documents, including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, order, or standard design approval, or regarding a rulemaking proceeding subject to this part shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC Public Document Room, except for matters that are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and

(ii) Are in fact properly classified under that Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), but only if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types or matters to be withheld.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use

of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged, or confidential commercial or financial information.

(1) The submitter shall request withholding at the time the document is submitted and shall comply with the document marking and affidavit requirements set forth in this paragraph. The NRC has no obligation to review documents not so marked to determine whether they contain information eligible for withholding under paragraph (a) of this section. Any documents not so marked may be made available to the public at the NRC Web site, *http://www.nrc.gov* or at the NRC Public Document Room.

(i) The submitter shall ensure that the document containing information sought to be withheld is marked as follows:

(A) The first page of the document, and each successive page containing such information, must be marked so as to be readily visible, at the top, or by electronic watermark or other suitable marking on the body of the page, with language substantially similar to: "confidential information submitted under 10 CFR 2.390," "withhold from public disclosure under 10 CFR 2.390," or "proprietary," to indicate that it contains information the submitter seeks to have withheld.

(B) Each document or page, as appropriate, containing information sought to be withheld from public disclosure must indicate, adjacent to the information, or as specified in paragraph (b)(1)(i)(A) of this section if the entire page is affected, the basis (*i.e.*, trade secret, personal privacy, etc.) for proposing that the information be withheld from public disclosure under paragraph (a) of this section.

(ii) The Commission may waive the affidavit requirements on request, or on its own initiative, in circumstances the Commission, in its discretion, deems appropriate. Otherwise, except for personal privacy information, which is not subject to the affidavit requirement, the request for withholding must be accompanied by an affidavit that—

(A) Identifies the document or part sought to be withheld;

(B) Identifies the official position of the person making the affidavit;

(C) Declares the basis for proposing the information be withheld, encompassing considerations set forth in § 2.390(a);

(D) Includes a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public; and

(E) Indicates the location(s) in the document of all information sought to be withheld.

(iii) In addition, an affidavit accompanying a withholding request based on paragraph (a)(4) of this section must contain a full statement of the reason for claiming the information should be withheld from public disclosure. This statement must address with specificity the considerations listed in paragraph (b)(4) of this section. In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate document. The affiant must designate with appropriate markings information submitted in the affidavit as a trade secret, or confidential or privileged commercial or financial information within the meaning of § 9.17(a)(4) of this chapter, and such information shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(2) A person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the basis for and effects of licensing or rulemaking actions, and that it is within the discretion of the Commission to withhold such information from public disclosure.

(3) The Commission shall determine whether information sought to be withheld from public disclosure under this paragraph:

(i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure.

(4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(5) If the Commission determines, under paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure under this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it will be returned to the applicant.

(6) Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the document. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding. *In camera* sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such *in camera* session will be made publicly available.

(c) The Commission either may grant or deny a request for withholding under this section.

(1) If the request is granted, the Commission will notify the submitter of its determination to withhold the information from public disclosure.

(2) If the Commission denies a request for withholding under this section, it will provide the submitter with a statement of reasons for that determination. This decision will specify the date, which will be a reasonable time thereafter, when the document will be available at the NRC Web site, *http://www.nrc.gov*. The document will not be returned to the submitter.

(3) Whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document, and the document will be returned unless the information—

(i) Forms part of the basis of an official agency decision, including but not limited to, a rulemaking proceeding or licensing activity;

(ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;

(iii) Was revealed, or relied upon, in an open Commission meeting held in accordance with 10 CFR part 9, subpart C;

(iv) Has been requested in a Freedom of Information Act request; or

(v) Has been obtained during the course of an investigation conducted by the NRC Office of Investigations.

(d) The following information is considered commercial or financial information within the meaning of §9.17(a)(4) of this chapter and is subject to disclosure only in accordance with the provisions of §9.19 of this chapter.

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

(2) Information submitted in confidence to the Commission by a foreign source.

(e) Submitting information to NRC for consideration in connection with NRC licensing or regulatory activities shall be deemed to constitute authority for the NRC to reproduce and distribute sufficient copies to carry out the Commission's official responsibilities.

(f) The presiding officer, if any, or the Commission may, with reference to the NRC records and documents made available pursuant to this section, issue orders consistent with the provisions of this section and §2.705(c).

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49152, Aug. 28, 2007; 72 FR 49477, Aug. 28, 2007; 75 FR 73937, Nov. 30, 2010]

Subpart D—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Construct and/or Operate Nuclear Power Plants of Identical Design at Multiple Sites

SOURCE: 72 FR 49477, Aug. 28, 2007, unless otherwise noted.

§ 2.400 Scope of subpart.

This subpart describes procedures applicable to licensing proceedings which involve the consideration in hearings of a number of applications, filed by one or more applicants pursuant to appendix N of parts 50 or 52 of this chapter, for licenses to construct and/or operate nuclear power reactors of identical design to be located at multiple sites.

§ 2.401 Notice of hearing on construction permit or combined license applications pursuant to appendix N of 10 CFR parts 50 or 52.

(a) In the case of applications pursuant to appendix N of part 50 of this chapter for construction permits for nuclear power reactors of the type described in §50.22 of this chapter, or applications pursuant to appendix N of part 52 of this chapter for combined licenses, the Secretary will issue notices of hearing pursuant to §2.104.

(b) The notice of hearing will also state the time and place of the hearings on any separate phase of the proceeding.

§ 2.402 Separate hearings on separate issues; consolidation of proceedings.

(a) In the case of applications under appendix N of part 50 of this chapter for construction permits for nuclear power reactors of a type described in 10 CFR 50.22, or applications pursuant to appendix N of part 52 of this chapter for combined licenses, the Commission or the presiding officer may order separate hearings on particular phases of the proceeding, such as matters related to the acceptability of the design of the reactor, in the context of the site parameters postulated for the design or environmental matters.

(b) If a separate hearing is held on a particular phase of the proceeding, the

CFR 50.10(d) without completion of the review for limited work authorizations required by subpart A of part 51 of this chapter. The authority of the Commission to review such a partial initial decision *sua sponte*, or to raise *sua sponte* an issue that has not been raised by the parties, will be exercised within the same time as in the case of a full decision relating to the issuance of a construction permit or combined license.

Subpart G—Rules for Formal Adjudications

SOURCE: 69 FR 2256, Jan. 14, 2004, unless otherwise noted.

§ 2.700 Scope of subpart G.

The provisions of this subpart apply to and supplement the provisions set forth in subpart C of this part with respect to enforcement proceedings initiated under subpart B of this part unless otherwise agreed to by the parties, proceedings conducted with respect to the initial licensing of a uranium enrichment facility, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention necessitates resolution of: issues of material fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, proceedings for initial applications for construction authorization for high-level radioactive waste repository noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings for initial applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area, and any other proceeding as ordered by the Commission. If there is any conflict between the provisions of this subpart and those set forth in subpart C of this part, the provisions of this subpart control.

§ 2.701 Exceptions.

Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

§ 2.702 Subpoenas.

(a) On application by any party, the designated presiding officer or, if he or she is not available, the Chief Administrative Judge, or other designated officer will issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence. The officer to whom application is made may require a showing of general relevance of the testimony or evidence sought, and may withhold the subpoena if such a showing is not made. However, the officer may not determine the admissibility of evidence.

(b) Every subpoena will bear the name of the Commission, the name and office of the issuing officer and the title of the hearing, and will command the person to whom it is directed to attend and give testimony or produce specified documents or other things at a designated time and place. The subpoena will also advise of the quashing procedure provided in paragraph (f) of this section.

(c) Unless the service of a subpoena is acknowledged on its face by the witness or is served by an officer or employee of the Commission, it must be served by a person who is not a party to the hearing and is not less than eighteen (18) years of age. Service of a subpoena must be made by delivery of a copy of the subpoena to the person named in it and tendering that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commission, fees and mileage need not be tendered and the subpoena may be served by registered mail.

(d) Witnesses summoned by subpoena must be paid the fees and mileage paid to witnesses in the district courts of the United States by the party at whose instance they appear.

(e) The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgment of service with the officer before whom the witness is required to testify or produce evidence or with the Secretary. Failure to make proof of

service does not affect the validity of the service.

(f) On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may:

(1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or

(2) Condition denial of the motion on just and reasonable terms.

(g) On application and for good cause shown, the Commission will seek judicial enforcement of a subpoena issued to a party and which has not been quashed.

(h) The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in their custody.

§ 2.703 Examination by experts.

(a) A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may permit the individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, upon finding:

(1) That cross-examination by that individual would serve the purpose of furthering the conduct of the proceeding;

(2) That the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination;

(3) That the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination; and

(4) That the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination, and has submitted a cross-examination plan in accordance with § 2.711(c).

(b) Examination or cross-examination conducted under this section must be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom this examination or cross-examination is conducted and his or her attorney is responsible for the conduct of examination or cross-examination by such individuals.

§ 2.704 Discovery-required disclosures.

(a) *Initial disclosures.* Except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, a party other than the NRC staff shall, without awaiting a discovery request, provide to other parties:

(1) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed issues alleged with particularity in the pleadings, identifying the subjects of the information; and

(2) A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed issues alleged with particularity in the pleadings. When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing;

(3) Unless otherwise stipulated or directed by the presiding officer, these disclosures must be made within forty-five (45) days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329. A party shall make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of

another party's disclosures, or because another party has not made its disclosures.

(b) *Disclosure of expert testimony.* (1) In addition to the disclosures required by paragraph (a) of this section, a party other than the NRC staff shall disclose to other parties the identity of any person who may be used at trial to present evidence under § 2.711.

(2) Except in proceedings with prefiled written testimony, or as otherwise stipulated or directed by the presiding officer, this disclosure must be accompanied by a written report prepared and signed by the witness, containing: A complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(3) These disclosures must be made at the times and in the sequence directed by the presiding officer. In the absence of other directions from the presiding officer, or stipulation by the parties, the disclosures must be made at least ninety (90) days before the hearing commencement date or the date the matter is to be presented for hearing. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(2) of this section, the disclosures must be made within thirty (30) days after the disclosure made by the other party. The parties shall supplement these disclosures when required under paragraph (e) of this section.

(c) *Pretrial disclosures.* (1) In addition to the disclosures required in the preceding paragraphs, a party other than the NRC staff shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(i) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(ii) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, when available, a transcript of the pertinent portions of the deposition testimony; and

(iii) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(2) Unless otherwise directed by the presiding officer or the Commission, these disclosures must be made at least thirty (30) days before commencement of the hearing at which the issue is to be presented.

(3) A party may object to the admissibility of documents identified under paragraph (c) of this section. A list of those objections must be served and filed within fourteen (14) days after service of the disclosures required by paragraphs (c)(1) and (2) of this section, unless a different time is specified by the presiding officer or the Commission. Objections not so disclosed, other than objections as to a document's admissibility under § 2.711(e), are waived unless excused by the presiding officer or Commission for good cause shown.

(d) *Form of disclosures; filing.* Unless otherwise directed by order of the presiding officer or the Commission, all disclosures under paragraphs (a) through (c) of this section must be made in writing, signed, served, and promptly filed with the presiding officer or the Commission.

(e) Supplementation of responses. A party who has made a disclosure under this section is under a duty to supplement or correct the disclosure to include information thereafter acquired if ordered by the presiding officer or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) of this section within a reasonable time after a party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has

not otherwise been made known to the other parties during the discovery process or in writing.

(2) With respect to testimony of an expert from whom a report is required under paragraph (b) of this section, the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information must be disclosed by the time the party's disclosures under §2.704(c) are due.

(f) Disclosure under this section of documents and records including Safeguards Information referred to in Sections 147 and 181 of the Atomic Energy Act of 1954, as amended, will be according to the provisions in §2.705(c)(3) through (c)(8).

[69 FR 2256, Jan. 14, 2004, as amended at 73 FR 63567, Oct. 24, 2008]

§2.705 Discovery-additional methods.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written interrogatories (§2.706); interrogatories to parties (§2.706); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§2.707); and requests for admission (§2.708).

(b) *Scope of discovery.* Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. When any book, document, or other tangible thing sought is reasonably available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, sufficient response to an interrogatory on materials would be the location, the title and a page reference to the relevant book, document, or tangible thing. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery begins only after the prehearing conference and relates only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, discovery may not take place after the beginning of the prehearing conference held under §2.329 except upon leave of the presiding officer upon good cause shown. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.* Upon his or her own initiative after reasonable notice or in response to a motion filed under paragraph (c) of this section, the presiding officer may alter the limits in these rules on the number of depositions and interrogatories, and may also limit the length of depositions under §2.706 and the number of requests under §§2.707 and 2.708. The presiding officer shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if he or she determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties' resources, the importance of the issue in the proceeding, and the importance of the proposed discovery in resolving the issues.

(3) *Trial preparation materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney,

consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney for a party concerning the proceeding.

(4) *Claims of privilege or protection of trial preparation materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. Identification of these privileged materials must be made within the time provided for disclosure of the materials, unless otherwise extended by order of the presiding officer or the Commission.

(5) *Nature of interrogatories.* Interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party. Interrogatories may not be addressed to, or be construed to require:

(i) Reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position; or

(ii) Performance of additional research or analytical work beyond that which is needed to support the party's position on any particular matter.

(c) *Protective order.* (1) Upon motion by a party or the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the presiding officer;

(vi) That, subject to the provisions of §§ 2.709 and 2.390, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(vii) That studies and evaluations not be prepared.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(3) In the case of documents and records including Safeguards Information referred to in Sections 147 and 181 of the Atomic Energy Act of 1954, as amended, the presiding officer may issue an order requiring disclosure if—

(i) The presiding officer finds that the individual seeking access to Safeguards Information in order to participate in an NRC proceeding has the requisite "need to know," as defined in 10 CFR 73.2;

(ii) The individual has undergone an FBI criminal history records check, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable, by submitting fingerprints to the NRC Office of Administration, Security Processing Unit, Mail Stop T–6E46, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and otherwise following the procedures in 10 CFR 73.57(d) for submitting and processing fingerprints.

However, before a final adverse determination by the NRC Office of Administration on an individual's criminal history records check is made, the individual shall be afforded the protections provided by 10 CFR 73.57; and

(iii) The NRC Office of Administration has found, based upon a background check, that the individual is trustworthy and reliable, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable. In addition to the protections provided by 10 CFR 73.57 for adverse determinations based on criminal history records checks, the Office of Administration must take the following actions before making a final adverse determination on an individual's background check for trustworthiness and reliability. The Office of Administration will:

(A) For the purpose of assuring correct and complete information, provide to the individual any records, in addition to those required to be provided under 10 CFR 73.57(e)(1), that were considered in the trustworthiness and reliability determination;

(B) Resolve any challenge by the individual to the completeness or accuracy of the records described in §2.705(c)(3)(iii)(A). The individual may make this challenge by submitting information and/or an explanation to the Office of Administration. The challenge must be submitted within 10 days of the distribution of the records described in §2.705(c)(3)(iii)(A), and the Office of Administration must promptly resolve any challenge.

(iv) Individuals seeking access to Safeguards Information to participate in an NRC adjudication for whom the NRC Office of Administration has made a final adverse determination on trustworthiness and reliability may submit a request to the Chief Administrative Judge for review of the adverse determination. Upon receiving such a request, the Chief Administrative Judge shall designate an officer other than the presiding officer of the proceeding to review the adverse determination. For purposes of review, the adverse determination must be in writing and set forth the grounds for the determination. The request for review shall be served on the NRC staff and may include additional information for review by the designated officer. The request must be filed within 15 days after receipt of the adverse determination by the person against whom the adverse determination has been made. Within 10 days of receipt of the request for review and any additional information, the NRC staff will file a response indicating whether the request and additional information has caused the NRC Office of Administration to reverse its adverse determination. The designated officer may reverse the Office of Administration's final adverse determination only if the officer finds, based on all the information submitted, that the adverse determination constitutes an abuse of discretion. The designated officer's decision must be rendered within 15 days after receipt of the staff filing indicating that the request for review and additional information has not changed the NRC Office of Administration's adverse determination.

(4) The presiding officer may include in an order any protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to prevent the unauthorized disclosure of Safeguards Information.

(5) When Safeguards Information protected from unauthorized disclosure under Section 147 of the Atomic Energy Act of 1954, as amended, is received and possessed by anyone other than the NRC staff, it must also be protected according to the requirements of §73.21 and the requirements of §73.22 or §73.23 of this chapter, as applicable.

(6) The presiding officer may also prescribe additional procedures to effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

(7) In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order may be subject to a civil penalty imposed under §2.205.

(8) For the purpose of imposing the criminal penalties contained in Section 223 of the Atomic Energy Act of 1954, as

amended, a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order issued pursuant to this paragraph is considered to be issued under Section 161b of the Atomic Energy Act of 1954, as amended.

(d) *Sequence and timing of discovery.* Except when authorized under these rules or by order of the presiding officer, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f) of this section, nor may a party seek discovery after the time limit established in the proceeding for the conclusion of discovery. Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the presiding officer or, with respect to a response to an interrogatory, request for production, or request for admission, within a reasonable time after a party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) *Meeting of parties; planning for discovery.* Except when otherwise ordered, the parties shall, as soon as practicable and in any event no more than thirty (30) days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329, meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by § 2.704, and to develop a proposed discovery plan.

(1) The plan must indicate the parties' views and proposals concerning:

(i) What changes should be made in the timing, form, or requirement for disclosures under § 2.704, including a statement as to when disclosures under § 2.704(a)(1) were made or will be made;

(ii) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(iii) What changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(iv) Any other orders that should be entered by the presiding officer under paragraph (c) of this section.

(2) The attorneys of record and all unrepresented parties that have appeared in the proceeding are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the presiding officer within ten (10) days after the meeting a written report outlining the plan.

(g) *Signing of disclosures, discovery requests, responses, and objections.* (1) Every disclosure made in accordance with § 2.704 must be signed by at least one attorney of record in the attorney's individual name, whose address must be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, whose address must be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(i) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(3) If a request, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(4) If a certification is made in violation of the rule without substantial justification, the presiding officer, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may, in appropriate circumstances, include termination of that person's right to participate in the proceeding.

(h) *Motion to compel discovery.* (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request, for an order compelling a response or inspection in accordance with the request. The motion must set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. The motion must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer. Failure to answer or respond may not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section. For purposes of this paragraph, an evasive or incomplete answer or response will be treated as a failure to answer or respond.

(2) In ruling on a motion made under this section, the presiding officer may issue a protective order under paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the NRC staff under § 2.709(a), or the production of NRC documents under §§ 2.709(b) or § 2.390, except for paragraphs (c) and (e) of this section.

[69 FR 2256, Jan. 14, 2004, as amended at 73 FR 63568, Oct. 24, 2008]

§ 2.706 Depositions upon oral examination and written interrogatories; interrogatories to parties.

(a) *Depositions upon oral examination and written interrogatories.* (1) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(2) [Reserved]

(3) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(4) Before any questioning, the deponent shall either be sworn or affirm the truthfulness of his or her answers. Examination and cross-examination must proceed as at a hearing. Each question propounded must be recorded and the answer taken down in the words of the witness. Objections on questions of evidence must be noted in short form without the arguments. The officer may not decide on the competency, materiality, or relevancy of evidence but must record the evidence subject to objection. Objections on questions of evidence not made before the officer will not be considered waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(5) When the testimony is fully transcribed, the deposition must be submitted to the deponent for examination and signature unless he or she is ill, cannot be found, or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

(6) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers must be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

(7) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party does not make a person his or her own witness for any purpose by taking his deposition.

(8) A deponent whose deposition is taken and the officer taking a deposition are entitled to the same fees as are paid for like services in the district courts of the United States. The fees must be paid by the party at whose instance the deposition is taken.

(9) The witness may be accompanied, represented, and advised by legal counsel.

(10) The provisions of paragraphs (a)(1) through (a)(9) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.709.

(b) *Interrogatories to parties.* (1) Any party may serve upon any other party (other than the NRC staff) written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings must be filed with the Secretary of the Commission, and must be served on the presiding officer and all parties to the proceeding.

(2) Each interrogatory must be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection must be stated in lieu of an answer. The answers must be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within fourteen (14) days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.706(a)(7)).

§ 2.707 Production of documents and things; entry upon land for inspections and other purposes.

(a) *Request for discovery*. Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of § 2.704 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of § 2.704.

(b) *Service*. The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in § 2.704, the request may be served after the proceeding is set for hearing.

(c) *Contents*. The request must identify the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) *Response*. The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified.

(e) *NRC records and documents*. The provisions of paragraphs (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of NRC records or documents is subject to the provisions of §§ 2.709 and 2.390.

§ 2.708 Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his or her answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document for which an admission of genuineness and authenticity is requested must be delivered with the request unless a copy has already been furnished.

(b)(1) Each requested admission is considered made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either:

(i) A sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them; or

(ii) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(2) Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request must be answered within the time designated.

(c) Admissions obtained under the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 2.709 Discovery against NRC staff.

(a)(1) In a proceeding in which the NRC staff is a party, the NRC staff will make available one or more witnesses, designated by the Executive Director for Operations or a delegee of the Executive Director for Operations, for oral

examination at the hearing or on deposition regarding any matter, not privileged, that is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise. However, the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations or a delegee of the Executive Director for Operations, require the attendance and testimony of named NRC personnel.

(2) A party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts, as designated by the Executive Director for Operations, or a delegee of the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the NRC staff answer the interrogatories.

(3) A deposition of a particular named NRC employee or answer to interrogatories by NRC personnel under paragraphs (a)(1) and (2) of this section may not be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, or after the beginning of the prehearing conference held in accordance with § 2.329, except upon leave of the presiding officer for good cause shown.

(4) The provisions of § 2.704(c) and (e) apply to interrogatories served under this paragraph.

(5) Records or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing under paragraph (b) of this section and § 2.390.

(b) A request for the production of an NRC record or document not available under § 2.390 by a party to an initial licensing proceeding may be served on the Executive Director for Operations or a delegee of the Executive Director for Operations, without leave of the Commission or the presiding officer. The request must identify the records or documents requested, either by individual item or by category, describe each item or category with reasonable particularity, and state why that record or document is relevant to the proceeding.

(c) If the Executive Director for Operations, or a delegee of the Executive Director for Operations, objects to producing a requested record or document on the ground that it is not relevant or it is exempted from disclosure under § 2.390 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, the Executive Director for Operations, or a delegee of the Executive Director for Operations, shall advise the requesting party.

(d) If the Executive Director for Operations, or a delegee of the Executive Director for Operations, objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application must set forth the relevancy of the record or document to the issues in the proceeding. The application will be processed as a motion in accordance with § 2.323 (a) through (d). The record or document covered by the application must be produced for the *in camera* inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine:

(1) The relevancy of that record or document;

(2) Whether the document is exempt from disclosure under § 2.390;

(3) Whether the disclosure is necessary to a proper decision in the proceeding; and

(4) Whether the document or the information therein is reasonably obtainable from another source.

(e) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure

under §2.390 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, the presiding officer shall order the Executive Director for Operations, or a delegee of the Executive Director for Operations, to produce the document.

(f)(1) In the case of requested documents and records including Safeguards Information referred to in Sections 147 and 181 of the Atomic Energy Act of 1954, as amended exempt from disclosure under §2.390, the presiding officer may issue an order requiring disclosure to the Executive Director for Operations or a delegee of the Executive Director for Operations, to produce the documents or records (or any other order issued ordering production of the document or records) if—

(i) The presiding officer finds that the individual seeking access to Safeguards Information to participate in an NRC adjudication has the requisite "need to know," as defined in 10 CFR 73.2;

(ii) The individual has undergone an FBI criminal history records check, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable, by submitting fingerprints to the NRC Office of Administration, Security Processing Unit, Mail Stop T–6E46, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and otherwise following the procedures in 10 CFR 73.57(d) for submitting and processing fingerprints. However, before a final adverse determination by the NRC Office of Administration on an individual's criminal history records check is made, the individual shall be afforded the protections provided by 10 CFR 73.57; and

(iii) The NRC Office of Administration has found, based upon a background check, that the individual is trustworthy and reliable, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable. In addition to the protections provided by 10 CFR 73.57 for adverse determinations based on criminal history records checks, the Office of Administration must take the following actions before making a final adverse determination on an individual's background check for trustworthiness and reliability. The Office of Administration will:

(A) For the purpose of assuring correct and complete information, provide to the individual any records, in addition to those required to be provided under 10 CFR 73.57(e)(1), that were considered in the trustworthiness and reliability determination;

(B) Resolve any challenge by the individual to the completeness or accuracy of the records described in §2.709(f)(1)(iii)(A). The individual may make this challenge by submitting information and/or an explanation to the Office of Administration. The challenge must be submitted within 10 days of the distribution of the records described in §2.709(f)(1)(iii)(A), and the Office of Administration must promptly resolve any challenge.

(iv) Individuals seeking access to Safeguards Information to participate in an NRC adjudication for whom the NRC Office of Administration has made a final adverse determination on trustworthiness and reliability may submit a request to the Chief Administrative Judge for review of the adverse determination. Upon receiving such a request, the Chief Administrative Judge shall designate an officer other than the presiding officer of the proceeding to review the adverse determination. For purposes of review, the adverse determination must be in writing and set forth the grounds for the determination. The request for review shall be served on the NRC staff and may include additional information for review by the designated officer. The request must be filed within 15 days after receipt of the adverse determination by the person against whom the adverse determination has been made. Within 10 days of receipt of the request for review and any additional information, the NRC staff will file a response indicating whether the request and additional information has caused the NRC Office of Administration to reverse its adverse determination. The designated officer may reverse the Office of Administration's final adverse determination only if the officer finds, based on all the information submitted, that the adverse determination constitutes an

abuse of discretion. The designated officer's decision must be rendered within 15 days after receipt of the staff filing indicating that the request for review and additional information has not changed the NRC Office of Administration's adverse determination.

(2) The presiding officer may include in an order any protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to prevent the unauthorized disclosure of Safeguards Information.

(3) When Safeguards Information protected from disclosure under Section 147 of the Atomic Energy Act of 1954, as amended, is received and possessed by anyone other than the NRC staff, it must also be protected according to the requirements of § 73.21 and the requirements of § 73.22 or § 73.23 of this chapter, as applicable.

(4) The presiding officer may also prescribe additional procedures to effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

(5) In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order may be subject to a civil penalty imposed under § 2.205.

(6) For the purpose of imposing the criminal penalties contained in Section 223 of the Atomic Energy Act of 1954, as amended, a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order issued pursuant to this paragraph is considered to be issued under Section 161b of the Atomic Energy Act of 1954, as amended.

(g) A ruling by the presiding officer or the Commission for the production of a record or document will specify the time, place, and manner of production.

(h) A request under this section may not be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held under § 2.329 except upon leave of the presiding officer for good cause shown.

(i) The provisions of § 2.705 (c) and (e) apply to production of NRC records and documents under this section.

[69 FR 2256, Jan. 14, 2004, as amended at 73 FR 63568, Oct. 24, 2008]

§ 2.710 Motions for summary disposition.

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. Summary disposition motions must be filed no later than twenty (20) days after the close of discovery. The moving party shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall attach to any answer opposing the motion a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto will be entertained.

(b) Affidavits must set forth the facts that would be admissible in evidence, and must demonstrate affirmatively that the affiant is competent to testify to the matters stated in the affidavit. The presiding officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer. The answer by

affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no answer is filed, the decision sought, if appropriate, must be rendered.

(c) Should it appear from the affidavits of a party opposing the motion that he or she cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the presiding officer may refuse the application for summary decision, order a continuance to permit affidavits to be obtained, or make an order as is appropriate. A determination to that effect must be made a matter of record.

(d)(1) The presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted. The presiding officer may dismiss summarily or hold in abeyance untimely motions filed shortly before the hearing commences or during the hearing if the other parties or the presiding officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion and thereby extend the proceeding.

(2) The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction permit for a production or utilization facility, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall be issued.

(e) The presiding officer shall issue an order no later than forty (40) days after any responses to the summary disposition motion are filed, indicating whether the motion is granted, or denied, and the bases therefore.

§2.711 Evidence.

(a) *General.* Every party to a proceeding has the right to present oral or documentary evidence and rebuttal evidence and to conduct, in accordance with an approved cross-examination plan that contains the information specified in paragraph (c) of this section, any cross-examination required for full and true disclosure of the facts.

(b) *Testimony.* The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its proposed written testimony on every other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity to examine it. Written testimony must be incorporated into the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit.

(c) *Cross-examination.* (1) The presiding officer shall require a party seeking an opportunity to cross-examine to request permission to do so in accordance with a schedule established by the presiding officer. A request to conduct cross-examination must be accompanied by a cross-examination plan containing the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

(2) The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(d) *Non-applicability to subpart B proceedings.* Paragraphs (b) and (c) of this

section do not apply to proceedings initiated under subpart B of this part for modification, suspension, or revocation of a license or to proceedings for imposition of a civil penalty, unless otherwise directed by the presiding officer.

(e) *Admissibility.* Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(f) *Objections.* An objection to evidence must briefly state the grounds of objection. The transcript must include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on-the-record.

(g) *Offer of proof.* An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.

(h) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(i) *Official record.* An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(j) *Official notice.* (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.

§ 2.712 Proposed findings and conclusions.

(a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law, briefs and a proposed form of order or decision within the time provided by this section, except as otherwise ordered by the presiding officer:

(1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law and briefs, and a proposed form of order or decision.

(2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed.

(3) A party who has the burden of proof may reply within five (5) days after filing of proposed findings and conclusions of law and briefs by other parties.

(b) Failure to file proposed findings of fact, conclusions of law, or briefs when directed to do so may be considered a default, and an order or initial decision may be entered accordingly.

(c) Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on-the-record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law must be set forth in numbered paragraphs as to all material issues of law or discretion presented on-the-record. An intervenor's proposed findings of fact and conclusions of law must be confined to

issues which that party placed in controversy or sought to place in controversy in the proceeding.

§ 2.713 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with § 2.341 or the Commission takes review sua sponte.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may:

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration under § 2.345; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on-the-record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order, or denial of relief with the effective date;

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

Subpart H—Rulemaking

§ 2.800 Scope and applicability.

(a) This subpart governs the issuance, amendment, and repeal of regulations in which participation by interested persons is prescribed under Section 553 of title 5 of the U.S. Code.

(b) The procedures in §§ 2.804 through 2.810 apply to all rulemakings.

(c) The procedures in §§ 2.802 through 2.803 apply to all petitions for rulemaking except for initial applications for standard design certification rulemaking under subpart B of part 52 of this chapter, and subsequent petitions for amendment of an existing design certification rule filed by the original applicant for the design certification rule.

(d) The procedures in §§ 2.811 through 2.819, as supplemented by the provisions of subpart B of part 52, apply to standard design certification rulemaking.

[72 FR 49481, Aug. 28, 2007]

§ 2.801 Initiation of rulemaking.

Rulemaking may be initiated by the Commission at its own instance, on the recommendation of another agency of the United States, or on the petition of any other interested person, including an application for design certification under subpart B of part 52 of this chapter.

[72 FR 49482, Aug. 28, 2007]

§ 2.802 Petition for rulemaking.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent either by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by facsimile; by hand delivery to the NRC's offices at 11555 Rockville Pike, Rockville, Maryland; or, where practicable, by electronic submission, for example, via Electronic Information Exchange, e-mail, or CD-ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html;* by e-mail to *MSHD.Resource@nrc.gov;* or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–

evidence to which an interested party has not had opportunity to receive access, the presiding officer and the Commission shall give to such evidence such weight as is appropriate under the circumstances, taking into consideration any lack of opportunity to rebut or impeach the evidence.

§ 2.913 Review of Restricted Data or other National Security Information received in evidence.

At the close of the reception of evidence, the presiding officer shall review the record and shall direct that any Restricted Data or other National Security Information be expunged from the record where such expunction would not prejudice the interests of a party or the public interest. Such directions by the presiding officer will be considered by the Commission in the event of review of the determinations of the presiding officer.

Subpart J—Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

SOURCE: 54 FR 14944, Apr. 14, 1989, unless otherwise noted.

§ 2.1000 Scope of subpart J.

The rules in this subpart, together with the rules in subparts C and G of this part, govern the procedure for an application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), and for an application for a license to receive and possess high level radioactive waste at a geologic repository operations area. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart C, except for the following provisions: §§ 2.301; 2.303; 2.307; 2.309; 2.312; 2.313; 2.314; 2.315; 2.316; 2.317(a); 2.318; 2.319; 2.320; 2.321; 2.322; 2.323; 2.324; 2.325; 2.326; 2.327; 2.328; 2.330; 2.331; 2.333; 2.335; 2.338; 2.339; 2.342; 2.343; 2.344; 2.345; 2.346; 2.348; and 2.390. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart G, except for the following provisions: §§ 2.701, 2.702; 2.703; 2.708; 2.709; 2.710; 2.711; 2.712.

[69 FR 2264, Jan. 14, 2004]

§ 2.1001 Definitions.

Bibliographic header means the minimum series of descriptive fields that a potential party, interested governmental participant, or party must submit with a document or other material.

Circulated draft means a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

Complex document means a document that consists (entirely or in part) of electronic files having substantial portions that are neither textual nor image in nature, and graphic or other Binary Large Objects that exceed 50 megabytes and cannot logically be divided. For example, specialized submissions may include runtime executable software, viewer or printer executables, dynamic link library (.dll) files, large data sets associated with an executable, and actual software code for analytical programs that a party may intend to introduce into the proceeding.

Document means any written, printed, recorded, magnetic, graphic matter, or other documentary material, regardless of form or characteristic.

Documentary material means:

(1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter;

(2) Any information that is known to, and in the possession of, or developed

by the party that is relevant to, but does not support, that information or that party's position; and

(3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related "circulated drafts," relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

DOE means the U.S. Department of Energy or its duly authorized representatives.

Electronic docket means the NRC information system that receives, distributes, stores, and retrieves the Commission's adjudicatory docket materials.

Image means a visual likeness of a document, presented on a paper copy, microform, or a bit-map on optical or magnetic media.

Interested governmental participant means any person admitted under §2.315(c) of this part to the proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter.

Large document means a document that consists of electronic files that are larger than 50 megabytes.

Licensing Support Network means the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to a proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter.

LSN Administrator means the person within the U.S. Nuclear Regulatory Commission responsible for coordinating access to and the integrity of data available on the Licensing Support Network. The LSN Administrator shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste repository licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards. For the purposes of this subpart, the organizational unit within the NRC selected to be the LSN Administrator shall not be considered to be a party to the proceeding.

Marginalia means handwritten, printed, or other types of notations added to a document excluding underlining and highlighting.

NRC means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

Party for the purpose of this subpart means the DOE, the NRC staff, the host State, any affected unit of local government as defined in Section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), and a person admitted under §2.309 to the proceeding on an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter; provided that a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of §2.309.

Personal record means a document in the possession of an individual associated with a party, interested governmental participant, or potential party that was not required to be created or retained by the party, interested governmental participant, or potential party, and can be retained or discarded at the possessor's sole discretion, or documents of a personal nature that are not associated with any business of

the party, interested governmental participant, or potential party.

Potential party means any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d), is given access to the Licensing Support Network and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

Pre-license application electronic docket means the NRC's electronic information system that receives, distributes, stores, and maintains NRC pre-license application docket materials during the pre-license application phase.

Pre-license application phase means the time period before a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter is docketed under § 2.101(f)(3), and the time period before a license application to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 is docketed under § 2.101(f)(3).

Pre-License Application Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation.

Preliminary draft means any nonfinal document that is not a circulated draft.

Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, designated in the notice of hearing to preside.

Searchable full text means the electronic indexed entry of a document that allows the identification of specific words or groups of words within a text file.

Simple document means a document that consists of electronic files that are 50 megabytes or less.

Topical Guidelines means the set of topics set forth in Regulatory Guide 3.69, Topical Guidelines for the Licensing Support System, which are intended to serve as guidance on the scope of "documentary material".

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7795, Feb. 26, 1991; 63 FR 71736, Dec. 30, 1998; 66 FR 29465, May 31, 2001; 66 FR 55788, Nov. 2, 2001; 69 FR 2264, Jan. 14, 2004; 69 FR 32848, June 14, 2004]

§ 2.1002 [Reserved]

§ 2.1003 Availability of material.

(a) Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository, the NRC shall make available no later than thirty days after the DOE certification of compliance under § 2.1009(b), and each other potential party, interested governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b)—

(1) An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party; provided, however, that an electronic file need not be provided for acquired documentary material that has already been made available by the potential party, interested governmental participant or party that originally created the documentary material. Concurrent with the production of the electronic files will be an authentication statement for posting on the LSN Web site that indicates where an authenticated image copy of the documents can be obtained.

(2) In electronic image format, subject to the claims of privilege in § 2.1006, graphic-oriented documentary material that includes raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs, which have been printed, scripted, or hand written. Text embedded within these documents need not be separately entered in searchable full text.

A bibliographic header must be provided for all graphic-oriented documentary material. Graphic-oriented documents may include—

(i) Calibration procedures, logs, guidelines, data and discrepancies;

(ii) Gauge, meter and computer settings;

(iii) Probe locations;

(iv) Logging intervals and rates;

(v) Data logs in whatever form captured;

(vi) Text data sheets;

(vii) Equations and sampling rates;

(viii) Sensor data and procedures;

(ix) Data Descriptions;

(x) Field and laboratory notebooks;

(xi) Analog computer, meter or other device print-outs;

(xii) Digital computer print-outs;

(xiii) Photographs;

(xiv) Graphs, plots, strip charts, sketches;

(xv) Descriptive material related to the information identified in this paragraph.

(3) In an electronic file, subject to the claims of privilege in §2.1006, only a bibliographic header for each item of documentary material that is not suitable for image or searchable full text.

(4) An electronic bibliographic header for each documentary material—

(i) For which a claim of privilege is asserted;

(ii) Which constitutes confidential financial or commercial information; or

(iii) Which constitutes Safeguards Information under §73.21 and the requirements of §73.22 or §73.23 of this chapter, as applicable.

(b) Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC, such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be made available in electronic form by the respective agency that generated the document.

(c) The participation of the host State in the pre-license application phase shall not affect the State's ability to exercise its disapproval rights under section 116(b)(2) of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10136(b)(2).

(d) This subpart shall not affect any independent right of a potential party, interested governmental participant or party to receive information.

(e) Each potential party, interested governmental participant or party shall continue to supplement its documentary material made available to other participants via the LSN with any additional material created after the time of its initial certification in accordance with paragraph (a)(1) through (a)(4) of this section until the discovery period in the proceeding has concluded.

[63 FR 71737, Dec. 30, 1998, as amended at 66 FR 29465, May 31, 2001; 69 FR 2264, Jan. 14, 2004; 69 FR 32848, June 14, 2004; 73 FR 63569, Oct. 24, 2008]

§2.1004 Amendments and additions.

Any document that has not been provided to other parties in electronic form must be identified in an electronic notice and made available for inspection and copying by the potential party, interested governmental participant, or party responsible for the submission of the document within five days after it has been requested unless some other time is approved by the Pre-License Application Presiding Officer or the Presiding Officer designated for the high-level waste proceeding. The time allowed under this paragraph will be stayed pending Officer action on a motion to extend the time.

[63 FR 71737, Dec. 30, 1998]

§2.1005 Exclusions.

The following material is excluded from the requirement to provide electronic access, either pursuant to §2.1003, or through derivative discovery pursuant to §2.1019(i)—

(a) Official notice materials;

(b) Reference books and text books;

(c) Material pertaining exclusively to administration, such as material related to budgets, financial management, personnel, office space, general distribution memoranda, or procurement, except for the scope of work on a procurement related to repository siting, construction, or operation, or to the transportation of spent nuclear fuel or high-level waste;

(d) Press clippings and press releases;
(e) Junk mail;
(f) References cited in contractor reports that are readily available;
(g) Classified material subject to subpart I of this part;
(h) Readily available references, such as journal articles and proceedings, which may be subject to copyright.
(i) Correspondence between a potential party, interested governmental participant, or party and the Congress of the United States.

[63 FR 71738, Dec. 30, 1998, as amended at 69 FR 32848, June 14, 2004]

§ 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(a)(4), the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.390 may be asserted by potential parties, interested States, local governmental bodies, Federally-recognized Indian Tribes, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by States, local governmental bodies, and Federally-recognized Indian Tribes.

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be provided in electronic form by the party, interested governmental participant, or potential party that asserted the claim to—

(1) The other participants; or

(2) To the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under §§ 2.1010(b) or 2.1018(c).

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be provided for electronic access pursuant to § 2.1003(a).

[63 FR 71738, Dec. 30, 1998; 64 FR 15920, Apr. 2, 1999, as amended at 69 FR 2265, Jan. 14, 2004]

§ 2.1007 Access.

(a)(1) A system to provide electronic access to the Licensing Support Network shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, beginning in the pre-license application phase.

(2) A system to provide electronic access to the Licensing Support Network shall be provided at the NRC Web site, *http://www.nrc.gov,* and/or at the NRC Public Document Room beginning in the pre-license application phase.

(3) [Reserved]

(b) Public availability of paper and electronic copies of the records of NRC and DOE, as well as duplication fees, and fee waiver for those records, is governed by the regulations of the respective agencies.

[63 FR 71738, Dec. 30, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

§ 2.1008 [Reserved]

§ 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall—

(1) Designate an official who will be responsible for administration of its responsibility to provide electronic files of documentary material ;

(2) Establish procedures to implement the requirements in § 2.1003;

(3) Provide training to its staff on the procedures for implementation of the responsibility to provide electronic files of documentary material;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the NRC under § 2.1011(d).

(b) The responsible official designated under paragraph (a)(1) of this section shall certify to the Pre-License Application Presiding Officer that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available. The initial certification must be made at the time the participant is required to

comply with § 2.1003. The responsible official for the DOE shall also update this certification at the time DOE submits the license application.

[63 FR 71738, Dec. 30, 1998, as amended at 66 FR 29466, May 31, 2001]

§ 2.1010 Pre-License Application Presiding Officer.

(a)(1) The Commission may designate one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority on the matter to serve as the Pre-License Application Presiding Officer to rule on disputes over the electronic availability of documents during the pre-license application phase, including disputes relating to privilege, and disputes relating to the implementation of the recommendations of the Advisory Review Panel established under § 2.1011(d).

(2) The Pre-License Application Presiding Officer shall be designated at such time during the pre-license application phase as the Commission finds it appropriate, but in any event no later than fifteen days after the DOE certification of initial compliance under § 2.1009(b).

(b) The Pre-License Application Presiding Officer shall rule on any claim of document withholding to determine—

(1) Whether it is documentary material within the scope of this subpart;

(2) Whether the material is excluded under § 2.1005;

(3) Whether the material is privileged or otherwise excepted from disclosure under § 2.1006;

(4) If privileged, whether it is an absolute or qualified privilege;

(5) If qualified, whether the document should be disclosed because it is necessary to a proper decision in the proceeding;

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to limit the disclosure to potential parties, interested governmental participants, and parties in the proceeding, or to their qualified witnesses and counsel.

(i) The Pre-License Application Presiding Officer may issue an order requiring disclosure of Safeguards Information if—

(A) The Pre-License Application Presiding Officer finds that the individual seeking access to Safeguards Information in order to participate in an NRC adjudication has the requisite "need to know," as defined in 10 CFR 73.2;

(B) The individual has undergone an FBI criminal history records check, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable, by submitting fingerprints to the NRC Office of Administration, Security Processing Unit, Mail Stop T–6E46, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and otherwise following the procedures in 10 CFR 73.57(d) for submitting and processing fingerprints. However, before a final adverse determination by the NRC Office of Administration on an individual's criminal history records check is made, the individual shall be afforded the protections provided by 10 CFR 73.57; and

(C) The NRC Office of Administration has found, based upon a background check, that the individual is trustworthy and reliable, unless exempt under 10 CFR 73.22(b)(3) or 73.23(b)(3), as applicable. In addition to the protections provided by 10 CFR 73.57 for adverse determinations based on criminal history records checks, the Office of Administration must take the following actions before making a final adverse determination on an individual's background check for trustworthiness and reliability. The Office of Administration will:

(*1*) For the purpose of assuring correct and complete information, provide to the individual any records, in addition to those required to be provided under 10 CFR 73.57(e)(1), that were considered in the trustworthiness and reliability determination;

(*2*) Resolve any challenge by the individual to the completeness or accuracy of the records described in § 2.1010(b)(6)(i)(C)(1). The individual may make this challenge by submitting information and/or an explanation to the Office of Administration. The challenge must be submitted within 10 days of the distribution of the records described in § 2.1010(b)(6)(i)(C)(1), and

the Office of Administration must promptly resolve any challenge.

(D) Individuals seeking access to Safeguards Information to participate in an NRC adjudication for whom the NRC Office of Administration has made a final adverse determination on trustworthiness and reliability may submit a request to the Chief Administrative Judge for review of the adverse determination. Upon receiving such a request, the Chief Administrative Judge shall designate an officer other than the Pre-License Application Presiding Officer to review the adverse determination. For purposes of review, the adverse determination must be in writing and set forth the grounds for the determination. The request for review shall be served on the NRC staff and may include additional information for review by the designated officer. The request must be filed within 15 days after receipt of the adverse determination by the person against whom the adverse determination has been made. Within 10 days of receipt of the request for review and any additional information, the NRC staff will file a response indicating whether the request and additional information has caused the NRC Office of Administration to reverse its adverse determination. The designated officer may reverse the Office of Administration's final adverse determination only if the officer finds, based on all the information submitted, that the adverse determination constitutes an abuse of discretion. The designated officer's decision must be rendered within 15 days after receipt of the staff filing indicating that the request for review and additional information has not changed the NRC Office of Administration's adverse determination.

(ii) The Pre-License Application Presiding Officer may include in an order any protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to prevent the unauthorized disclosure of Safeguards Information.

(iii) When Safeguards Information, protected from disclosure under Section 147 of the Atomic Energy Act of 1954, as amended, is received and possessed by a potential party, interested government participant, or party, other than the NRC staff, it shall also be protected according to the requirements of §73.21 and the requirements of §§73.22 or 73.23 of this chapter, as applicable.

(iv) The Pre-License Application Presiding Officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

(v) In addition to any other sanction that may be imposed by the Pre-License Application Presiding Officer for violation of a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order, the entity in violation may be subject to a civil penalty imposed pursuant to §2.205.

(vi) For the purpose of imposing the criminal penalties contained in Section 223 of the Atomic Energy Act of 1954, as amended, a provision for the protection of Safeguards Information from unauthorized disclosure that is contained in an order issued pursuant to this paragraph is considered to be issued under Section 161b of the Atomic Energy Act of 1954, as amended.

(c) Upon a final determination that the material is relevant, and not privileged, exempt from disclosure, or otherwise exempt from production under §2.1005, the potential party, interested governmental participant, or party who asserted the claim of withholding must make the document available in accordance with the provisions of this subpart within five days.

(d) The service of all pleadings and answers, orders, and decisions during the pre-license application phase shall be made according to the procedures specified in §2.1013(c) and entered into the pre-license application electronic docket.

(e) The Pre-License Application presiding officer possesses all the general powers specified in §§2.319 and 2.321(c).

(f) The Commission, in designating the Pre-License Application Presiding Officer in accordance with paragraphs

(a) (1) and (2) of this section, shall specify the jurisdiction of the Officer.

[63 FR 71738, Dec. 30, 1998, as amended at 66 FR 29466, May 31, 2001; 69 FR 2265, Jan. 14, 2004; 73 FR 63569, Oct. 24, 2008]

§ 2.1011 Management of electronic information.

(a) Electronic document production and the electronic docket are subject to the provisions of this subpart.

(b)(1) The NRC, DOE, parties, and potential parties participating in accordance with the provision of this subpart shall be responsible for obtaining the computer system necessary to comply with the requirements for electronic document production and service.

(2) The NRC, DOE, parties, and potential parties participating in accordance with the provision of this subpart shall comply with the following standards in the design of the computer systems necessary to comply with the requirements for electronic document production and service:

(i) The participants shall make textual (or, where non-text, image) versions of their documents available on a web accessible server which is able to be canvassed by web indexing software (*i.e.*, a "robot", "spider", "crawler") and the participant system must make both data files and log files accessible to this software.

(ii) The participants shall make bibliographic header data available in an HTTP (Hypertext Transfer Protocol) accessible, ODBC (Open Database Connectivity) and SQL (Structured Query Language)-compliant (ANSI IX3.135–1992/ISO 9075–1992) database management system (DBMS). Alternatively, the structured data containing the bibliographic header may be made available in a standard database readable (e.g., XML (Extensible Markup Language *http://www.w3.org/xml/*), comma delimited, or comma separated value (.csv)) file.

(iii) Textual material must be formatted to comply with the ISO/IEC 8859–1 character set and be in one of the following acceptable formats: ASCII, native word processing (Word, WordPerfect), PDF Normal, or HTML.

(iv) Image files must be formatted as TIFF CCITT G4 for bi-tonal images or PNG (Portable Network Graphics) per [*http://www.w3.org/TR/REC-png-multi.html*]) format for grey-scale or color images, or PDF (Portable Document Format—Image). TIFF, PDF, or PNG images will be stored at 300 dpi (dots per inch) or greater, grey scale images at 150 dpi or greater with eight bits of tonal depth, and color images at 150 dpi or greater with 24 bits of color depth. Images found on participant machines will be stored as single image-per-page to facilitate retrieval of no more than a single page, or alternatively, images may be stored in an image-per-document format if software is incorporated in the web server that allows image-per-page representation and delivery.

(v) The participants shall programmatically link, preferably via hyperlink or some other automated process, the bibliographic header record with the text or image file it represents. Each participant's system must afford the LSN software enough information to allow a text or image file to be identified to the bibliographic data that describes it.

(vi) To facilitate data exchange, participants shall adhere to hardware and software standards, including, but not limited to:

(A) Network access must be HTTP/1.1 [*http://www.faqs.org/rfcs/rfc2068.html*] over TCP (Transmission Control Protocol, [*http://www.faqs.org/rfcs/rfc793.html*]) over IP (Internet Protocol, [*http://www.faqs.org/rfcs/rfc791.html*]).

(B) Associating server names with IP addresses must follow the DNS (Domain Name System), [*http://www.faqs.org/rfcs/rfc1034.html*] and [*http://www.faqs.org/rfcs/rfc1035.html*].

(C) Web page construction must be HTML [*http://www.w3.org/TR/REC-html40/*].

(D) Electronic mail (e-mail) exchange between e-mail servers must be SMTP (Simple Mail Transport Protocol, [*http://www.faqs.org/rfcs/rfc821.html*]).

(E) Format of an electronic mail message must be per [*http://www.faqs.org/rfcs/rfc822.html*] optionally extended by MIME (Multipurpose Internet Mail Extensions) per [*http://www.faqs.org/rfcs/rfc2045.html*]) to accommodate multipurpose e-mail.

(c) The Licensing Support Network shall be coordinated by the LSN Administrator, who shall be designated before the start of the pre-license application phase. The LSN Administrator shall have the responsibility to—

(1) Identify technical and policy issues related to implementation of the LSN for LSN Advisory Review Panel and Commission consideration;

(2) Address the consensus advice of the LSN Advisory Review Panel under paragraph (e)(1) of this section that is consistent with the requirements of this subpart;

(3) Identify any problems experienced by participants regarding LSN availability, including the availability of individual participant's data, and provide a recommendation to resolve any such problems to the participant(s) and the Pre-License Application Presiding Officer relative to the resolution of any disputes regarding LSN availability, including disputes on the availability of an individual participant's data;

(4) Identify any problems regarding the integrity of documentary material certified in accordance with §2.1009(b) by the participants to be in the LSN, and provide a recommendation to resolve any such problems to the participant(s) and the Pre-License Application Presiding Officer relative to the resolution of any disputes regarding the integrity of documentary material;

(5) Provide periodic reports to the Commission on the status of LSN functionality and operability.

(6) Evaluate LSN participant compliance with the basic design standards in paragraph (b)(2) of this section, and provide for individual variances from the design standards to accommodate changes in technology or problems identified during initial operability testing of the individual documentary collection websites or the "central LSN site".

(7) Issue guidance for LSN participants on how best to comply with the design standards in paragraph (b)(2) of this section.

(d) The Secretary of the Commission shall reconstitute the LSS Advisory Review Panel as the LSN Advisory Review Panel, composed of the interests currently represented on the LSS Advisory Review Panel. The Secretary of the Commission shall have the authority to appoint additional representatives to the LSN Advisory Review Panel consistent with the requirements of the Federal Advisory Committee Act, 5 U.S.C. app. I, giving particular consideration to potential parties, parties, and interested governmental participants who were not members of the NRC HLW Licensing Support System Advisory Review Panel.

(e)(1) The LSN Advisory Review Panel shall provide advice to—

(i) NRC on the fundamental issues of the type of computer system necessary to access the Licensing Support Network effectively under paragraph (b) of this section; and

(ii) The Secretary of the Commission on the operation and maintenance of the electronic docket established for the HLW geologic repository licensing proceeding under the Commission's Rules of Practice (10 CFR part 2).

(iii) The LSN Administrator on solutions to improve the functioning of the LSN;

(2) The responsibilities of the LSN Advisory Review Panel shall include advice on—

(i) Format standards for providing electronic access to the documentary material certified by each participant to be made available in the LSN to the other parties, interested governmental participants, or potential parties;

(ii) The procedures and standards for the electronic transmission of filings, orders, and decisions during both the pre-license application phase and the high-level waste licensing proceeding;

(iii) Other duties as specified in this subpart or as directed by the Secretary of the Commission.

[63 FR 71739, Dec. 30, 1998, as amended at 66 FR 29466, May 31, 2001]

§2.1012 Compliance.

(a) If the Department of Energy fails to make its initial certification at least six months prior to tendering the application, upon receipt of the tendered application, notwithstanding the provisions of §2.101(f)(3), the Director of the NRC's Office of Nuclear Material Safety and Safeguards will not docket the application until at least six months have elapsed from the time of

the certification. The Director may determine that the tendered application is not acceptable for docketing under this subpart if the application is not accompanied by an updated certification pursuant to § 2.1009(b), or if the Secretary of the Commission determines that the application is not submitted on optical storage media in a format consistent with NRC regulations and guidance, or for non-compliance with any other requirements identified in this subpart.

(b)(1) A person, including a potential party given access to the Licensing Support Network under this subpart, may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of § 2.1003. Admission of such a party or interested governmental participant under §§ 2.309 or 2.315, respectively, is conditioned on accepting the status of the proceeding at the time of admission.

(c) The Presiding Officer shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any person who is not in compliance with all applicable orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7796, Feb. 26, 1991; 63 FR 71739, Dec. 30, 1998; 66 FR 29466, May 31, 2001; 69 FR 2265, Jan. 14, 2004; 69 FR 32848, June 14, 2004]

§ 2.1013 Use of the electronic docket during the proceeding.

(a)(1) As specified in § 2.303, the Secretary of the Commission will maintain the official docket of the proceeding on the application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and for applications for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 or 63 of this Chapter.

(2) The Secretary of the Commission will establish an electronic docket to contain the official record materials of the high-level radioactive waste repository licensing proceeding in searchable full text, or, for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been made available to the parties in electronic form before the commencement of that portion of the hearing in which the exhibit will be offered. The electronic docket will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. For any hearing sessions recorded stenographically or by other means, transcripts will be entered into the electronic docket on a daily basis in order to afford next-day availability at the hearing. However, for any hearing sessions recorded on videotape or other video medium, if a copy of the video recording is made available to all parties on a daily basis that affords next-day availability at the hearing, a transcript of the session prepared from the video recording will be entered into the electronic docket within twenty-four (24) hours of the time the transcript is tendered to the electronic docket by the transcription service.

(c)(1) All filings in the adjudicatory proceeding on the application for a high-level radioactive waste geologic repository under part 60 or 63 of this chapter shall be transmitted by the submitter to the Presiding Officer, parties, and Secretary of the Commission, according to the following requirements—

(i) "Simple documents" must be transmitted electronically via EIE;

(ii) "Large documents" must be transmitted electronically in multiple transmissions of 50 megabytes or less each via EIE;

(iii) "Complex documents":

(A) Those portions that can be electronically submitted through the EIE, in 50 MB or less segments, must be transmitted electronically, along with a transmittal letter; and

(B) Those portions that are not capable of being transmitted electronically must be submitted on optical storage media which must also include those portions of the document that had been or will be transmitted electronically.

(iv) Electronic submissions must have the following resolution—

(A) Electronic submissions of files created after January 1, 2004 must have 300 dots per inch (dpi) as the minimum resolution for bi-tonal, color, and grayscale, except in limited circumstances where submitters may need to use an image scanned before January 1, 2004, in a document created after January 1, 2004, or the scanning process for a large, one-page image may not successfully complete at the 300 dpi standard resolution.

(B) Electronic submissions of files created before January 1, 2004, or electronic submissions created after January 1, 2004, which cannot meet the 300 dpi standard for color and grayscale, must meet the standard for documents placed on LSN participant Web sites in §2.1011(b)(2)(iv) of this subpart, which is 150 dpi for color and grayscale documents and 300 dpi for bi-tonal documents.

(v) Electronic submissions must be generated in the appropriate PDF output format by using:

(A) PDF—Formatted Text and Graphics for textual documents converted from native applications;

(B) PDF—Searchable Image (Exact) for textual documents converted from scanned documents; and

(C) PDF—Image Only for graphic-, image-, and forms-oriented documents. In addition, Tagged Image File Format (TIFF) images and the results of spreadsheet applications must to be converted to PDF, except in those rare instances where PDF conversion is not practicable.

(vi) Electronic submissions must not rely on hyperlinks to other documents or Web sites for completeness or access except for hyperlinks that link to material within the same PDF file. If the submittal contains hyperlinks to other documents or Web sites, then it must include a disclaimer to the effect that the hyperlinks may be inoperable or are not essential to the use of the filing. Information contained in hyperlinks to a Web site on the Internet or to another PDF file, that is necessary for the completeness of a filing, must be submitted in its entirety in the filing or as an attachment to the filing.

(vii) All electronic submissions must be free of author-imposed security restrictions.

(2) Filings required to be served shall be served upon either the parties and interested governmental participants, or their designated representatives. When a party or interested governmental participant has appeared by attorney, service must be made upon the attorney of record.

(3) Service upon a party or interested governmental participant is completed when the sender receives electronic acknowledgment ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox.

(4) Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, by—

(i) Electronic acknowledgment ("delivery receipt");

(ii) The affidavit of the person making the service; or

(iii) The certificate of counsel.

(5) All Presiding Officer and Commission issuances and orders will be transmitted electronically to the parties and interested governmental participants.

(d) Online access to the electronic docket, including a Protective Order File if authorized by a Presiding Officer, shall be provided to the Presiding Officer, the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use during the hearing. Use of paper copy and other images will also be permitted at the hearing.

[63 FR 71739, Dec. 30, 1998, as amended at 66 FR 55788, Nov. 2, 2001; 69 FR 2265, Jan. 14, 2004; 69 FR 32849, June 14, 2004]

§ 2.1015 Appeals.

(a) No appeals from any Pre-License Application Presiding Officer or Presiding Officer order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), and (d) of this section.

(b) A notice of appeal from a Pre-License Application presiding officer order issued under § 2.1010, a presiding officer prehearing conference order issued under § 2.1021, a presiding officer order granting or denying a motion for summary disposition issued in accordance with § 2.1025, or a presiding officer order granting or denying a petition to amend one or more contentions under § 2.309, must be filed with the Commission no later than ten (10) days after service of the order. A supporting brief must accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten (10) days after service of the appeal.

(c) Appeals from a Presiding Officer initial decision or partial initial decision must be filed and briefed before the Commission in accordance with the following requirements.

(1) *Notice of appeal.* Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal. The notice shall specify:

(i) The party taking the appeal; and

(ii) The decision being appealed.

(2) *Filing appellant's brief.* Each appellant shall file a brief supporting its position on appeal within thirty (30) days (40 days if Commission staff is the appellant) after the filing of notice required by paragraph (a) of this section.

(3) *Filing responsive brief.* Any party who is not an appellant may file a brief in support of or in opposition to the appeal within thirty (30) days after the period has expired for the filing and service of the brief of all appellants. Commission staff may file a responsive brief within forty (40) days after the period has expired for the filing and service of the briefs of all appellants. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed.

(4) *Brief content.* A brief in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.

(i) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. An intervenor-appellant's brief must be confined to issues which the intervenor-appellant placed in controversy or sought to place in controversy in the proceeding. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

(ii) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.

(5) *Brief length.* A party shall not file a brief in excess of seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request an increase of this page limit for good cause. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement requested.

(6) *Certificate of service.* All documents filed under this section must be accompanied by a certificate reflecting service upon all other parties to the proceeding.

(7) *Failure to comply.* A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

(d) When, in the judgment of a Pre-License Application presiding officer or presiding officer, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Pre-License Application presiding officer or presiding officer may refer the ruling promptly to the Commission, and shall provide notice of this referral to the

parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Pre-License Application presiding officer or presiding officer certify under §2.319 rulings not immediately appealable under paragraph (b) of this section.

(e) Unless otherwise ordered, the filing of an appeal, petition for review, referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

[56 FR 7797, Feb. 26, 1991, as amended at 56 FR 29410, June 27, 1991; 69 FR 2265, Jan. 14, 2004]

§2.1017 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party, potential party, or interested governmental participant, has the right or is required to do some act within a prescribed period after the service of a notice or other document upon it, one day shall be added to the prescribed period. If the electronic docket is unavailable for more than four access hours of any day that would be counted in the computation of time, that day will not be counted in the computation of time.

[63 FR 71740, Dec. 30, 1998]

§2.1018 Discovery.

(a)(1) Parties, potential parties, and interested governmental participants in the high-level waste licensing proceeding may obtain discovery by one or more of the following methods:

(i) Access to the documentary material made available pursuant to §2.1003;

(ii) Entry upon land for inspection, access to raw data, or other purposes pursuant to §2.1020;

(iii) Access to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to §2.1003(a);

(iv) Depositions upon oral examination pursuant to §2.1019;

(v) Requests for admissions pursuant to §2.708;

(vi) Informal requests for information not made electronically available, such as the names of witnesses and the subjects they plan to address; and

(vii) Interrogatories and depositions upon written questions, as provided in paragraph (a)(2) of this section.

(2) Interrogatories and depositions upon written questions may be authorized by order of the discovery master appointed under paragraph (g) of this section, or if no discovery master has been appointed, by order of the Presiding Officer, in the event that the parties are unable, after informal good faith efforts, to resolve a dispute in a timely fashion concerning the production of information.

(b)(1) Parties, potential parties, and interested governmental participants, pursuant to the methods set forth in paragraph (a) of this section, may obtain discovery regarding any matter, not privileged, which is relevant to the licensing of the likely candidate site for a geologic repository, whether it relates to the claim or defense of the person seeking discovery or to the claim or defense of any other person. Except for discovery pursuant to §§2.1018(a)(2) and 2.1019 of this subpart, all other discovery shall begin during the pre-license application phase. Discovery pursuant to §§2.1018(a)(2) and 2.1019 of this subpart shall begin after the issuance of the first pre-hearing conference order under §2.1021 of this subpart, and shall be limited to the issues defined in that order or subsequent amendments to the order. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A party, potential party, or interested governmental participant may obtain discovery of documentary material otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of, or for the

hearing by, or for another party's, potential party's, or interested governmental participant's representative (including its attorney, surety, indemnitor, insurer, or similar agent) only upon a showing that the party, potential party, or interested governmental participant seeking discovery has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the Presiding Officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, potential party, or interested governmental participant concerning the proceeding.

(c)(1) Upon motion by a party, potential party, interested governmental participant, or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order that justice requires to protect a party, potential party, interested governmental participant, or other person from annoyance, embarrassment, oppression, or undue burden, delay, or expense, including one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery;

(iv) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the presiding officer;

(vi) That, subject to the provisions of § 2.390 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(vii) That studies and evaluations not be prepared.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party, potential party, interested governmental participant or other person provide or permit discovery.

(d) Except as provided in paragraph (b) of this section, and unless the Presiding Officer upon motion, for the convenience of parties, potential parties, interested governmental participants, and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party, potential party, or interested governmental participant is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's, potential party's, or interested governmental participant's discovery.

(e) A party, potential party, or interested governmental participant who has made available in electronic form all material relevant to any discovery request or who has responded to a request for discovery with a response that was complete when made is under no duty to supplement its response to include information thereafter acquired, except as follows:

(1) To the extent that written interrogatories are authorized pursuant to paragraph (a)(2) of this section, a party or interested governmental participant is under a duty to seasonably supplement its response to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the witness is expected to testify, and the substance of the witness' testimony.

(2) A party, potential party, or interested governmental participant is under a duty seasonably to amend a prior response if it obtains information upon the basis of which (i) it knows that the response was incorrect when made, or (ii) it knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Presiding Officer or agreement of the parties, potential parties, and interested governmental participants.

(f)(1) If a deponent of a party, potential party, or interested governmental participant upon whom a request for discovery is served fails to respond or objects to the request, or any part thereof, the party, potential party, or interested governmental participant submitting the request or taking the deposition may move the Presiding Officer, within five days after the date of the response or after failure to respond to the request, for an order compelling a response in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party, potential party, interested governmental participant, or other person upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person, party, potential party, or interested governmental participant failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the Presiding Officer may make such a protective order as it is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) An independent request for issuance of a subpoena may be directed to a nonparty for production of documents. This section does not apply to requests for the testimony of the NRC regulatory staff under §2.709.

(g) The presiding officer, under §2.322, may appoint a discovery master to resolve disputes between parties concerning informal requests for information as provided in paragraphs (a)(1) and (a)(2) of this section.

(h) Discovery under this section of documentary material including Safeguards Information referred to in Sections 147 and 181 of the Atomic Energy Act of 1954, as amended, will be according to the provisions in §2.1010(b)(6)(i) through (b)(6)(vi).

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991; 63 FR 71740, Dec. 30, 1998; 69 FR 2266, Jan. 14, 2004; 73 FR 63570, Oct. 24, 2008]

§2.1019 Depositions.

(a) Any party or interested governmental participant desiring to take the testimony of any person by deposition on oral examination shall, without leave of the Commission or the Presiding Officer, give reasonable notice in writing to every other party and interested governmental participant, to the person to be examined, and to the Presiding Officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or her or the class or group to which he or she belongs, the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission. Depositions may be conducted by telephone or by video teleconference at the option of the party or interested governmental participant taking the deposition.

(c) The deponent shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the

evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless the deponent is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly transmit an electronic copy of the deposition to the Secretary of the Commission for entry into the electronic docket.

(e) Where the deposition is to be taken on written questions as authorized under § 2.1018(a)(2), the party or interested governmental participant taking the deposition shall electronically serve a copy of the questions, showing each question separately and consecutively numbered, on every other party and interested governmental participant with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be asked. Within ten days after service, any other party or interested governmental participant may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, returned, and transmitted in electronic form to the Secretary of the Commission for entry into the electronic docket as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the evidentiary record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party or interested governmental participant, any other party or interested governmental participant may introduce any other parts. A party or interested governmental participant shall not be deemed to make a person its own witness for any purpose by taking his or her deposition.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party or interested governmental participant at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

(i)(1) After receiving written notice of the deposition under paragraph (a) or paragraph (e) of this section, and ten days before the scheduled date of the deposition, the deponent shall submit an electronic index of all documents in his or her possession, relevant to the subject matter of the deposition, including the categories of documents set forth in paragraph (i)(2) of this section, to all parties and interested governmental participants. The index shall identify those records which have already been made available electronically. All documents that are not identical to documents already made available electronically, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents.

(2) The following material is excluded from the initial requirements of § 2.1003 to be made available electronically, but is subject to derivative discovery under paragraph (i)(1) of this section—

(i) Personal records;

(ii) Travel vouchers;

(iii) Speeches;

(iv) Preliminary drafts;

(v) Marginalia.

(3) Subject to paragraph (i)(6) of this section, any party or interested governmental participant may request from the deponent a paper copy of any or all of the documents on the index that have not already been provided electronically.

(4) Subject to paragraph (i)(6) of this section, the deponent shall bring a paper copy of all documents on the index that the deposing party or interested governmental participant requests that have not already been provided electronically to an oral deposition conducted pursuant to paragraph (a) of this section, or in the case of a deposition taken on written questions pursuant to paragraph (e) of this section, shall submit such documents with the certified deposition.

(5) Subject to paragraph (i)(6) of this section, a party or interested governmental participant may request that any or all documents on the index that have not already been provided electronically, and on which it intends to rely at hearing, be made electronically available by the deponent.

(6) The deposing party or interested governmental participant shall assume the responsibility for the obligations set forth in paragraphs (i)(1), (i)(3), (i)(4), and (i)(5) of this section when deposing someone other than a party or interested governmental participant.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991; 63 FR 71740, Dec. 30, 1998; 69 FR 2266, Jan. 14, 2004]

§ 2.1020 Entry upon land for inspection.

(a) Any party, potential party, or interested governmental participant may serve on any other party, potential party, or interested governmental participant a request to permit entry upon designated land or other property in the possession or control of the party, potential party, or interested governmental participant upon whom the request is served for the purpose of access to raw data, inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.1018 of this subpart.

(b) The request may be served on any party, potential party, or interested governmental participant without leave of the Commission or the Presiding Officer.

(c) The request shall describe with reasonable particularity the land or other property to be inspected either by individual item or by category. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party, potential party, or interested governmental participant upon whom the request is served shall serve on the party, potential party, or interested governmental participant submitting the request a written response within ten days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991]

§ 2.1021 First prehearing conference.

(a) In any proceeding involving an application for a construction authorization for a HLW repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, the Commission or the presiding officer will direct the parties, interested governmental participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, within seventy days after the notice of hearing is published, or such other time as the Commission or the presiding officer may deem appropriate, for a conference to:

(1) Permit identification of the key issues in the proceeding;

(2) Take any steps necessary for further identification of the issues;

(3) Consider all intervention petitions to allow the Presiding Officer to make such preliminary or final determination as to the parties and interested governmental participants, as may be appropriate;

(4) Establish a schedule for further actions in the proceeding; and

(5) Establish a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d).

(b) The Presiding Officer may order any further formal and informal conferences among the parties and interested governmental participants including teleconferences, to the extent that it considers that such a conference would expedite the proceeding.

(c) A prehearing conference held pursuant to this section shall be stenographically reported.

(d) The Presiding Officer shall enter an order which recites the action taken at the conference, the schedule for further actions in the proceeding, and any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties and interested governmental participants in the proceeding, and provides for the submission of status reports on discovery.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991; 66 FR 55788, Nov. 2, 2001; 69 FR 2266, Jan. 14, 2004]

§ 2.1022 Second prehearing conference.

(a) The Commission or the presiding officer in a proceeding on either an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than thirty days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

(1) Any amended contentions submitted, which must be reviewed under the criteria in § 2.309(c) of this part;

(2) Simplification, clarification, and specification of the issues;

(3) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

(4) Identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(5) The setting of a hearing schedule;

(6) Establishing a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d); and

(7) Such other matters as may aid in the orderly disposition of the proceeding.

(b) A prehearing conference held pursuant to this section shall be stenographically reported.

(c) The Presiding Officer shall enter an order which recites the action taken at the conference and the agreements by the parties, limits the issues or defines the matters in controversy to be determined in the proceeding, sets a discovery schedule, and sets the hearing schedule.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991; 69 FR 2266, Jan. 14, 2004]

§ 2.1023 Immediate effectiveness.

(a) Pending review and final decision by the Commission, and initial decision resolving all issues before the presiding officer in favor of issuance or amendment of either an authorization to construct a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter will be immediately effective upon issuance except:

(1) As provided in any order issued in accordance with § 2.342 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

(b) The Director of Nuclear Material Safety and Safeguards, notwithstanding the filing or pendency of an appeal or a petition for review pursuant to § 2.1015 of this subpart, promptly shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic respository operations area, or amendments thereto, following an initial decision resolving all issues before the Presiding Officer in favor of the licensing action, upon making the appropriate licensing findings, except—

(1) As provided in paragraph (c) of this section; or

(2) As provided in any order issued in accordance with § 2.342 of this part that stays the effectiveness of an initial decision; or

(3) As otherwise provided by the Commission in special circumstances.

(c)(1) Before the Director of Nuclear Material Safety and Safeguards may

issue a construction authorization or a license to receive and possess waste at a geologic repository operations area in accordance with paragraph (b) of this section, the Commission, in the exercise of its supervisory authority over agency proceedings, shall undertake and complete a supervisory examination of those issues contested in the proceeding before the Presiding Officer to consider whether there is any significant basis for doubting that the facility will be constructed or operated with adequate protection of the public health and safety, and whether the Commission should take action to suspend or to otherwise condition the effectiveness of a Presiding Officer decision that resolves contested issues in a proceeding in favor of issuing a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area. This supervisory examination is not part of the adjudicatory proceeding. The Commission shall notify the Director in writing when its supervisory examination conducted in accordance with this paragraph has been completed.

(2) Before the Director of Nuclear Material Safety and Safeguards issues a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission shall review those issues that have not been contested in the proceeding before the Presiding Officer but about which the Director must make appropriate findings prior to the issuance of such a license. The Director shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area only after written notification from the Commission of its completion of its review under this paragraph and of its determination that it is appropriate for the Director to issue such a construction authorization or license. This Commission review of uncontested issues is not part of the adjudicatory proceeding.

(3) No suspension of the effectiveness of a Presiding Officer's initial decision or postponement of the Director's issuance of a construction authorization or license that results from a Commission supervisory examination of contested issues under paragraph (c)(1) of this section or a review of uncontested issues under paragraph (c)(2) of this section will be entered except in writing with a statement of the reasons. Such suspension or postponement will be limited to such period as is necessary for the Commission to resolve the matters at issue. If the supervisory examination results in a suspension of the effectiveness of the Presiding Officer's initial decision under paragraph (c)(1) of this section, the Commission will take review of the decision sua sponte and further proceedings relative to the contested matters at issue will be in accordance with procedures for participation by the DOE, the NRC staff, or other parties and interested governmental participants to the Presiding Officer proceeding established by the Commission in its written statement of reasons. If a postponement results from a review under paragraph (c)(2) of this section, comments on the uncontested matters at issue may be filed by the DOE within ten days of service of the Commission's written statement.

[54 FR 14944, Apr. 14, 1989, as amended at 56 FR 7797, Feb. 26, 1991; 66 FR 55789, Nov. 2, 2001; 69 FR 2266, Jan. 14, 2004]

§ 2.1025 Authority of the Presiding Officer to dispose of certain issues on the pleadings.

(a) Any party may move, with or without supporting affidavits, for a decision by the Presiding Officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise, statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement to be filed by the moving party

will be deemed to be admitted unless controverted by the statement required to be filed by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The Presiding Officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the Presiding Officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

(b) Affidavits must set forth those facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. The Presiding Officer may permit affidavits to be supplemented or opposed by further affidavits. When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, must be rendered.

(c) The Presiding Officer shall render the decision sought if the filings in the proceeding show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.

[56 FR 7798, Feb. 26, 1991]

§ 2.1026 Schedule.

(a) Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.

(b)(1) Pursuant to § 2.307, the presiding officer may approve extensions of no more than fifteen (15) days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforseen circumstances, requests for extensions of more than fifteen (15) days must be filed no later than five (5) days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

(2) Extensions beyond 15 days must be referred to the Commission. If the Commission does not disapprove the extension within 10 days of receiving the request, the extension will be effective. If the Commission disapproves the extension, the date which was the subject of the extension request will be set for 5 days after the Commission's disapproval action.

(c)(1) The Presiding Officer may delay the issuance of an order up to thirty days beyond the time set forth for the issuance in appendix D.

(2) If the Presiding Officer anticipates that the issuance of an order will not occur until after the thirty day extension specified in paragraph (c)(1) of this section, the Presiding Officer shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

[56 FR 7798, Feb. 26, 1991, as amended at 69 FR 2266, Jan. 14, 2004]

§ 2.1027 Sua sponte.

In any initial decision in a proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Presiding Officer, other than the Commission, shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties and determined to be litigable issues in the proceeding.

[69 FR 2266, Jan. 14, 2004]

reflect electronic filing and service in accordance with 10 CFR 2.305. The only discovery provided is the mandatory disclosure made by each party pursuant to 10 CFR 2.336.

MODEL MILESTONES

[10 CFR Part 2, Subpart N]

• Within 20 of date of enforcement order:	Person subject to order files answer; if order immediately effective, motion to set aside immediate effectiveness due; requests for hearing due, including joint motion to use Subpart N procedures.
• Within 50 days of date of enforcement order:	Presiding officer decision on requests for hearing and confirms use of Subpart N procedures (note: if presiding officer concludes that Subpart N procedures should not be used, the Model Milestone for Enforcement Actions under Subpart G are applicable).
• Within 30 days of presiding officer decision granting hearing:	Mandatory disclosures complete.
• Within 40 days of presiding officer decision granting hearing:	Prehearing conference to specify issues for hearing and set schedules for remaining course of proceeding.
• Within 60 days of presiding officer decision granting hearing:	Evidentiary hearing begins.
• Within 30 days of end of evidentiary hearing and closing of record:	Presiding officer issues initial decision.

[70 FR 20462, Apr. 20, 2005]

APPENDIX C TO PART 2 [RESERVED]

APPENDIX D TO PART 2—SCHEDULE FOR THE PROCEEDING ON CONSIDERATION OF CONSTRUCTION AUTHORIZATION FOR A HIGH-LEVEL WASTE GEOLOGIC REPOSITORY.

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5).	FEDERAL REGISTER Notice of Hearing.
30	2.309(b)(2)	Petition to intervene/request for hearing, w/contentions.
30	2.309(b)(2)	Petition for status as interested government participant.
55	2.315(c)	Answers to intervention & interested government participant Petitions.
62	2.309(h)(1)	Petitioner's response to answers.
70	2.1021	First Prehearing conference.
100	2.309(h)(2)	First Prehearing Conference Order identifying participants in proceeding, admitted contentions, and setting discovery and other schedules.
110	2.1021	Appeals from First Prehearing Conference Order.
120	.....	Briefs in opposition to appeals.
150	2.1021, 2.329	Commission ruling on appeals for First Prehearing Conference Order.
548	.....	NRC Staff issues SER.
578	2.1022	Second Prehearing Conference.
608	2.1021, 2.1022	Discovery complete; Second Prehearing Conference Order finalizes issues for hearing and sets schedule for prefiled testimony and hearing.
618	2.1015(b)	Appeals from Second Prehearing Conference Order.
628	2.1015(b), *c.f.* 2.710(a).	Briefs in opposition to appeals; last date for filing motions for summary disposition.
648	*c.f.* 2.710(a)	Last date for responses to summary disposition motions.
658	2.710(a)	Commission ruling on appeals from Second Prehearing Conference Order; last date for party opposing summary disposition motion to file response to new facts and arguments in any response supporting summary disposition motion.
698	2.1015(b)	Decision on summary disposition motions (may be determination to dismiss or to hold in abeyance).
720	*c.f.* 2.710(a)	Evidentiary hearing begins.
810	.....	Evidentiary hearing ends.
840	2.712(a)(1)	Applicant's proposed findings.
850	2.712(a)(2)	Other parties' proposed findings.
855	2.712(a)(3)	Applicant's reply to other parties' proposed findings.
955	2.713	Initial decision.
965	2.342(a), 2.345(a), 2.1015(c)(1).	Stay motion. Petition for reconsideration, notice of appeal.
975	2.342(d), 2.345(b).	Other parties' responses to stay motion and Petitions for reconsideration.
985	.....	Commission ruling on stay motion.
995	2.1015(c)(2)	Appellant's briefs.
1015	2.1015(c)(3)	Appellee's briefs.
1055	2.1023 Supp. Info.	Completion of NMSS and Commission supervisory review; issuance of construction authorization; NWPA 3-year period tolled.
1125	.....	Commission decision.

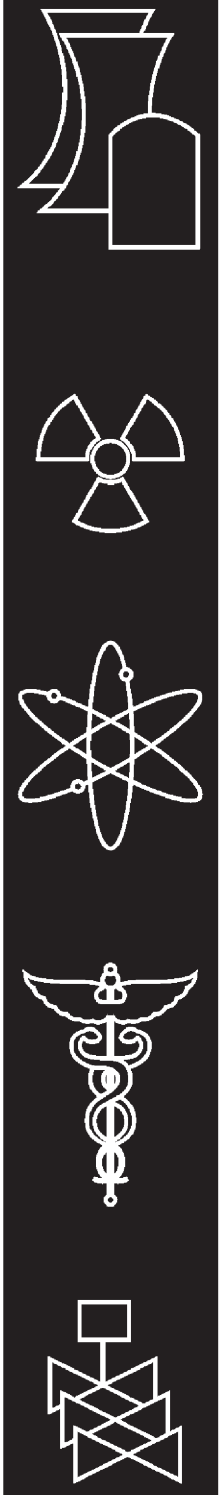
[69 FR 2275, Jan. 14, 2004; 69 FR 25997, May 11, 2004]

PART 4—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE COMMISSION

GENERAL PROVISIONS

Sec.

NUREG-1804
Revision 2



Yucca Mountain Review Plan

Final Report

U.S. Nuclear Regulatory Commission
Office of Nuclear Material Safety and Safeguards
Washington, DC 20555-0001

EXECUTIVE SUMMARY

Disposal of high-level radioactive waste requires a U.S. Nuclear Regulatory Commission license. Part 63 under Title 10 of the U.S. Code of Federal Regulations ("Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada") contains the governing regulations. U.S. Nuclear Regulatory Commission authority to regulate a high-level waste repository comes from the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and the Nuclear Waste Policy Act of 1982, as amended. The Yucca Mountain Review Plan is guidance to the U.S. Nuclear Regulatory Commission staff for review of any license application from the U.S. Department of Energy for a geologic repository for disposal of high-level radioactive waste at Yucca Mountain, Nevada. The U.S. Nuclear Regulatory Commission has directed the staff to carry out risk-informed, performance-based regulatory programs. 10 CFR Part 63 is risk-informed and performance-based, because risk of health effects to the reasonably maximally exposed individual is the basis for its performance objectives. 10 CFR Part 63 also requires protection of ground water by limiting the radioactivity in a representative volume of ground water and an assessment of repository performance under conditions of human intrusion. The U.S. Nuclear Regulatory Commission will base its licensing decision on whether the U.S. Department of Energy has demonstrated compliance with the performance objectives. Therefore, the Yucca Mountain Review Plan is risk-informed and performance-based.

The principal purpose of the Yucca Mountain Review Plan is to ensure the quality and uniformity of U.S. Nuclear Regulatory Commission staff licensing reviews. Yucca Mountain Review Plan sections present the areas of review, review methods, acceptance criteria, evaluation findings, and references the staff will use for its review. There are sections for reviews of general information, repository safety before permanent closure, repository safety after permanent closure, the research and development program to resolve safety questions, the performance confirmation program, and administrative and programmatic requirements. A summary of the risk-informed, performance-based foundation for each section follows.

An acceptance review is the first screening of the U.S. Department of Energy license application. The application must be complete and provide enough information to demonstrate compliance with the regulations. The reviewer will evaluate whether the information is sufficient to support a detailed review, and will assess the schedule for any later U.S. Nuclear Regulatory Commission milestones. The acceptance review does not determine the technical adequacy of the submitted information; that will be accomplished during a subsequent detailed technical review. U.S. Nuclear Regulatory Commission staff will send the results of the acceptance review, with a projected schedule for the rest of the review, to the U.S. Department of Energy within 90 days of receiving the license application. If the license application fails the acceptance review,, the staff will inform the U.S. Department of Energy in writing, that the application is not acceptable for processing or docketing and will inform the U.S. Department of Energy as to how the document is deficient.

During the detailed technical review, the general information section of the license application will be evaluated to determine if it provides a broad overview of the U.S. Department of Energy engineering design concept for the repository and allows the U.S. Department of Energy to demonstrate its understanding of which aspects of the Yucca Mountain site and its environs influence repository design and performance. More detailed technical information about the repository is in the Safety Analysis Report sections of the license application. The assessment

1.1.3 Acceptance Criteria

The following acceptance criteria are based on meeting the requirements of 10 CFR 63.21(b)(1), relating to the description of the general information.

Acceptance Criterion 1 The Location and Arrangement of the Geologic Repository Operations Area are Adequately Defined.

(1) A general but accurate description of the geologic repository operations area is provided. This description includes:

(a) A discussion of the physical characteristics of the site and the natural setting;

(b) Scaled drawings or maps showing the location of the geologic repository operations area and its associated structures, systems, and components;

(c) A summary of the design features of the above- and below-ground structures, systems, and components, with a designation of whether they are permanent or temporary;

(d) A definition of the purpose of each geologic repository operations area structure, system, and component, and any interrelationships among them;

(e) Plans to restrict access to, and to regulate land uses around, the geologic repository operations area; and

(f) A description of radiological monitoring instrumentation and activities, including the U.S. Department of Energy plans for the mitigation of radiological impacts associated with the construction and operation of the proposed repository.

Acceptance Criterion 2 The General Nature of the Activities to be Conducted at the Geologic Repository is Adequately Described.

(1) A summary description of the types, kinds, and amounts of spent nuclear fuel and other high-level radioactive waste to be disposed of is provided;

(2) A summary description of the proposed operations is provided that includes receipt, handling, emplacement, retrieval, of waste and waste packages. This description includes basic plans for the movement of personnel, material, and equipment during construction and normal operations;

(3) A description of plans for the inspection and testing of waste forms and waste package is provided;

(4) A description of plans for the retrieval and the alternative storage of radioactive wastes, should retrieval be necessary is provided;

(5) A description of plans for decommissioning and permanent closure of the geologic repository operations area is provided;

(6) A general discussion of proposed uses of the geologic repository operations area for purposes other than the disposal of spent nuclear fuel and other types of high-level radioactive waste is incorporated; and

(7) A description of plans for responses to emergencies is provided.

Acceptance Criterion 3 An Adequate Basis for the Exercise of the U.S. Nuclear Regulatory Commission Licensing Authority is Provided.

(1) The license application describes the basis for the Commission's licensing authority that applies to the proposed activities at the geologic repository.

1.1.4 Evaluation Findings

If the license application provides sufficient information and the regulatory acceptance criteria in Section 1.1.3 are appropriately satisfied, the staff concludes that this portion of the staff evaluation is acceptable. The reviewer writes material suitable for inclusion in the safety evaluation report prepared for the entire application. The report includes a summary statement of what was reviewed and why the reviewer finds the submittal acceptable. The staff can document the review as follows.

U.S. Nuclear Regulatory Commission staff has reviewed the "General Information" and other information submitted in support of the license application and has found, with reasonable assurance, that the requirements of 10 CFR 63.21(b)(1) are satisfied. An adequate general description of the geologic repository has been provided that identifies the location of the geologic repository operations area, discusses the general character of the proposed activities at the geologic repository operations area, and provides the basis for the exercise of the Commission's licensing authority.

1.1.5 References

None.

1.2 Proposed Schedules For Construction, Receipt, and Emplacement of Waste

Review Responsibilities—High-Level Waste Branch and Environmental and Performance Assessment Branch

1.2.1 Areas of Review

This section reviews proposed schedules for construction, receipt, and emplacement of waste. Reviewers will evaluate the information required by 10 CFR 63.21(b)(2).

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the fifth day of January, two thousand and eleven

An Act

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2012, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2012".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

SEC. 9014. The amounts appropriated in title IX of this Act are hereby reduced by $4,042,500,000 to reflect reduced troop strength in theater: *Provided,* That the reductions shall be applied to the military personnel and operation and maintenance appropriations only: *Provided further,* That the Secretary of Defense shall, not fewer than 15 days prior to reducing funds for this purpose, notify the congressional defense committees in writing of the details of any such reduction by appropriation and budget line item.

SEC. 9015. Of the funds appropriated in Department of Defense Appropriations Acts, the following funds are hereby rescinded from the following accounts and programs in the specified amounts: *Provided*, That such amounts are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985:

"Overseas Contingency Operations Transfer Fund, 2010", $356,810,000;

"Procurement of Ammunition, Army, 2010/2012", $21,000,000;

"Other Procurement, Air Force, 2010/2012", $2,250,000.

This division may be cited as the "Department of Defense Appropriations Act, 2012".

DIVISION B—ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 2012

TITLE I

CORPS OF ENGINEERS—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

INVESTIGATIONS

For expenses necessary where authorized by law for the collection and study of basic information pertaining to river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related needs; for surveys and detailed studies, and plans and specifications of proposed river and harbor, flood and storm damage reduction, shore protection, and aquatic ecosystem restoration projects and related efforts prior to construction; for restudy of authorized projects; and for miscellaneous investigations and, when authorized by law, surveys and detailed studies, and plans and specifications of projects prior to construction, $125,000,000, to remain available until expended.

(b) WALKER BASIN RESTORATION PROGRAM.—Section 208(b) of the Energy and Water Development and Related Agencies Appropriations Act, 2010 (Public Law 111–85; 123 Stat. 2858) is amended—

(1) in paragraph (1)(B)(iv), by striking "exercise water rights" and inserting "manage land, water appurtenant to the land, and related interests"; and

(2) in paragraph (2)(A), by striking "The amount made available under subsection (a)(1) shall be provided to the National Fish and Wildlife Foundation" and inserting "Any amount made available to the National Fish and Wildlife Foundation under subsection (a) shall be provided".

TITLE III

DEPARTMENT OF ENERGY

ENERGY PROGRAMS

ENERGY EFFICIENCY AND RENEWABLE ENERGY

(INCLUDING RESCISSION OF FUNDS)

For Department of Energy expenses including the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for energy efficiency and renewable energy activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, $1,825,000,000, to remain available until expended: *Provided*, That $165,000,000 shall be available until September 30, 2013 for program direction: *Provided further,* That for the purposes of allocating weatherization assistance funds appropriated by this Act to States and tribes, the Secretary of Energy may waive the allocation formula established pursuant to section 414(a) of the Energy Conservation and Production Act (42 U.S.C. 6864(a)): *Provided further,* That of the unobligated balances available under this heading, $9,909,000 are hereby rescinded: *Provided further,* That no amounts may be rescinded from amounts that were designated by the Congress as an emergency requirement pursuant to the Concurrent Resolution on the Budget or the Balanced Budget and Emergency Deficit Control Act of 1985.

ELECTRICITY DELIVERY AND ENERGY RELIABILITY

For Department of Energy expenses including the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for electricity delivery and energy reliability activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, $139,500,000, to remain available until expended: *Provided*, That $27,010,000 shall be available until September 30, 2013 for program direction.

NUCLEAR ENERGY

For Department of Energy expenses including the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for nuclear energy activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not more than 10 buses, all for replacement only, $768,663,000, to remain available until expended: *Provided*, That $91,000,000 shall be available until September 30, 2013 for program direction.

FOSSIL ENERGY RESEARCH AND DEVELOPMENT

(INCLUDING RESCISSION OF FUNDS)

For necessary expenses in carrying out fossil energy research and development activities, under the authority of the Department of Energy Organization Act (Public Law 95–91), including the acquisition of interest, including defeasible and equitable interests in any real property or any facility or for plant or facility acquisition or expansion, and for conducting inquiries, technological investigations and research concerning the extraction, processing, use, and disposal of mineral substances without objectionable social and environmental costs (30 U.S.C. 3, 1602, and 1603), $534,000,000, to remain available until expended: *Provided*, That $120,000,000 shall be available until September 30, 2013 for program direction: *Provided further,* That for all programs funded under Fossil Energy appropriations in this Act or any other Act, the Secretary may vest fee title or other property interests acquired under projects in any entity, including the United States: *Provided further,* That of prior-year balances, $187,000,000 are hereby rescinded: *Provided further,* That no rescission made by the previous proviso shall apply to any amount previously appropriated in Public Law 111–5 or designated by the Congress as an emergency requirement pursuant to a concurrent resolution on the budget or the Balanced Budget and Emergency Deficit Control Act of 1985.

NAVAL PETROLEUM AND OIL SHALE RESERVES

For expenses necessary to carry out naval petroleum and oil shale reserve activities, $14,909,000, to remain available until expended: *Provided*, That, notwithstanding any other provision of law, unobligated funds remaining from prior years shall be available for all naval petroleum and oil shale reserve activities.

STRATEGIC PETROLEUM RESERVE

For necessary expenses for Strategic Petroleum Reserve facility development and operations and program management activities pursuant to the Energy Policy and Conservation Act of 1975, as amended (42 U.S.C. 6201 et seq.), $192,704,000, to remain available until expended.

SPR PETROLEUM ACCOUNT

(INCLUDING RESCISSION OF FUNDS)

Of the amounts deposited in the SPR Petroleum Account established under section 167 of the Energy Policy and Conservation Act (42 U.S.C. 6247) in fiscal year 2011 which remain available for obligation under that section, $500,000,000 are hereby permanently rescinded.

NORTHEAST HOME HEATING OIL RESERVE

(INCLUDING RESCISSION OF FUNDS)

For necessary expenses for Northeast Home Heating Oil Reserve storage, operation, and management activities pursuant to the Energy Policy and Conservation Act, $10,119,000, to remain available until expended: *Provided*, That amounts net of the purchase of 1 million barrels of petroleum distillates in fiscal year 2012; costs related to transportation, delivery, and storage; and sales of petroleum distillate from the Reserve under section 182 of the Energy Policy and Conservation Act (42 U.S.C. 6250a) are hereby permanently rescinded: *Provided further*, That notwithstanding section 181 of the Energy Policy and Conservation Act (42 U.S.C. 6250), for fiscal year 2012 and hereafter, the Reserve shall contain no more than 1 million barrels of petroleum distillate.

ENERGY INFORMATION ADMINISTRATION

For necessary expenses in carrying out the activities of the Energy Information Administration, $105,000,000, to remain available until expended.

NON-DEFENSE ENVIRONMENTAL CLEANUP

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses necessary for non-defense environmental cleanup activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, $235,721,000, to remain available until expended.

URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND

For necessary expenses in carrying out uranium enrichment facility decontamination and decommissioning, remedial actions, and other activities of title II of the Atomic Energy Act of 1954, and title X, subtitle A, of the Energy Policy Act of 1992, $472,930,000, to be derived from the Uranium Enrichment Decontamination and Decommissioning Fund, to remain available until expended.

SCIENCE

For Department of Energy expenses including the purchase, construction, and acquisition of plant and capital equipment, and

other expenses necessary for science activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or facility or for plant or facility acquisition, construction, or expansion, and purchase of not more than 49 passenger motor vehicles for replacement only, including one ambulance and one bus, $4,889,000,000, to remain available until expended: *Provided*, That $185,000,000 shall be available until September 30, 2013 for program direction.

ADVANCED RESEARCH PROJECTS AGENCY—ENERGY

For necessary expenses in carrying out the activities authorized by section 5012 of the America COMPETES Act (Public Law 110–69), as amended, $275,000,000: *Provided*, That $20,000,000 shall be available until September 30, 2013 for program direction.

TITLE 17 INNOVATIVE TECHNOLOGY LOAN GUARANTEE PROGRAM

Such sums as are derived from amounts received from borrowers pursuant to section 1702(b)(2) of the Energy Policy Act of 2005 under this heading in prior Acts, shall be collected in accordance with section 502(7) of the Congressional Budget Act of 1974: *Provided*, That for necessary administrative expenses to carry out this Loan Guarantee program, $38,000,000, is appropriated, to remain available until expended: *Provided further,* That $38,000,000 of the fees collected pursuant to section 1702(h) of the Energy Policy Act of 2005 shall be credited as offsetting collections to this account to cover administrative expenses and shall remain available until expended, so as to result in a final fiscal year 2012 appropriation from the general fund estimated at not more than $0: *Provided further,* That fees collected under section 1702(h) in excess of the amount appropriated for administrative expenses shall not be available until appropriated.

ADVANCED TECHNOLOGY VEHICLES MANUFACTURING LOAN PROGRAM

For administrative expenses in carrying out the Advanced Technology Vehicles Manufacturing Loan Program, $6,000,000, to remain available until expended.

DEPARTMENTAL ADMINISTRATION

For salaries and expenses of the Department of Energy necessary for departmental administration in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the hire of passenger motor vehicles and official reception and representation expenses not to exceed $30,000, $237,623,000, to remain available until September 30, 2013, plus such additional amounts as necessary to cover increases in the estimated amount of cost of work for others notwithstanding the provisions of the Anti-Deficiency Act (31 U.S.C. 1511 et seq.): *Provided*, That such increases in cost of work are offset by revenue increases of the same or greater amount, to remain available until expended: *Provided further*, That moneys received by the Department for miscellaneous revenues estimated to total $111,623,000 in fiscal year 2012 may be retained and used for operating expenses

within this account, and may remain available until expended, as authorized by section 201 of Public Law 95–238, notwithstanding the provisions of 31 U.S.C. 3302: *Provided further*, That the sum herein appropriated shall be reduced by the amount of miscellaneous revenues received during 2012, and any related appropriated receipt account balances remaining from prior years' miscellaneous revenues, so as to result in a final fiscal year 2012 appropriation from the general fund estimated at not more than $126,000,000.

OFFICE OF THE INSPECTOR GENERAL

For necessary expenses of the Office of the Inspector General in carrying out the provisions of the Inspector General Act of 1978, as amended, $42,000,000, to remain available until expended.

ATOMIC ENERGY DEFENSE ACTIVITIES

NATIONAL NUCLEAR SECURITY ADMINISTRATION

WEAPONS ACTIVITIES

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other incidental expenses necessary for atomic energy defense weapons activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, the purchase of not to exceed one ambulance and one aircraft; $7,233,997,000, to remain available until expended: *Provided*, That of such amount not more than $89,425,000 may be made available for the B–61 Life Extension Program until the Administrator of the National Nuclear Security Administration submits to the Committees on Appropriations of the House of Representatives and the Senate a final report on the Phase 6.2a design definition and cost study.

DEFENSE NUCLEAR NONPROLIFERATION

(INCLUDING RESCISSION OF FUNDS)

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other incidental expenses necessary for defense nuclear nonproliferation activities, in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed one passenger motor vehicle for replacement only, $2,324,303,000, to remain available until expended: *Provided,* That of the unobligated balances available under this heading, $21,000,000 are hereby rescinded: *Provided further*, That no amounts may be rescinded from amounts that were designated by the Congress as an emergency requirement pursuant to the Concurrent Resolution on the Budget or the Balanced Budget and Emergency Deficit Control Act of 1985.

NAVAL REACTORS

For Department of Energy expenses necessary for naval reactors activities to carry out the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition (by purchase, condemnation, construction, or otherwise) of real property, plant, and capital equipment, facilities, and facility expansion, $1,080,000,000, to remain available until expended: *Provided*, That $40,000,000 shall be available until September 30, 2013 for program direction.

OFFICE OF THE ADMINISTRATOR

For necessary expenses of the Office of the Administrator in the National Nuclear Security Administration, including official reception and representation expenses not to exceed $12,000, $410,000,000, to remain available until September 30, 2013.

ENVIRONMENTAL AND OTHER DEFENSE ACTIVITIES

DEFENSE ENVIRONMENTAL CLEANUP

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses necessary for atomic energy defense environmental cleanup activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed one ambulance and one fire truck for replacement only, $5,023,000,000, to remain available until expended: *Provided*, That $321,628,000 shall be available until September 30, 2013 for program direction.

OTHER DEFENSE ACTIVITIES

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses, necessary for atomic energy defense, other defense activities, and classified activities, in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed 10 passenger motor vehicles for replacement only, $823,364,000: *Provided*, That $114,086,000 shall be available until September 30, 2013 for program direction.

POWER MARKETING ADMINISTRATIONS

BONNEVILLE POWER ADMINISTRATION FUND

Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93–454, are approved for the Kootenai River Native Fish Conservation Aquaculture Program, Lolo Creek Permanent Weir Facility, and Improving Anadromous Fish production on the Warm Springs Reservation, and, in addition, for official reception and representation expenses in an amount

not to exceed $7,000. During fiscal year 2012, no new direct loan obligations may be made.

OPERATION AND MAINTENANCE, SOUTHEASTERN POWER ADMINISTRATION

For necessary expenses of operation and maintenance of power transmission facilities and of marketing electric power and energy, including transmission wheeling and ancillary services pursuant to section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), as applied to the southeastern power area, $8,428,000, to remain available until expended: *Provided*, That notwithstanding 31 U.S.C. 3302 and section 5 of the Flood Control Act of 1944, up to $8,428,000 collected by the Southeastern Power Administration from the sale of power and related services shall be credited to this account as discretionary offsetting collections, to remain available until expended for the sole purpose of funding the annual expenses of the Southeastern Power Administration: *Provided further*, That the sum herein appropriated for annual expenses shall be reduced as collections are received during the fiscal year so as to result in a final fiscal year 2012 appropriation estimated at not more than $0: *Provided further*, That, notwithstanding 31 U.S.C. 3302, up to $100,162,000 collected by the Southeastern Power Administration pursuant to the Flood Control Act of 1944 to recover purchase power and wheeling expenses shall be credited to this account as offsetting collections, to remain available until expended for the sole purpose of making purchase power and wheeling expenditures: *Provided further*, That for purposes of this appropriation, annual expenses means expenditures that are generally recovered in the same year that they are incurred (excluding purchase power and wheeling expenses).

OPERATION AND MAINTENANCE, SOUTHWESTERN POWER ADMINISTRATION

For necessary expenses of operation and maintenance of power transmission facilities and of marketing electric power and energy, for construction and acquisition of transmission lines, substations and appurtenant facilities, and for administrative expenses, including official reception and representation expenses in an amount not to exceed $1,500 in carrying out section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), as applied to the Southwestern Power Administration, $45,010,000, to remain available until expended: *Provided*, That notwithstanding 31 U.S.C. 3302 and section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), up to $33,118,000 collected by the Southwestern Power Administration from the sale of power and related services shall be credited to this account as discretionary offsetting collections, to remain available until expended, for the sole purpose of funding the annual expenses of the Southwestern Power Administration: *Provided further*, That the sum herein appropriated for annual expenses shall be reduced as collections are received during the fiscal year so as to result in a final fiscal year 2012 appropriation estimated at not more than $11,892,000: *Provided further*, That, notwithstanding 31 U.S.C. 3302, up to $40,000,000 collected by the Southwestern Power Administration pursuant to the Flood Control Act of 1944 to recover purchase power and wheeling expenses shall

be credited to this account as offsetting collections, to remain available until expended for the sole purpose of making purchase power and wheeling expenditures: *Provided further*, That for purposes of this appropriation, annual expenses means expenditures that are generally recovered in the same year that they are incurred (excluding purchase power and wheeling expenses).

CONSTRUCTION, REHABILITATION, OPERATION AND MAINTENANCE, WESTERN AREA POWER ADMINISTRATION

For carrying out the functions authorized by title III, section 302(a)(1)(E) of the Act of August 4, 1977 (42 U.S.C. 7152), and other related activities including conservation and renewable resources programs as authorized, including official reception and representation expenses in an amount not to exceed $1,500; $285,900,000, to remain available until expended, of which $278,856,000 shall be derived from the Department of the Interior Reclamation Fund: *Provided*, That notwithstanding 31 U.S.C. 3302, section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), and section 1 of the Interior Department Appropriation Act, 1939 (43 U.S.C. 392a), up to $189,932,000 collected by the Western Area Power Administration from the sale of power and related services shall be credited to this account as discretionary offsetting collections, to remain available until expended, for the sole purpose of funding the annual expenses of the Western Area Power Administration: *Provided further*, That the sum herein appropriated for annual expenses shall be reduced as collections are received during the fiscal year so as to result in a final fiscal year 2012 appropriation estimated at not more than $95,968,000, of which $88,924,000 is derived from the Reclamation Fund: *Provided further*, That of the amount herein appropriated, not more than $3,375,000 is for deposit into the Utah Reclamation Mitigation and Conservation Account pursuant to title IV of the Reclamation Projects Authorization and Adjustment Act of 1992: *Provided further*, That notwithstanding 31 U.S.C. 3302, up to $306,541,000 collected by the Western Area Power Administration pursuant to the Flood Control Act of 1944 and the Reclamation Project Act of 1939 to recover purchase power and wheeling expenses shall be credited to this account as offsetting collections, to remain available until expended for the sole purpose of making purchase power and wheeling expenditures: *Provided further*, That for purposes of this appropriation, annual expenses means expenditures that are generally recovered in the same year that they are incurred (excluding purchase power and wheeling expenses).

FALCON AND AMISTAD OPERATING AND MAINTENANCE FUND

For operation, maintenance, and emergency costs for the hydroelectric facilities at the Falcon and Amistad Dams, $4,169,000, to remain available until expended, and to be derived from the Falcon and Amistad Operating and Maintenance Fund of the Western Area Power Administration, as provided in section 2 of the Act of June 18, 1954 (68 Stat. 255) as amended: *Provided*, That notwithstanding the provisions of that Act and of 31 U.S.C. 3302, up to $3,949,000 collected by the Western Area Power Administration from the sale of power and related services from the Falcon and Amistad Dams shall be credited to this account as discretionary offsetting collections, to remain available until

expended for the sole purpose of funding the annual expenses of the hydroelectric facilities of these Dams and associated Western Area Power Administration activities: *Provided further*, That the sum herein appropriated for annual expenses shall be reduced as collections are received during the fiscal year so as to result in a final fiscal year 2012 appropriation estimated at not more than $220,000: *Provided further*, That for purposes of this appropriation, annual expenses means expenditures that are generally recovered in the same year that they are incurred.

FEDERAL ENERGY REGULATORY COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Federal Energy Regulatory Commission to carry out the provisions of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including services as authorized by 5 U.S.C. 3109, the hire of passenger motor vehicles, and official reception and representation expenses not to exceed $3,000, $304,600,000, to remain available until expended: *Provided*, That notwithstanding any other provision of law, not to exceed $304,600,000 of revenues from fees and annual charges, and other services and collections in fiscal year 2012 shall be retained and used for necessary expenses in this account, and shall remain available until expended: *Provided further*, That the sum herein appropriated from the general fund shall be reduced as revenues are received during fiscal year 2012 so as to result in a final fiscal year 2012 appropriation from the general fund estimated at not more than $0.

GENERAL PROVISIONS—DEPARTMENT OF ENERGY

(INCLUDING RESCISSION AND TRANSFER OF FUNDS)

SEC. 301. (a) No appropriation, funds, or authority made available by this title for the Department of Energy shall be used to initiate or resume any program, project, or activity or to prepare or initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) for a program, project, or activity if the program, project, or activity has not been funded by Congress.

(b) The Department of Energy may not, with respect to any program, project, or activity that uses budget authority made available in this title under the heading "Department of Energy—Energy Programs", enter into a multi-year contract, award a multi-year grant, or enter into a multi-year cooperative agreement unless the contract, grant, or cooperative agreement includes a clause conditioning the Federal Government's obligation on the availability of future-year budget authority and the Secretary notifies the Committees on Appropriations of the House of Representatives and the Senate at least 14 days in advance.

(c) Except as provided in this section, the amounts made available by this title shall be expended as authorized by law for the projects and activities specified in the "Conference" column in the "Department of Energy" table included under the heading "Title III—Department of Energy" in the joint explanatory statement accompanying this Act.

(d) The amounts made available by this title may be reprogrammed for any program, project, or activity, and the Department shall notify the Committees on Appropriations of the House of Representatives and the Senate at least 30 days prior to the use of any proposed reprogramming which would cause any program, project, or activity funding level to increase or decrease by more than $5,000,000 or 10 percent, whichever is less, during the time period covered by this Act.

(e) Notwithstanding subsection (c), none of the funds provided in this title shall be available for obligation or expenditure through a reprogramming of funds that—

(1) creates, initiates, or eliminates a program, project, or activity;

(2) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act; or

(3) reduces funds that are directed to be used for a specific program, project, or activity by this Act.

(f)(1) The Secretary of Energy may waive any requirement or restriction in this section that applies to the use of funds made available for the Department of Energy if compliance with such requirement or restriction would pose a substantial risk to human health, the environment, welfare, or national security.

(2) The Secretary of Energy shall notify the Committees on Appropriations of any waiver under paragraph (1) as soon as practicable, but not later than 3 days after the date of the activity to which a requirement or restriction would otherwise have applied. Such notice shall include an explanation of the substantial risk under paragraph (1) that permitted such waiver.

SEC. 302. The unexpended balances of prior appropriations provided for activities in this Act may be available to the same appropriation accounts for such activities established pursuant to this title. Available balances may be merged with funds in the applicable established accounts and thereafter may be accounted for as one fund for the same time period as originally enacted.

SEC. 303. Funds appropriated by this or any other Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 414) during fiscal year 2012 until the enactment of the Intelligence Authorization Act for fiscal year 2012.

SEC. 304. (a) SUBMISSION TO CONGRESS.—The Secretary of Energy shall submit to Congress each year, at the time that the President's budget is submitted to Congress that year under section 1105(a) of title 31, United States Code, a future-years energy program reflecting the estimated expenditures and proposed appropriations included in that budget. Any such future-years energy program shall cover the fiscal year with respect to which the budget is submitted and at least the four succeeding fiscal years. A future-years energy program shall be included in the fiscal year 2014 budget submission to Congress and every fiscal year thereafter.

(b) ELEMENTS.—Each future-years energy program shall contain the following:

(1) The estimated expenditures and proposed appropriations necessary to support programs, projects, and activities of the Secretary of Energy during the 5-fiscal year period covered by the program, expressed in a level of detail comparable

to that contained in the budget submitted by the President to Congress under section 1105 of title 31, United States Code.

(2) The estimated expenditures and proposed appropriations shaped by high-level, prioritized program and budgetary guidance that is consistent with the administration's policies and out year budget projections and reviewed by the Department of Energy's (DOE) senior leadership to ensure that the future-years energy program is consistent and congruent with previously established program and budgetary guidance.

(3) A description of the anticipated workload requirements for each DOE national laboratory during the 5-fiscal year period.

(c) CONSISTENCY IN BUDGETING.—

(1) The Secretary of Energy shall ensure that amounts described in subparagraph (A) of paragraph (2) for any fiscal year are consistent with amounts described in subparagraph (B) of paragraph (2) for that fiscal year.

(2) Amounts referred to in paragraph (1) are the following:

(A) The amounts specified in program and budget information submitted to Congress by the Secretary of Energy in support of expenditure estimates and proposed appropriations in the budget submitted to Congress by the President under section 1105(a) of title 31, United States Code, for any fiscal year, as shown in the future-years energy program submitted pursuant to subsection (a).

(B) The total amounts of estimated expenditures and proposed appropriations necessary to support the programs, projects, and activities of the administration included pursuant to paragraph (5) of section 1105(a) of such title in the budget submitted to Congress under that section for any fiscal year.

SEC. 305. Section 1702 of the Energy Policy Act of 2005 (42 U.S.C. 16512) is amended—

(1) by striking subsection (b) and inserting the following:

"(b) SPECIFIC APPROPRIATION OR CONTRIBUTION.—

"(1) IN GENERAL.—No guarantee shall be made unless—

"(A) an appropriation for the cost of the guarantee has been made;

"(B) the Secretary has received from the borrower a payment in full for the cost of the guarantee and deposited the payment into the Treasury; or

"(C) a combination of one or more appropriations under subparagraph (A) and one or more payments from the borrower under subparagraph (B) has been made that is sufficient to cover the cost of the guarantee.".

SEC. 306. Plant or construction projects for which amounts are made available under this and subsequent appropriation Acts with a current estimated cost of less than $10,000,000 are considered for purposes of section 4703 of Public Law 107–314 as a plant project for which the approved total estimated cost does not exceed the minor construction threshold and for purposes of section 4704 of Public Law 107–314 as a construction project with a current estimated cost of less than a minor construction threshold.

SEC. 307. In section 839b(h)(10)(B) of title 16, United States Code, strike "$1,000,000" and insert "$2,500,000".

SEC. 308. None of the funds made available in this title shall be used for the construction of facilities classified as high-hazard nuclear facilities under 10 CFR Part 830 unless independent oversight is conducted by the Office of Health, Safety, and Security to ensure the project is in compliance with nuclear safety requirements.

SEC. 309. Of the amounts appropriated in this title, $73,300,000 are hereby rescinded, to reflect savings from the contractor pay freeze instituted by the Department. The Department shall allocate the rescission among the appropriations made in this title.

SEC. 310. None of the funds made available in this title may be used to approve critical decision-2 or critical decision-3 under Department of Energy Order 413.3B, or any successive departmental guidance, for construction projects where the total project cost exceeds $100,000,000, until a separate independent cost estimate has been developed for the project for that critical decision.

SEC. 311. None of the funds made available in this title may be used to make a grant allocation, discretionary grant award, discretionary contract award, or Other Transaction Agreement, or to issue a letter of intent, totaling in excess of $1,000,000, or to announce publicly the intention to make such an allocation, award, or Agreement, or to issue such a letter, including a contract covered by the Federal Acquisition Regulation, unless the Secretary of Energy notifies the Committees on Appropriations of the Senate and the House of Representatives at least 3 full business days in advance of making such an allocation, award, or Agreement, or issuing such a letter: *Provided*, That if the Secretary of Energy determines that compliance with this section would pose a substantial risk to human life, health, or safety, an allocation, award, or Agreement may be made, or a letter may be issued, without advance notification, and the Secretary shall notify the Committees on Appropriations of the Senate and the House of Representatives not later than 5 full business days after the date on which such an allocation, award, or Agreement is made or letter issued: *Provided further,* That the notification shall include the recipient of the award, the amount of the award, the fiscal year for which the funds for the award were appropriated, and the account and program from which the funds are being drawn, the title of the award, and a brief description of the activity for which the award is made.

SEC. 312. (a) Any determination (including a determination made prior to the date of enactment of this Act) by the Secretary pursuant to section 3112(d)(2)(B) of the USEC Privatization Act (110 Stat. 1321–335), as amended, that the sale or transfer of uranium will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry shall be valid for not more than 2 calendar years subsequent to such determination.

(b) Not less than 30 days prior to the transfer, sale, barter, distribution, or other provision of uranium in any form for the purpose of accelerating cleanup at a Federal site, the Secretary shall notify the House and Senate Committees on Appropriations of the following:

(1) the amount of uranium to be transferred, sold, bartered, distributed, or otherwise provided;

(2) an estimate by the Secretary of the gross market value of the uranium on the expected date of the transfer, sale, barter, distribution, or other provision of the uranium;

(3) the expected date of transfer, sale, barter, distribution, or other provision of the uranium;

(4) the recipient of the uranium; and

(5) the value of the services the Secretary expects to receive in exchange for the uranium, including any reductions to the gross value of the uranium by the recipient.

(c) Not later than June 30, 2012, the Secretary shall submit to the House and Senate Committees on Appropriations a revised excess uranium inventory management plan for fiscal years 2013 through 2018.

(d) Not later than December 31, 2011 the Secretary shall submit to the House and Senate Committees on Appropriations a report evaluating the economic feasibility of re-enriching depleted uranium located at Federal sites.

SEC. 313. None of the funds made available by this Act may be used to pay the salaries of Department of Energy employees to carry out section 407 of division A of the American Recovery and Reinvestment Act of 2009.

SEC. 314. (a) The Secretary of Energy may openly compete and issue an award to allow a third party, on a fee-for-service basis, to operate and maintain a metering station of the Strategic Petroleum Reserve that is underutilized (as defined in section 102–75.50 of title 41, Code of Federal Regulations (or successor regulations)) and related equipment.

(b) Not later than 30 days before the issuance of such award, the Secretary of Energy shall certify to the Committees on Appropriations of the House of Representatives and the Senate that the award will not reduce the reliability or accessibility of the Strategic Petroleum Reserve, raise costs of oil in the local market, or negatively impact the supply of oil to current users.

(c) Funds collected under subsection (a) shall be deposited in the general fund of the Treasury.

SEC. 315. None of the funds made available in this Act may be used—

(1) to implement or enforce section 430.32(x) of title 10, Code of Federal Regulations; or

(2) to implement or enforce the standards established by the tables contained in section 325(i)(1)(B) of the Energy Policy and Conservation Act (42 U.S.C. 6295(i)(1)(B)) with respect to BPAR incandescent reflector lamps, BR incandescent reflector lamps, and ER incandescent reflector lamps.

SEC. 316. Recipients of grants awarded by the Department in excess of $1,000,000 shall certify that they will, by the end of the fiscal year, upgrade the efficiency of their facilities by replacing any lighting that does not meet or exceed the energy efficiency standard for incandescent light bulbs set forth in section 325 of the Energy Policy and Conservation Act (42 U.S.C. 6295).

TITLE IV

INDEPENDENT AGENCIES

APPALACHIAN REGIONAL COMMISSION

For expenses necessary to carry out the programs authorized by the Appalachian Regional Development Act of 1965, as amended, for necessary expenses for the Federal Co-Chairman and the Alternate on the Appalachian Regional Commission, for payment of the Federal share of the administrative expenses of the Commission, including services as authorized by 5 U.S.C. 3109, and hire of passenger motor vehicles, $68,263,000, to remain available until expended.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

SALARIES AND EXPENSES

For necessary expenses of the Defense Nuclear Facilities Safety Board in carrying out activities authorized by the Atomic Energy Act of 1954, as amended by Public Law 100–456, section 1441, $29,130,000, to remain available until September 30, 2013: *Provided*, That within 90 days of enactment of this Act, the Defense Nuclear Facilities Safety Board shall enter into an agreement for inspector general services with the Office of Inspector General for the Nuclear Regulatory Commission for fiscal years 2012 and 2013: *Provided further,* That at the expiration of such agreement, the Defense Nuclear Facilities Safety Board shall procure inspector general services annually thereafter.

DELTA REGIONAL AUTHORITY

SALARIES AND EXPENSES

For necessary expenses of the Delta Regional Authority and to carry out its activities, as authorized by the Delta Regional Authority Act of 2000, as amended, notwithstanding sections 382C(b)(2), 382F(d), 382M, and 382N of said Act, $11,677,000, to remain available until expended.

DENALI COMMISSION

For expenses of the Denali Commission including the purchase, construction, and acquisition of plant and capital equipment as necessary and other expenses, $10,679,000, to remain available until expended, notwithstanding the limitations contained in section 306(g) of the Denali Commission Act of 1998: *Provided*, That funds shall be available for construction projects in an amount not to exceed 80 percent of total project cost for distressed communities, as defined by section 307 of the Denali Commission Act of 1998 (division C, title III, Public Law 105–277), as amended by section 701 of appendix D, title VII, Public Law 106–113 (113 Stat. 1501A–280), and an amount not to exceed 50 percent for non-distressed communities.

NORTHERN BORDER REGIONAL COMMISSION

For necessary expenses of the Northern Border Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, $1,497,000, to remain available until expended: *Provided*, That such amounts shall be available for administrative expenses, notwithstanding section 15751(b) of title 40, United States Code.

SOUTHEAST CRESCENT REGIONAL COMMISSION

For necessary expenses of the Southeast Crescent Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, $250,000, to remain available until expended.

NUCLEAR REGULATORY COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974, as amended, and the Atomic Energy Act of 1954, as amended, including official representation expenses (not to exceed $25,000), $1,027,240,000, to remain available until expended: *Provided*, That of the amount appropriated herein, not more than $9,000,000 may be made available for salaries and other support costs for the Office of the Commission: *Provided further,* That revenues from licensing fees, inspection services, and other services and collections estimated at $899,726,000 in fiscal year 2012 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2012 so as to result in a final fiscal year 2012 appropriation estimated at not more than $127,514,000: *Provided further,* That of the amounts appropriated under this heading, $10,000,000 shall be for university research and development in areas relevant to their respective organization's mission, and $5,000,000 shall be for a Nuclear Science and Engineering Grant Program that will support multiyear projects that do not align with programmatic missions but are critical to maintaining the discipline of nuclear science and engineering.

OFFICE OF INSPECTOR GENERAL

For necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, $10,860,000, to remain available until September 30, 2013: *Provided*, That revenues from licensing fees, inspection services, and other services and collections estimated at $9,774,000 in fiscal year 2012 shall be retained and be available until expended, for necessary salaries and expenses in this account, notwithstanding section 3302 of title 31, United States Code: *Provided further,* That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2012 so as to result in a final fiscal year 2012 appropriation estimated at not more than $1,086,000.

NUCLEAR WASTE TECHNICAL REVIEW BOARD

SALARIES AND EXPENSES

For necessary expenses of the Nuclear Waste Technical Review Board, as authorized by Public Law 100–203, section 5051, $3,400,000 to be derived from the Nuclear Waste Fund, and to remain available until expended.

OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS TRANSPORTATION PROJECTS

For necessary expenses for the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects pursuant to the Alaska Natural Gas Pipeline Act of 2004, $1,000,000.

GENERAL PROVISIONS—INDEPENDENT AGENCIES

SEC. 401. (a) None of the funds provided in this title for "Nuclear Regulatory Commission—Salaries and Expenses" shall be available for obligation or expenditure through a reprogramming of funds that—

(1) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act; or

(2) reduces funds that are directed to be used for a specific program, project, or activity by this Act.

(b) The Chairman of the Nuclear Regulatory Commission may not terminate any program, project, or activity without the approval of a majority vote of the Commissioners of the Nuclear Regulatory Commission approving such action.

(c) The Nuclear Regulatory Commission may waive the restriction on reprogramming under subsection (a) on a case-by-case basis by certifying to the Committees on Appropriations of the House of Representatives and the Senate that such action is required to address national security or imminent risks to public safety. Each such waiver certification shall include a letter from the Chairman of the Commission that a majority of Commissioners of the Nuclear Regulatory Commission have voted and approved the reprogramming waiver certification.

SEC. 402. The Nuclear Regulatory Commission shall require reactor licensees to re-evaluate the seismic, tsunami, flooding, and other external hazards at their sites against current applicable Commission requirements and guidance for such licenses as expeditiously as possible, and thereafter when appropriate, as determined by the Commission, and require each licensee to respond to the Commission that the design basis for each reactor meets the requirements of its license, current applicable Commission requirements and guidance for such license. Based upon the evaluations conducted pursuant to this section and other information it deems relevant, the Commission shall require licensees to update the design basis for each reactor, if necessary.

112TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 112–118

ENERGY AND WATER DEVELOPMENT APPROPRIATIONS BILL, 2012

JUNE 24, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FRELINGHUYSEN, from the Committee on Appropriations, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2354]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for energy and water development for the fiscal year ending September 30, 2012, and for other purposes.

INDEX TO BILL AND REPORT

SCIENCE PROGRAM DIRECTION

The Committee recommends $180,000,000 for Science Program Direction, $22,520,000 below fiscal year 2011 and $36,863,000 below the request.

NUCLEAR WASTE DISPOSAL

Appropriation, 2011	−$2,800,000
Budget estimate, 2012	—
Recommended, 2012	25,000,000
Comparison:	
Appropriation, 2011	+27,800,000
Budget estimate, 2012	+25,000,000

The Committee recommendation includes $25,000,000, $27,800,000 more than fiscal year 2011 and $25,000,000 more than the request, to continue the Department of Energy's congressionally-mandated activities to continue the Yucca Mountain license application activity.

As discussed elsewhere in this report, the Administration's attempts to shut down this activity are without scientific merit and are contrary to existing law and congressional direction. The Committee has included this funding to provide necessary expenses in the event that ongoing litigation requires the Administration to reconstitute its license application team.

The Committee supports the good analytical work that the Blue Ribbon Commission on American's Nuclear Future could contribute to the national dialogue surrounding nuclear power. While the Committee understands that the Commission is not a "siting commission," the Commission does have an obligation to include in its analysis information gathered from decades of work on Yucca Mountain, and should be able to show how and why any of its proposed alternatives are better than the existing options. The Committee directs the Blue Ribbon Commission, as it has in the past, to include Yucca Mountain among the alternatives it is considering for the future of nuclear waste disposition in the United States.

While disposition at Yucca Mountain and additional geological repositories must be part of this nation's spent fuel disposition plan, this Administration's political maneuvering has further delayed the opening of any such repository. In the meantime, this delay is increasing the liability of the U.S. government caused by its failure to fulfill the responsibilities laid out in the Nuclear Waste Policy Act of 1982, liabilities which must eventually be paid by the taxpayer. As discussed above, these liabilities may be as much as $16.2 billion by 2020 and $500 million more each year after.

This Committee has long held the view that the federal government could demonstrate its capability to meet its contractual obligation under the Nuclear Waste Policy Act by addressing the spent fuel and other high-level nuclear waste at permanently shut-down reactors. Moreover, the Department of Energy, in a December 2008 report prepared at the direction of the Committee, indicated that the interim storage of this material "would provide the Department an option in addition to Yucca Mountain to allow the Department to begin to meet its contractual obligations with the owners of commercial spent nuclear fuel. This option could prove beneficial should Yucca Mountain experience delays due to licensing, litiga-

SOUTHEAST CRESCENT REGIONAL COMMISSION

Appropriation, 2011	$250,000
Budget estimate, 2012	—
Recommended, 2012	250,000
Comparison:	
Appropriation, 2011	—
Budget estimate, 2012	+250,000

The Food, Conservation, and Energy Act of 2008 (Public Law 110–234) authorized the establishment of the Southeast Crescent Regional Commission as a federal-state partnership intended to address the economic development needs of distressed portions of the southeastern United States not already served by a regional development agency.

The Committee recommends $250,000 for operations of the commission in fiscal year 2012, the same as fiscal year 2011 and $250,000 above the budget request.

NUCLEAR REGULATORY COMMISSION

GROSS APPROPRIATION

Appropriation, 2011	$1,043,208,000
Budget estimate, 2012	1,027,240,000
Recommended, 2012	1,027,240,000
Comparison:	
Appropriation, 2011	−15,968,000
Budget estimate, 2012	—

REVENUES

Appropriation, 2011	−$906,220,000
Budget estimate, 2012	−899,726,000
Recommended, 2012	−890,713,000
Comparison:	
Appropriation, 2011	+15,507,000
Budget estimate, 2012	+9,013,000

NET APPROPRIATION

Appropriation, 2011	$136,988,000
Budget estimate, 2012	127,514,000
Recommended, 2012	136,527,000
Comparison:	
Appropriation, 2011	−461,000
Budget estimate, 2012	+9,013,000

The Committee recommendation for the Nuclear Regulatory Commission (NRC) salaries and expenses for fiscal year 2012 is $1,027,240,000, $15,968,000 below fiscal year 2011 and the same as the request. The total amount of budget authority is offset by estimated revenues of $890,713,000, $15,507,000 less than fiscal year 2011 and $9,013,000 less than the request. Including revenues, the net appropriation for the Nuclear Regulatory Commission is $136,527,000.

The recommendation includes $10,000,000 to be derived from the Nuclear Waste Fund, $10,000,000 above the request. This funding may only be used to continue the Yucca Mountain license application. A general provision is included to prohibit any funding in this bill from being used to bring the Yucca Mountain license application to a close until the Commission reverses the Atomic Safety and Licensing Board decision LBP–10–11. In addition, to improve

112TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
112–331

MILITARY CONSTRUCTION AND VETERANS AFFAIRS AND RELATED AGENCIES APPROPRIATIONS ACT, 2012

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2055

DECEMBER 15, 2011.—Ordered to be printed

The conferees provide $25,490,000 for Clean Energy Transmission and Reliability, and include no funds for the proposed Smart Grid Technology and Systems Energy Innovation Hub. The conference agreement includes $24,000,000 for Smart Grid Research and Development, $20,000,000 for Energy Storage, and $30,000,000 for Cyber Security for Energy Delivery Systems.

NUCLEAR ENERGY

The conference agreement provides $768,663,000 for nuclear energy activities, instead of $733,633,000 as proposed by the House and $583,834,000 as proposed by the Senate.

The conferees direct the Department to develop a strategy for the management of spent nuclear fuel and other nuclear waste within 6 months of publication of the final report of the Blue Ribbon Commission on America's Nuclear Future.

Nuclear Energy Enabling Technologies.—The conference agreement provides $74,880,000, to include $14,580,000 for the National Science User Facility at Idaho National Laboratory, $24,300,000 for the Modeling and Simulation Energy Innovation Hub, and $36,000,000 for Crosscutting Research.

Small Modular Reactor Licensing Technical Support.—The conference agreement includes $67,000,000 to provide licensing and first-of-a-kind engineering support for small modular reactor designs that can be deployed expeditiously, to be administered as specified in the budget request. The Department is directed to consider applications utilizing any small modular reactor technologies. The conferees expect the program to total $452,000,000 over five years.

Reactor Concepts Research and Development.—The conferees provide $115,544,000, to include $28,674,000 for Small Modular Reactors Advanced Concepts and $21,870,000 for Advanced Reactor Concepts.

The conference agreement includes $25,000,000 for Light Water Reactor Sustainability. Within available funds, the Department is directed to conduct research and development furthering knowledge on how long the current fleet of reactors can safely operate.

The conference agreement includes $40,000,000 for the Next Generation Nuclear Plant program, $30,000,000 of which is to accelerate fuel development and qualification activities and $10,000,000 of which is to continue ongoing research and development projects begun in prior fiscal years.

Fuel Cycle Research and Development.—The conference agreement provides $187,351,000.

The conference agreement includes $60,000,000 for Used Nuclear Fuel Disposition. Within available funds, $10,000,000 is for development and licensing of standardized transportation, aging, and disposition canisters and casks. Multiple geologic repositories will ultimately be required for the long-term disposition of the nation's spent fuel and nuclear waste; the Department should build upon its current knowledge base to fully understand all repository media and storage options and their comparative advantages, and the conferees direct the Department to focus, within available funds, $3,000,000 on development of models for potential partner-

ships to manage spent nuclear fuel and high level waste, and $7,000,000 on characterization of potential geologic repository media. The Department is directed to preserve all documentation relating to Yucca Mountain, including technical information, records, and other documents, as well as scientific data and physical materials.

The conference agreement includes $10,000,000 to expand the Department's capabilities for assessing issues related to the aging and safety of storing spent nuclear fuel, to include experimentation, modeling, and simulation for dry storage casks, as well as for spent fuel pools, as necessary.

The conference agreement includes $59,000,000 for Advanced Fuels, and directs that priority for the increase in funding be given to efforts to develop and qualify meltdown-resistant, accident-tolerant nuclear fuels that would enhance the safety of light water reactors.

Radiological Facilities Management.—The conference agreement provides $64,902,000 for space and defense infrastructure, to include $15,000,000 for nuclear infrastructure at Oak Ridge National Laboratory. The conferees provide no funds for the Plutonium–238 Production Restart Project.

FOSSIL ENERGY RESEARCH AND DEVELOPMENT

(INCLUDING RESCISSION OF FUNDS)

The conference agreement provides $534,000,000 in new budget authority for Fossil Energy Research and Development, instead of $476,993,000 as proposed by the House and $445,471,000 as proposed by the Senate, and rescinds $187,000,000 in prior-year balances, as proposed by the Senate. The conference agreement does not include the use of prior-year balances, as proposed by the House and the Senate.

CCS and Power Systems.—The conferees provide $368,609,000 for CCS and Power Systems. The conference agreement includes $100,000,000 for Advanced Energy Systems, to include $5,000,000 for Coal and Coal-Biomass to Liquids, and not less than $25,000,000 to continue research, development, and demonstration of solid oxide fuel cell systems.

Within CCS and Power Systems, the conference agreement includes $35,031,000 for NETL Coal Research and Development, to include Integrated Gasification Combined Cycle, Turbines, Carbon Sequestration, Fuels, Fuel Cells, and Advanced Research activities. The reduction in Program Direction funding reflects the relocation of NETL Direct Program Direction into this research line, in order to increase transparency by grouping together all fossil energy research activities and by including only oversight and management activities within Program Direction. The Department is directed to continue including in the budget request all full-time equivalent information within this program line, as it has been doing previously within Program Direction.

Natural Gas Technologies.—The conference agreement provides $15,000,000, of which $10,000,000 is for gas hydrates research.

Fusion Energy Sciences.—The conference agreement provides $402,177,000 for Fusion Energy Sciences, of which not more than $105,000,000 is for U.S. Contributions to ITER. The conference agreement includes $24,741,000 for the High Energy Density Laboratory Plasma program, of which $12,000,000 is to be evenly distributed among heavy-ion fusion, laser-driven fusion, and magneto-inertial fusion. The conference agreement includes direction for the submission of a 10-year fusion plan as provided by both the House and Senate.

High Energy Physics.—The conference agreement provides $791,700,000 for High Energy Physics research.

The conferees understand that the United States has unique capabilities to develop a world-leading neutrino science program. To begin the transition to the intensity frontier, the conferees provide $21,000,000 for the Long Baseline Neutrino Experiment, which includes $17,000,000 for research and development and $4,000,000 for project engineering and design. The conferees provide no funding for long-lead procurements or construction activities. The conferees are concerned that this project is not mature enough for construction because a location and technology for the underground detectors has not been selected. Before consideration of congressional approval of construction, the Department is directed to provide to the House and Senate Committees on Appropriations a detailed project plan and refined total cost estimate for construction, not later than April 1, 2012.

Within available funds, the conferees provide $15,000,000 as requested, $10,000,000 within High Energy Physics and $5,000,000 within Nuclear Physics, to support minimal, sustaining operations at the Homestake Mine in South Dakota.

Nuclear Physics.—The conference agreement provides $550,000,000 for Nuclear Physics. Within available funds, the conference agreement includes $22,000,000 for the Facility for Rare Isotope Beams, and $50,000,000 for the 12 GeV upgrade of the Continuous Electron Beam Accelerator Facility.

Workforce Development for Teachers and Scientists.—The conference agreement provides $18,500,000 for Science Workforce Development. Within available funds, up to $5,000,000 is for the graduate fellowship program to fund the existing cohort established in fiscal year 2010.

Science Laboratories Infrastructure.—The conference agreement provides $111,800,000 for Science Laboratories Infrastructure.

Safeguards and Security.—The conference agreement provides $82,000,000 for Safeguards and Security.

Science Program Direction.—The conference agreement provides $185,000,000 for Science Program Direction. No funds shall be used to hire new site office personnel, except for field staff at the Integrated Support Centers in Chicago and Oak Ridge.

NUCLEAR WASTE DISPOSAL

The conference agreement provides $0 for nuclear waste disposal, as proposed by the Senate, instead of $25,000,000 as proposed by the House.

TITLE IV

INDEPENDENT AGENCIES

Appalachian Regional Commission

The conference agreement provides $68,263,000 for the Appalachian Regional Commission, instead of $68,400,000 as proposed by the House and $58,024,000 as proposed by the Senate.

Defense Nuclear Facilities Safety Board

salaries and expenses

The conference agreement provides $29,130,000 for the Defense Nuclear Facilities Safety Board, as proposed by the House and Senate. The conferees direct the Board to enter into an agreement for fiscal years 2012 and 2013 with the Office of Inspector General for the Nuclear Regulatory Commission. The conferees direct the Board to enter into an enduring procurement with a provider of inspector general services thereafter.

Delta Regional Authority

salaries and expenses

The conference agreement provides $11,677,000 for the Delta Regional Authority, instead of $11,700,000 as proposed by the House and $9,925,000 as proposed by the Senate.

Denali Commission

The conference agreement provides $10,679,000 for the Denali Commission, instead of $10,700,000 as proposed by the House and $9,077,000 as proposed by the Senate.

Northern Border Regional Commission

The conference agreement provides $1,497,000 for the Northern Border Regional Commission, instead of $1,350,000 as proposed by the House and $1,275,000 as proposed by the Senate.

Southeast Crescent Regional Commission

The conference agreement provides $250,000 for the Southeast Crescent Regional Commission, as proposed by the House, instead of $213,000 as proposed by the Senate.

Nuclear Regulatory Commission

salaries and expenses

The conference agreement provides $1,027,240,000 for the Nuclear Regulatory Commission (NRC) salaries and expenses, as proposed by the Senate, instead of $1,037,240,000 as proposed by the House. This amount is offset by estimated revenues of $899,726,000, resulting in a net appropriation of $127,514,000. The fee recovery is consistent with that authorized by section 637 of the Energy Policy Act of 2005. The conference agreement does not include $20,000,000 to be made available from the Nuclear Waste

Fund to support the geological repository for nuclear fuel and waste, as proposed by the House. The Senate proposed no similar provision.

The conference agreement includes a National Academy of Sciences study of the lessons learned from the events at the Fukushima nuclear plant, as proposed by the Senate. The Commission is directed to transfer $2,000,000 to the National Academy of Sciences for this study within 30 days of enactment of this Act.

The conference agreement includes $15,000,000, as proposed by the House, to support university education programs relevant to the NRC mission, of which not less than $5,000,000 is for grants to support research projects that do not align with programmatic missions but are critical to maintaining the discipline of nuclear science and engineering.

The conferees recognize the progress that the Nuclear Regulatory Commission has made on the recommendations of the Near Term Task Force. Commission staff has proposed a prioritized list of the Task Force recommendations that reflects the order regulatory actions are to be taken. The conferees direct the Commission to implement these recommendations consistent with, or more expeditiously than, the "schedules and milestones" proposed by NRC staff on October 3, 2011. The conferees direct the Commission to maintain an implementation schedule such that the remaining recommendations (not identified as Tier 1 priorities) will be evaluated and acted upon as expeditiously as practicable. The conferees request that the Commission provide a written status report to the House and Senate Committees on Appropriations on its implementation of the Task Force recommendations on the one year anniversary of the Fukushima disaster.

OFFICE OF INSPECTOR GENERAL

The conference agreement includes $10,860,000 for the Office of the Inspector General in the Nuclear Regulatory Commission, as proposed by the House and Senate. This amount is offset by revenues of $9,774,000, for a net appropriation of $1,086,000.

NUCLEAR WASTE TECHNICAL REVIEW BOARD

SALARIES AND EXPENSES

The conference agreement provides $3,400,000 for the Nuclear Waste Technical Review Board, as proposed by the House and Senate.

OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS TRANSPORTATION PROJECTS

The conference agreement provides $1,000,000 for the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects, as proposed by the Senate, instead of $4,032,000 as proposed by the House. The conference agreement does not include a House provision addressing excess fees.

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Congressional Record

PROCEEDINGS AND DEBATES OF THE *112th* CONGRESS, FIRST SESSION

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House of Representatives

The House met at 10 a.m. and was called to order by the Speaker pro tempore (Mrs. ELLMERS).

DESIGNATION OF SPEAKER PRO TEMPORE

The SPEAKER pro tempore laid before the House the following communication from the Speaker:

WASHINGTON, DC,
July 13, 2011.

I hereby appoint the Honorable RENEE L. ELLMERS to act as Speaker pro tempore on this day.

JOHN A. BOEHNER,
Speaker of the House of Representatives.

MORNING-HOUR DEBATE

The SPEAKER pro tempore. Pursuant to the order of the House of January 5, 2011, the Chair will now recognize Members from lists submitted by the majority and minority leaders for morning-hour debate.

The Chair will alternate recognition between the parties, with each party limited to 1 hour and each Member other than the majority and minority leaders and the minority whip limited to 5 minutes each, but in no event shall debate continue beyond 11:50 a.m.

STOP PLAYING POLITICAL GAMES WITH SOCIAL SECURITY

The SPEAKER pro tempore. The Chair recognizes the gentleman from Ohio (Mr. KUCINICH) for 5 minutes.

Mr. KUCINICH. Madam Speaker, 3 months ago, 276 experts on Social Security, the Federal budget or the economy wrote to President Obama ''to correct a commonly held misconception that Social Security somehow contributes to the Federal Government's deficit.''

Despite the fact that Social Security has a $2.6 trillion surplus and can pay 100 percent of its benefits through 2037 without any cuts or tax increases, President Obama declared yesterday that Social Security checks may not go out after August 2, presumably unless there is a deal on the Federal deficit, which has nothing to do with Social Security.

According to today's Washington Post, 15 years ago, Congress passed laws which stated Social Security did not count against the debt limit and gave Treasury clear authority to use Social Security trust funds to pay benefits and administration expenses in the event a debt ceiling is reached.

A fake Social Security crisis will do nothing to solve a real debt crisis, will undermine the public's faith in government, and will create unnecessary anxiety among our elderly. Stop playing political games with Social Security.

THE WILL TO GET AMERICAN JOBS MOVING AGAIN

The SPEAKER pro tempore. The Chair recognizes the gentleman from California (Mr. DENHAM) for 5 minutes.

Mr. DENHAM. Madam Speaker, with the June national unemployment rate at 9.2 percent and with consistent double-digit unemployment in my district, we must get Americans back to work. June marks 29 consecutive months in which we've had unemployment at or above 8 percent, averaging 9.5 percent during that time. Unemployment hasn't been above 8 percent for that length of time since the Great Depression.

We've got to start utilizing the policies that will get Americans back to work. We need to make sure that we are reducing the regulations and are having the economic policies that get Americans willing to take the risk: the risk to go out and borrow money to start a business, willing to take the risk to not only hire employees but to actually make sure that they're willing to have that long-term employment, making sure that they've got the promise to those employees that they're going to be able to continue on those jobs. We've got to give Americans the opportunity to take that great risk in our economy.

We also need to unleash the strength of our Nation by utilizing our natural resources. The greatest opportunity we have as a Nation to get Americans back to work is by utilizing our own natural resources. In my area, where we've got double-digit unemployment, we've got a water shortage that causes our agriculture to leave land fallow, leaving thousands unemployed. By getting the water flowing again, we will not only get agriculture moving again but the local economies as well.

The mountain areas with timber, if we don't use the natural resources that we have in our forests, if we don't manage our timber harvesting plans, not only will we see the lack of employment opportunities, but we'll see devastation and we'll see fires, because the forests will manage themselves if we don't manage the forests for them.

We need to make sure that we're looking across the Nation at our oil reserves. Between our oil, our natural gas, our oil shale reserves, we have the largest resources in the world. We've just got to be willing to tap into them. We need to shorten the time on permits. We need to reduce the regulations so we can actually go in and get the oil so that we're not dependent on other nations.

These aren't Republican jobs. These aren't Democrat jobs. These are American jobs for which we've got to be willing to go out and stand strong on cutting the regulation, on getting the right economic policies, on getting the permits moving again so that we can actually utilize our natural gas, utilize our oil, utilize our oil shale so that we're not relying on other nations, utilize our timber harvesting plans so that we don't see the devastation when

against the statistics that he has proposed.

I should say for the record that our bill strongly supports our nuclear security strategy. It fully funds the 4-year effort to lock down nuclear materials around the world and increases funding for our other international security efforts, such as enforcing export controls and promoting nuclear safeguards.

With that, I am happy to yield to the ranking member.

Mr. VISCLOSKY. I appreciate the chairman for yielding and supporting the amendment.

I certainly appreciate the gentleman offering this amendment. I think it's very, very important. Certainly I think the most serious threat confronting this Nation is that of nuclear terrorism.

Again, I appreciate the gentleman's work on the issue day in and day out, offering the amendment, as well as those who support it. I rise in support of it.

Mr. FRELINGHUYSEN. I yield back the balance of my time.

Ms. LORETTA SANCHEZ of California. Mr. Chair, I would like to thank Representative FORTENBERRY for working with me along with Representative LARSEN and GARAMENDI in order to offer this important amendment.

This amendment is a small restoration of funds in response to a $468 million cut to defense nonproliferation programs in this bill—equivalent to an 18% reduction in funding.

The $35 million would come from the Departmental Administrative account.

This transfer of funding will contribute to reducing the risk of nuclear terrorism.

The danger that nuclear materials or weapons might spread to countries hostile to the United States or to terrorists is one of the gravest dangers to the United States—nonproliferation programs are critical to U.S. national security and must be a top priority.

The funding for Global Threat Reduction Initiative (GTRI) specifically supports securing vulnerable nuclear material around the world in 4 years, in order to prevent this deadly material from falling into the hands of terrorists intent on doing us harm.

Nonproliferation programs are the most cost-effective way to achieve these urgent goals and objectives.

Last year at the Nuclear Security summit which brought together nearly 50 heads of state in Washington, President Obama secured significant commitments from countries willing to give up their nuclear weapons-usable material.

The United States must follow through on its international commitments to help remove and secure these materials.

Failing to do so will jeopardize the effort to secure these materials in 4 years, result in unacceptable delays and complicate further negotiations with countries who have vulnerable nuclear bomb-grade materials.

Specifically, a $35 million increase would prevent delays of at least 1 year to Highly Enriched Uranium reactor conversions in Poland, Kazakhstan, Uzbekistan, Ghana, and Nigeria.

Reactor conversions are directly linked to removal of bomb-grade material: removals of vulnerable material from these sites that cannot take place until the reactors are converted.

These countries are among the NNSA's highest priorities to secure material, convert research reactors and remove vulnerable HEU.

These funds would also expedite by 1 year the development of a new low enriched uranium fuel for the conversion of 6 U.S. High Performance Research reactors that currently use approximately 150 kilograms—6 nuclear weapons' worth—of highly enriched uranium annually.

The $35 million will help not only the U.S. fuel development program but also our R&D efforts with Russia for conversion of their high performance reactors that need this same new type of high density fuel.

Over 70 research reactors that should be shut down or converted are in Russia, and there has been recent progress on converting at least 6 reactors.

We are right at the cusp of success in addressing these dangerous Russian reactors.

Cuts to funds now would send a bad message and squander an important opportunity to move forward and pursue cost sharing on some of the remaining reactors.

The 9–11 Commission and of the Nuclear Posture Commission noted the urgency of addressing this grave danger, with the Nuclear Posture Commission warning that ''The urgency arises from the imminent danger of nuclear terrorism if we pass a tipping point in nuclear proliferation.''

I urge support for this modest increase of $35 million that will help address the risk of delays to the most urgent efforts for removing and securing vulnerable materials, stemming from FY11 appropriations cuts.

The Acting CHAIR. The question is on the amendment offered by the gentleman from Nebraska (Mr. FORTENBERRY).

The amendment was agreed to.

AMENDMENT OFFERED BY MR. SHIMKUS

Mr. SHIMKUS. Mr. Chairman, I have an amendment at the desk.

The Acting CHAIR. The Clerk will report the amendment.

The Clerk read as follows:

Page 32, line 4, after the dollar amount insert ''(reduced by $10,000,000)''.

Page 54, line 20, after the second dollar amount insert ''(increased by $10,000,000)''.

Page 54, line 25, after the dollar amount insert ''(increased by $10,000,000)''.

The Acting CHAIR. The gentleman from Illinois is recognized for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman.

First of all, I want to thank my colleagues on the Appropriations Committee. I don't come down to the floor often. This is a special occasion and a special time to bring focus on Yucca Mountain.

As the investigation continues into the shutdown of Yucca Mountain, we have heard over and over again that the licensing application should move forward and let the science speak for itself.

The $10 million provided in the bill is a start but too low for the Nuclear Regulatory Commission to do anything functional toward reviewing the licensing application. In fact, just a few years ago, they were receiving nearly $60 million for these efforts.

In addition, the Shimkus-Inslee amendment—it didn't officially get recorded that way, but that was our intent, that JAY INSLEE, my friend from Washington State, would join me. The amendment adds $10 million to continue the Yucca Mountain license application. There is $10 million in the bill, and my amendment would take it to $20 million.

Our amendment is budget neutral and fully offset by taking funds from the DOE's departmental administration account. We are asking DOE to do more with less by making modest cuts to an account for salaries and expenses. And, again, I want to thank the Appropriations Committee for helping us find a way to move in this direction. Again I want to thank my colleague Mr. INSLEE for supporting this amendment.

I have had a lot of my colleagues on both sides of the aisle talk to me about when are we going to have a vote on the floor to show our support for what we have done? What we have done historically, in 1982 the Nuclear Waste Policy Act was passed, 30 years, countless different administrations on both sides of the aisle, different control of the Chamber here, both parties.

□ 2050

This has been our consistent policy for 30 years. Now, with Japan and Fukushima Daiichi and part of the problem being high-level nuclear waste stored in pools, we have to have a centralized location. This amendment says let us finish the science to get to the final permit, and let that science be the judge. It's providing the money.

But I will tell you that we have high-level nuclear waste all over this country, and we need it in one centralized location. It has been our policy that that would be Yucca Mountain—an isolated area in Nevada, in the desert, 90 miles from Las Vegas. It's underneath a mountain, in the desert, in one of the most arid places in this country. If we can't store it there, we really can't store it anywhere. As you've heard from my colleagues already this evening, it is stored in locations we should not have it.

Again, I really want to thank the Appropriations Committee for helping me through this process. We need a vote. I will call for a vote.

With that, I yield back the balance of my time.

Mr. INSLEE. I move to strike the last word.

The Acting CHAIR. The gentleman from Washington is recognized for 5 minutes.

Mr. INSLEE. I want to thank the gentleman from Illinois and the committee for helping us find a solution to this problem.

There are really a couple of reasons for this amendment:

One, there really is a national interest here. We've got 75,000 metric tons of nuclear waste at 80 sites in 45 States. This is a national interest, a national

bill, and is an appropriation we need to get done.

Two, my State is particularly acute at the Hanford site, a place where we fought World War II and the Cold War, and now we are preparing nuclear waste to go to Yucca Mountain—nuclear waste that, essentially, will be all dressed up with no place to go if we don't finish this project.

This is a very small step forward, but I do think it's important, not just for the $10 million that will help us move forward on the scientific assessment of this, but the fact that it will be another statement by this House of why we need to move forward. We made that statement in 1987. We made that statement in 2002. We made it again in 2007. This is the way to do it in the appropriations system. It is an important statement to make. We've got to continue to push this ball uphill until this job gets done.

I yield back the balance of my time.

Mr. BROUN of Georgia. Mr. Chairman, I move to strike the last word.

The Acting CHAIR. The gentleman is recognized for 5 minutes.

Mr. BROUN of Georgia. Mr. Chairman, I rise in support of Mr. SHIMKUS' and Mr. INSLEE's amendment, and I congratulate them on bringing this very important amendment to the floor in this appropriations bill.

Just across the Savannah River from my district is the Savannah River site. I've been over there very many times, and I am very concerned about the storage of nuclear materials that are there on the site, and that's happening all over this country. We hear people talk about this as nuclear waste, but I don't view it that way. In fact, there is a tremendous amount of energy in the fuel rods and in the nuclear material that's being stored at facilities all over this country. We just don't know how to utilize it, and we're just beginning that process.

Some of these fast reactors, small modular reactors, would burn up a lot of this nuclear material and would provide energy that is drastically needed. Yet, Mr. Chairman, one man from Nevada—a staffer, who left from being on staff in the U.S. Senate and went to the administration—has, what I consider to be, illegally closed up Yucca Mountain. This administration has illegally closed up Yucca Mountain.

This facility has been studied at great lengths. I'm on the Science, Space, and Technology Committee, and am the Subcommittee chairman for Investigations and Oversight. We've looked at this. We've had hearings. In fact, I just recently had a group of people from our local area, the Augusta area—and North Augusta, in the South Carolina area of Aiken County, where SRS is—testify about what's going on and about Yucca Mountain.

It is critical that we as a Congress do what the law requires. We need a central repository. We need somewhere we can store this material, not as waste, but we need a repository so that this material can be set in a safe, scientifically studied area that won't harm anybody. Yucca fits all of those categories. It's the only place in this country that does. We can store this material until we can utilize it.

We need to be energy independent as a Nation. Nuclear energy is going to be one of the keys of an all-of-the-above energy policy. We, on our side, have been fighting for that, and I know some Democrats are very supportive of nuclear energy, as I am. I am an ardent supporter of nuclear energy, and I think it's absolutely critical in order for us to go forward. Yucca Mountain has to be a part of that formula, and we cannot close it up. We've spent billions of taxpayer dollars on this facility. One man, because he doesn't want it in his backyard, has prompted this administration to close it up. We've got to open it up.

So I congratulate Mr. INSLEE and particularly my dear friend JOHN SHIMKUS from Illinois for bringing this amendment to the floor. We need to support it. We need to have a vote on it so that we can show how important this is to Members of Congress. I congratulate them, and I wholeheartedly support it, and hope other Members of Congress will support it, too.

I yield back the balance of my time.

Mr. FRELINGHUYSEN. Mr. Chairman, I move to strike the last word.

The Acting CHAIR. The gentleman from New Jersey is recognized for 5 minutes.

Mr. FRELINGHUYSEN. I strongly support, Mr. Chairman, the Shimkus-Inslee amendment.

This administration's Yucca Mountain policy has been, at best, irresponsible with the taxpayers' time and treasure. Most Members in this room have voted many times in support of this project. For years, we supported it as the law of the land, and ensured that the scientific review process continued so we could understand how good the site was.

Despite more than the $15 billion already spent on the site or the more than $16 billion in potential fines that the taxpayer is facing because the administration has not fulfilled its responsibility to take spent fuel off the hands of so many utilities, this administration has persisted in a backroom political deal to shut down the project. Yet, despite the administration's best efforts to hide from the public the inconvenient facts, we now know that the science does support Yucca Mountain as a long-term geological repository. The NRC's review, which was virtually complete when the administration pulled the plug, apparently shows that the site can safely store the fuel for thousands and thousands of years if that is necessary.

Even in the face of this, the administration hasn't changed its position. We can only keep the pressure on and trust that good policy and good science will eventually overcome bad politics. We need to finish the Yucca Mountain license application so that we as a Nation can take into account all of the facts as we determine the future of nuclear energy in this country.

I want to thank the gentlemen, both Mr. INSLEE and Mr. SHIMKUS—members of the authorizing committee.

I had an opportunity, as an observer, to attend Mr. SHIMKUS' subcommittee. May I say I was impressed by how the gentleman from Illinois questioned the NRC commissioners, and particularly the chairman, on some of the very questions the gentleman from Illinois and other Members have raised.

I want to commend you for your vigor and for your astuteness and for coming to the floor with this very important amendment.

I would be happy to yield, unless he cares to have his own time, to the ranking member, the gentleman from Indiana.

Mr. VISCLOSKY. I appreciate the chairman's yielding. I would just add two brief comments in support of the amendment and of the chairman's remarks.

The administration's attempts to shut this activity down, I believe, are without scientific merit, and are contrary to existing law and congressional direction.

I believe that the Federal Government has a responsibility to demonstrate its capability to meet its contractual obligation under the Nuclear Waste Policy Act by addressing the spent fuel and other high-level nuclear waste at permanently shutdown reactors.

So, again, I will join in support of the amendment.

Mr. FRELINGHUYSEN. I thank the gentleman.

We're going to keep Yucca Mountain open, Mr. Chairman.

I yield back the balance of my time.

The Acting CHAIR. The question is on the amendment offered by the gentleman from Illinois (Mr. SHIMKUS).

The question was taken; and the Acting Chair announced that the ayes appeared to have it.

Mr. SHIMKUS. Mr. Chairman, I demand a recorded vote.

The Acting CHAIR. Pursuant to clause 6 of rule XVIII, further proceedings on the amendment offered by the gentleman from Illinois will be postponed.

□ 2100

The Clerk will read.

The Clerk read as follows:

OFFICE OF THE INSPECTOR GENERAL

For necessary expenses of the Office of the Inspector General in carrying out the provisions of the Inspector General Act of 1978, as amended, $41,774,000, to remain available until expended.

ATOMIC ENERGY DEFENSE ACTIVITIES

NATIONAL NUCLEAR SECURITY ADMINISTRATION

WEAPONS ACTIVITIES

(INCLUDING RESCISSION OF FUNDS)

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and

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Statistical Tables for the Federal Judiciary December 31, 2010

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Table B-4C.
U.S. Courts of Appeals—Median Time Intervals in Months for Merit Terminations of Administrative Agency Appeals, by Circuit, During the 12-Month Period Ending September 30, 2010

Circuit	Total Cases	From Filing in Appellate Court to Filing Last Brief		From Filing Last Brief to Hearing or Submission		From Hearing to Final Disposition		From Submission to Final Disposition		From Filing in Appellate Court to Final Disposition	
		Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval
TOTAL	**5,378**	**4,219**	**7.0**	**4,219**	**7.9**	**794**	**1.6**	**4,584**	**0.7**	**5,378**	**16.7**
DISTRICT OF COLUMBIA	95	65	7.7	65	3.5	57	2.9	38	0.6	95	16.6
FIRST	127	107	5.3	107	2.6	9	5.2	118	1.5	127	9.7
SECOND	1,166	1,007	6.5	1,007	3.5	111	1.1	1,055	1.6	1,166	12.7
THIRD	528	461	5.2	461	6.9	33	2.0	495	0.7	528	12.9
FOURTH	193	143	5.2	143	3.2	33	2.0	160	0.7	193	9.2
FIFTH	265	220	4.8	220	4.9	56	1.7	209	1.0	265	11.1
SIXTH	220	196	5.5	196	5.3	46	1.3	174	1.8	220	13.0
SEVENTH	116	80	5.7	80	2.1	61	2.7	55	0.3	116	10.0
EIGHTH	113	107	3.9	107	5.3	40	3.5	73	0.2	113	12.3
NINTH	2,221	1,526	10.3	1,526	23.6	310	1.0	1,911	0.4	2,221	32.6
TENTH	71	66	4.8	66	1.9	18	3.9	53	1.8	71	9.9
ELEVENTH	263	241	4.3	241	2.1	20	2.7	243	1.4	263	8.1

NOTE: This table does not include data for the U.S. Court of Appeals for the Federal Circuit.