

**NUCLEAR REGULATORY COMMISSION  
REGULATORY INFORMATION CONFERENCE  
MARCH 8, 2011**

**PRESENTATION BY:**

**ANTHONY Z. ROISMAN  
NATIONAL LEGAL SCHOLARS LAW FIRM**

**“SAVING THE SHIP”**

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**PROBLEM**

- A STATIC HEARING PROCESS
- A DYNAMIC APPLICATION AND REVIEW PROCESS
- EXCESSIVE PLEADINGS ADDRESSED TO NEW AND/OR AMENDED CONTENTION ADMISSIBILITY ISSUES
- DISCONNECT BETWEEN KEY STAFF DOCUMENTS AND HEARING PROCESS

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**PROPOSED SOLUTION**

- INVOLVE POTENTIAL INTERVENORS IN THE PROCESS AT THE EARLIEST DATE
- REQUIRE CONTENTION FILING ONLY AFTER COMPLETED APPLICATION AND STAFF REVIEW
- REQUIRE COMPLETE CONTENTIONS WITH ALL BASES AND SUPPORTING EVIDENCE SHORTLY AFTER A FINISHED APPLICATION AND STAFF REVIEW ARE FILED

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**POSSIBLE PART 2  
AMENDMENTS TO ADDRESS  
THE PROBLEM**

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**EARLY NOTICE**

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**PROPOSED**  
**10 C.F.R. § 2.100A**

Prior to filing an application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval and prior to contacting any employee or contractor of the NRC regarding such an application, an applicant shall file a formal notice with the NRC of its intention to file such an application, including the nature of the intended application and scope of the application, and shall publish at least a ½ page notice of intent in all daily newspapers of general distribution within the area where the facility involved is, or may be, located, with at least three national daily newspapers and on its website for a period of at least one month. The content of the notice shall be prescribed by NRC Staff and shall have as its purpose the widest possible disclosure of the applicant's intent and the nature of the intended application.

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**EARLY OPPORTUNITY TO PARTICIPATE**  
**(STANDING ONLY)**

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**PROPOSED 10 C.F.R. § 2.100B**

Upon receipt of a notice of intent pursuant to 10 C.F.R. § 2.100A, NRC Staff shall determine if the notice meets all the requirements and intent of that Section and once such a determination is made it shall have published in the Federal Register and in the same newspapers as those used by the applicant in complying with 10 C.F.R. § 2.100A, and as frequently, at least a ½ page notice of opportunity to participate in the NRC regulatory process with regard to such proposed action. The notice shall require that all persons who wish to participate in any way in the regulatory process with regard to such proposed action must file, within 30 days of the publication of the notice in the Federal Register and the newspapers, a request to participate. Such a request to participate must demonstrate that the proposed participant meets the requirements of 10 C.F.R. § 2.309(d).

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**EARLY DECISION ON RIGHT TO PARTICIPATE AND RIGHTS AND RESPONSIBILITIES**

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**PROPOSED 10 C.F.R. § 2.308A**

Upon filing of the Federal Register Notice prescribed by 10 C.F.R. § 2.100B, the Commission shall designate an Atomic Safety and Licensing Board Panel to determine whether any request for participation filed is 1) timely and 2) meets the requirements of 10 C.F.R. § 2.309(d). Any person that meets those requirements shall be deemed a "participant" and shall have all the rights and responsibilities identified in 10 C.F.R. § 2.308B. The Atomic Safety and Licensing Board Panel may consider untimely filings for participant status but shall not grant such requests unless good cause is shown why the proposed participant could not have learned of the proposed action and filed a timely request to participate and, if granted participant status, the participant must take the proceeding as it finds it including the need to meet any filing requirements regarding documents and the need to comply with any time limits imposed by these regulations or the Board.

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**PROPOSED 10 C.F.R. § 2.308B**

Once a person is determined to be a participant within the meaning of 10 C.F.R. § 2.308A, they shall have the following rights and responsibilities:

1. The participant shall receive a copy of all documents generated, received, reviewed or relied upon by an applicant, its employees, contractors or experts and by the NRC Staff or any contractor of the NRC Staff, with regard to the intended application or any issues relevant to the determination of the application within one week of when the document was generated, received, reviewed or relied upon;
2. The participant shall receive advance notice of all meetings and phone calls between the applicant, the NRC Staff or any contractor of the NRC Staff or the applicant, with regard to the intended application or the application itself and the participant shall have the right to listen in on any such call or be an attendee at any such meeting. NRC Staff may limit the number of representatives of the participant who may attend such meetings but not to less than two. These rights shall not include the right to actively participate in the call or meeting unless NRC Staff or the applicant request such participation.
3. The participant shall provide a copy to NRC Staff and the applicant of all documents with regard to the intended application or any issues relevant to the application generated, received, reviewed or relied upon by it, its employees, experts or contractors within one week of their generation, receipt, review or reliance upon the document.
4. The participant shall have the right to request either phone calls or meetings with NRC Staff with regard to the intended application or any issues relevant to the application and such requests shall be granted absent good cause for denial. An applicant may participate in any of these meetings or calls to the same extent a participant can participate in meeting or calls pursuant to 2. above.

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**FILING CONTENTIONS  
RIGHTS AND RESPONSIBILITIES**

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**PROPOSED 10 C.F.R. § 2.308C**

A notice of opportunity for a hearing shall be filed within 30 days after the following conditions have been met. If there is a dispute regarding whether conditions have been met, an Atomic Safety and Licensing Board Panel shall resolve the dispute:

1. Applicant files a final and complete application for the requested action, files a certification, signed by a duly authorized officer of the applicant, that the applicant has no present intent to file any additional information in the form of amendments to the application AND NRC Staff files a final Safety Evaluation Report (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to any safety issues related to the proposed application; AND
2. Applicant files a final and complete Environmental Report for the requested action, files a certification, signed by a duly authorized officer of the applicant, that applicant has no present intent to file any additional information in the form of amendments to the Environmental Report AND NRC Staff files a Final Environmental Impact Statement or Supplemental Final Environmental Impact Statement (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to, or amendments to, the FEIS or FSEIS regarding any environmental issues related to the proposed application.

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**PROPOSED 10 C.F.R. § 2.308D**

After the Certification required by 10 C.F.R. § 2.308C an Applicant or the NRC Staff may file an amendment to the documents specified there only by leave of the Atomic Safety and Licensing Board and only upon demonstrating that it meets all of the following requirements:

- (i) The information upon which the amendment is based was not previously available and could not have been previously available;
- (ii) The information upon which the amendment is based is materially different than information previously available; and
- (iii) The amendment has been submitted within 15 days of the availability of the subsequent information or the subsequent information has been made available to the participants in the proceeding within 15 days of its availability and a request for an extension of time to file the amendment has been filed within 10 days of availability of the subsequent information with the Atomic Safety and License Board.

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**PROPOSED AMENDED 10 C.F.R. § 2.309(a)**

(a) General requirements. *Within 45 days of the filings required by 10 C.F.R. § 2.308C, any person who has been determined to be a participant pursuant to 10 C.F.R. § 2.308A may request a hearing on the proposed application. The request shall specify the contentions which the person seeks to have litigated in the hearing. A person who has not been determined to be a participant pursuant to 10 C.F.R. § 2.308A may also seek a hearing but must meet all the requirements applicable to a participant and must take the proceeding as it exists.* 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 limited to the contentions it determines meet 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 1 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.

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**PROPOSED 10 C.F.R. § 2.309(c)(3)**

**If an untimely request for a hearing is accepted, the requestor shall take the hearing as it finds it and shall comply with all the obligations and time requirements applicable to a participant.**

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PROPOSED AMENDED 10 C.F.R. § 2.309(b)(3)

(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 *forty-five (45) days* from the date of publication of the notice in the Federal Register;

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PROPOSED AMENDED 10 C.F.R. § 2.309(e)

(e) Discretionary Intervention. The presiding officer may consider a request for *discretionary participation* when at least one requestor/petitioner has established standing. 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 participate as a matter of right under paragraph § 2.308A and (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 *participation* 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:

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PROPOSED AMENDED 10 C.F.R. § 2.309(f)(1)

(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:

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

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(v) Provide a *full statement* of the alleged facts 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 *all the specific sources and documents that were produced pursuant to 10 C.F.R. § 2.308B* on which the requestor/petitioner intends to rely to support its position on the issue and *identify all experts to be used in support of the position on the issue along with a copy of the CV of the expert and all publications by the expert relevant to the position to be taken by the expert;*

(vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee and/or NRC Staff 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) and the *Final Environmental Impact Statement or Final Supplemental Environmental Impact Statement* that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application, FEIS or FSEIS 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;

(vii) *No contention of omission or failure to comply with NRC regulations or federal statutes may be filed unless either the alleged omission or failure has been identified by the Petitioner in written comments filed with regard to the Application, the draft Safety Evaluation Report, the draft Final or Final Supplemental Environmental Impact Statement during the time allowed for such comments or the Petitioner demonstrates it could not have known of the omission or failure until the filing of the final Application or the Final SER or the FEIS and FSEIS.*

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PROPOSED AMENDED 10 C.F.R. § 2.309(f)(2)

(2) Contentions must be based on *all* documents or other information *made available pursuant to 10 C.F.R. § 2.308B*, at the time the petition is to be filed. The petitioner may amend contentions or file new contentions 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.

In the event of an amendment to the Application, Safety Evaluation Report, Final or Final Supplemental Environmental that is allowed pursuant to 10 C.F.R. § 2.308D, amended or new contentions solely based on the § 2.308D amendment will be considered timely if filed within 90 days of the Board's Order allowing the § 2.308D amendment.

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**THE PROPOSED CHANGES TO STAFF  
DISCOVERY OBLIGATIONS**

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**DISCOVERY FROM NRC STAFF:  
AN IGNORED REGULATION**

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**PART C  
10 C.F.R. § 2.336(b)**

(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.

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**SUBPART L  
10 C.F.R. § 2.1202(b)(3)**

(3) Once the NRC staff chooses to participate as a party, it shall have all the rights and *responsibilities* of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate. (Emphasis added)

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**10 C.F.R. § 2.3(a)**

**(a) In any conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs**

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