

RULEMAKING ISSUE NOTATION VOTE

July 2, 2007

SECY-07-0108

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: RULEMAKING PLAN TO REVISE 10 CFR 51.22, "CRITERION FOR CATEGORICAL EXCLUSION; IDENTIFICATION OF LICENSING AND REGULATORY ACTIONS ELIGIBLE FOR CATEGORICAL EXCLUSION OR OTHERWISE NOT REQUIRING ENVIRONMENTAL REVIEW" (RM# 644)

PURPOSE:

To obtain Commission approval to initiate a rulemaking to revise Section 51.22 of Title 10 of the *Code of Federal Regulations* (CFR) categorical exclusions to clarify the scope of the categories and to add new categories of actions that have no significant effect on the human environment. This paper does not address any new commitments.

BACKGROUND:

The staff is proposing to amend 10 CFR 51.22, "Criterion for Categorical Exclusion; Identification of Licensing and Regulatory Actions Eligible for Categorical Exclusion or Otherwise Not Requiring Environmental Review." This section contains the list of categories of actions which do not require an environmental assessment (EA) under the requirements of the National Environmental Policy Act of 1969 (NEPA) because they have no significant effect on the human environment. The results of a staff review and the recommendations of the September 2003 NEPA Task Force Report to the Council on Environmental Quality, "Modernizing NEPA Implementation," form the basis for the staff's proposed revisions to the U.S. Nuclear Regulatory Commission's (NRC's) categorical exclusion regulations.

CONTACT: Cardelia H. Maupin, FSME/DILR
(301) 415-2312

DISCUSSION:

The Task Force Report noted that the development and updating of categorical exclusions occur too infrequently. The report recommended that Federal agencies examine their categorical exclusion regulations and identify potential revisions that would eliminate unnecessary and costly EAs.

The last major update of the 10 CFR 51.22 categorical exclusions took place nearly 20 years ago. The staff recently conducted a review of this regulation. The staff identified several recurring categories of regulatory actions that result in findings of no significant impact (FONSI), yet such actions are not addressed in 10 CFR 51.22. Consequently, the staff routinely prepares unnecessary EAs/FONSIs that consume NRC resources and delay regulatory actions.

The proposed revisions of the categorical exclusion regulations would minimize inefficiencies and inconsistencies in the implementation of NRC's regulatory program by accomplishing three primary goals. First, they would add new categories of actions identified by the staff as having no significant effect on the human environment that are not addressed by the current categorical exclusions. Second, they would minimize the preparation of EA/FONSIs for NRC actions that are minor, administrative, or of a nonpolicy nature (e.g., no increases in releases/uses of radioactive or chemical materials). Third, they would clarify that the existing categorical exclusions apply to exemptions from regulations, as well as to amendments to permits and licenses. The same criteria that govern the granting of a categorical exclusion for amendments to permits, licenses, and regulations also apply to many exemptions from the regulations. However, there is no current provision for categorically excluding exemptions. The proposed addition of exemptions to the list of categorically excluded actions would capture the same criteria currently used for amendments to permits, licenses, and regulations. Some examples of the proposed changes being considered are as follows: (1) a categorical exclusion covering all exports of nuclear equipment and materials subject to the licensing requirements under 10 CFR Part 110, except for nuclear production or nuclear waste management facilities covered by Executive Order 12114; and (2) a categorical exclusion to include certain decommissioning activities, (e.g., the elimination of the preparation of EAs/FONSIs for decommissioning activities previously approved as standard operating procedures in the license).

The staff's proposed revisions to 10 CFR 51.22 were assessed against the NRC's strategic performance goals. The proposed rulemaking will not adversely impact the agency's goals to ensure: (1) protection of public health and safety and the environment, and (2) secure use and management of radioactive materials. Categorical exclusions only apply to actions with no potential significant effect on the human environment. In fact, in some instances, the proposed revisions will enhance the agency's safety goals. For example, the staff is proposing to expand the categorical exclusions to include the incorporation by reference of certain NRC approved American Society of Mechanical Engineers (ASME) codes and regulatory guides for nuclear power plants exclusions. The Office of Nuclear Reactor Regulation (NRR) routinely modifies the requirements in 10 CFR 50.55a to update its incorporation by reference of the ASME Boiler and Pressure Vessel Code and the Code for Operation and Maintenance of Nuclear Power Plants. These amendments can streamline reactor operations, enhance safety, or reduce public exposure to radiation. In addition, these amendments are nonpolicy in nature, approved by the Executive Director for Operations, and result in the issuance of EAs/FONSIs, but are not

covered under NRC's existing categorical exclusions.

By eliminating the preparation of costly and unnecessary EAs, which delay regulatory actions, the proposed revisions will support the NRC's goal of ensuring that its actions are effective, efficient, realistic, and timely. An opportunity for public review and comment on the proposed revisions will be provided as required by the Administrative Procedure Act.

AGREEMENT STATE ISSUES:

NEPA applies only to Federal agencies. This rulemaking will not have any impact on Agreement States' regulations. Therefore, Agreement States will not need to make conforming changes to their regulations.

RECOMMENDATION:

The staff recommends that the Commission approve the plan to proceed with rulemaking to revise 10 CFR Part 51 categorical exclusion requirements.

RESOURCES:

The required resources to implement and complete the preferred option, which is to complete the final rulemaking are: FY 2007 0.7 FTE (0.5 FSME, 0.1 NRR, and 0.1 OGC) and FY 2008 0.3 FTE (FSME). The required resources are included in the FY 2007 budgets of FSME, NRR, and OGC and are included in FSME's FY 2008 budget request.

COORDINATION:

The Office of the General Counsel has no legal objection to the rulemaking plan. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.

/RA William F. Kane Acting for/

Luis A. Reyes
Executive Director
for Operations

Enclosure:
Rulemaking Plan For Revising Categorical
Exclusions in 10 CFR 51.22

Rulemaking Plan for Revising Categorical Exclusions in 10 CFR 51.22

Regulatory Problem

The September 2003 National Environmental Policy Act of 1969 (NEPA) Task Force Report (Task Force Report) to the Council on Environmental Quality (CEQ), "Modernizing NEPA Implementation," noted that the development and updating of categorical exclusions occur too infrequently. The Task Force Report recommended that Federal agencies examine their categorical exclusion regulations and identify potential revisions that would eliminate unnecessary and costly environmental assessments (EAs).

The last major update of 10 CFR 51.22, "Criteria for Categorical Exclusion: Identification of Licensing and Regulatory Actions Eligible for Categorical Exclusion or Otherwise not Requiring Environmental Review," took place nearly 20 years ago. A Nuclear Regulatory Commission's (NRC) staff review of 10 CFR Part 51.22 revealed that the existing categorical exclusion regulations create inefficiencies and inconsistencies in the implementation of the NRC's regulatory programs. The NRC staff identified several recurring categories of actions that result in findings of no significant impacts (FONSI) which are not addressed in 10 CFR 51.22. As a result, the NRC staff routinely prepares unnecessary EAs/FONSI that delay regulatory actions and consume resources.

The results of the NRC staff review and the recommendations of the NEPA Task Force Report form the basis for the proposed revisions to the NRC's categorical exclusion regulations in 10 CFR 51.22. The proposed action would result in a more efficient and effective implementation of the NRC's regulatory programs.

Existing Regulatory Framework

The NEPA requires Federal agencies to consider environmental impacts of their proposed licensing and regulatory actions. The NRC promulgated its NEPA implementing regulations in 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions."

The CEQ realized that many actions undertaken by Federal agencies would have little or no significant effect on the human environment. Therefore, the CEQ introduced the term "categorical exclusion," which is defined as a category of actions that do not individually or collectively have a significant effect on the human environment and thus, do not require the preparation of an EA or an environmental impact statement.

In addition, NRC staff identified, as a candidate for a categorical exclusion, amendments to licenses or permits that are minor, administrative, or of a nonpolicy nature. For example, the provisions in 10 CFR 51.22(c)(10) cover administrative changes to a license or permit. However, because of the vagueness of the language in this provision, the NRC is required to prepare EAs for changes to a licensee's name, address, or telephone number. Similarly, the NRC plans to include certain categories of exemptions that have no potential for significant effect on the human environment and result in EAs/FONSI in the proposed revisions.

Enclosure

The NRC is also proposing to expand the categorical exclusions to include the incorporation by reference of certain NRC approved American Society of Mechanical Engineers (ASME) codes and regulatory guides for nuclear power plants. The Office of Nuclear Reactor Regulation (NRR) routinely modifies the requirements in 10 CFR 50.55a, "Codes and Standards," to update its incorporation by reference of the ASME Boiler and Pressure Vessel Code and the Code for Operation and Maintenance of Nuclear Power Plants. These amendments streamline reactor operations, enhance safety, or reduce public exposure to radiation. They are nonpolicy in nature, approved by the Executive Director for Operations, and result in the issuance of EAs/FONSIs, but are not covered under NRC's existing categorical exclusions. The proposed rulemaking would eliminate the preparation of costly EAs/FONSIs that consume resources and delay regulatory actions.

Alternatives for Resolution

Two principal options were considered, as follows:

- Option 1: Maintain the status quo—No action—continue to use existing 10 CFR Part 51.22
- Option 2: Revise the categorical exclusion to address inefficiencies and inconsistencies

Option 1: Maintain the status quo—No action

The NRC could continue to use the regulations in 10 CFR Part 51.22. The only advantage of this option is that no resources would be expended on rulemaking activities. However, any resource savings from maintaining the status quo would be offset by the continued expenditure of NRC's resources on costly and unnecessary EAs that delay regulatory actions. In some instances, these delays impede the implementation of requirements that would streamline reactor operations, enhance safety, or reduce public exposure to radiation. As such, this option would not support NRC's strategic goal to ensure that actions are effective, efficient, realistic, and timely.

Option 2: Revise the list of categorical exclusions

This option would update the existing categorical exclusions in 10 CFR 51.22 to reflect agency experience over the last two decades. The only disadvantage of this option is that agency resources would be necessary to complete the rulemaking. However, the proposed rulemaking would result in significant resource savings to the agency. The proposed revisions of the categorical exclusion regulations would eliminate inefficiencies and inconsistencies in the implementation of the NRC's regulatory program by accomplishing three primary goals. First, they would add new categories of actions identified by the NRC as having no significant effect on the human environment. Second, they would eliminate the preparation of EA/FONSIs for NRC actions that are minor, administrative, or of a nonpolicy nature (e.g., no increases in releases/uses of radioactive or chemical materials). Third, they would clarify that the existing categorical exclusions apply to exemptions from regulations as well as to amendments to licenses and permits. The same criteria that govern the granting of a categorical exclusion for amendments to permits and licenses should also apply to many exemptions from the regulations. However, there is no current provision for categorically excluding exemptions. The proposed addition of exemptions from regulations to the list of categorical exclusions would be consistent with the current criteria used for amendments to permits and licenses.

In addition, this option is consistent with CEQ guidance on development and revision of categorical exclusions. The revision of 10 CFR 51.22 supports the NRC's strategic goal to ensure actions are effective, efficient, realistic, and timely.

Recommended Approach

The NRC staff recommends Option 2 because it: (1) eliminates costly and unnecessary EAs; (2) enhances the NRC's strategic goals of effective, efficient, realistic, and timely regulatory actions; and (3) enhances the implementation of the NRC's regulatory programs.

OGC Analysis

The proposed rulemaking is consistent with current NRC regulations and other applicable law. The Office of the General Counsel (OGC) has no legal objection to implementing the recommendations of this rulemaking plan.

Backfit Rule

This rulemaking will not impose any requirement on NRC licensees and does not constitute a backfit as defined in 10 CFR 50.109(a)(1). Thus, the backfit rule does not apply and a backfit analysis will not be prepared.

Paperwork Reduction Act

The Office of Information Services has reviewed this rulemaking plan for information technology and information management implications and concurs. The plan does not suggest changes in information collection requirements.

Regulatory Analysis

This rule is anticipated to be cost-effective. It will eliminate the need to prepare EAs for actions that have no significant effect on the human environment, and will eliminate the delays associated with the preparation of these documents. Since this rulemaking does not impose any new requirements on NRC licensees, it is anticipated that a regulatory analysis will not be required. If the staff finds, during the development of the proposed rule, that the burden on NRC licensees will increase or decrease, a regulatory analysis to estimate the costs and benefits of the rulemaking will be prepared.

Agreement State Implementation Issues

NEPA applies only to Federal agencies. This rulemaking will not have any impact on Agreement States' regulations. Therefore, Agreement States will not need to make conforming changes to their regulations.

Major Rule

This is not a major rule as defined by the Congressional Review Act.

Supporting Documents

If the NRC staff proceeds with the rulemaking, additional supporting documents are not likely to be necessary. An EA is not required for this rulemaking because the development of categorical exclusions is an internal NRC process that does not qualify as a major Federal action.

If approved, this rulemaking may necessitate revisions to NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," and NRR Office Instruction LIC-203, "Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues." In addition, any new environmental review guidance documents for the Office of New Reactors programs will need to reflect this rulemaking.

Resources

The required resources to implement and complete this final rulemaking are: FY 2007 0.7 FTE (0.5 FSME, 0.1 NRR, and 0.1 OGC) and FY 2008 0.3 FTE (FSME). The required resources are included in the FY 2007 budgets of FSME, NRR, and OGC and are included in FSME's FY 2008 budget request.

Lead Office and Staff from Supporting Offices
Cardelia H. Maupin, FSME/DILR, Team Leader
Andrew S. Pessin, OGC/RFC
Susanne Woods, FSME/DWMEP
Harry Tovmassian, NRR/DRIP
Philip Harrision, ADM/DAS

Concurring Official
C. Miller, FSME
F. Cameron, OGC
C. Miller
J. Dyer, NRR
M. Lesar, ADM

Steering Group

No interoffice management group is necessary for this rulemaking.

Public Participation

The proposed rule will be published in the *Federal Register* for public comment. The rulemaking documents will also be placed on the NRC's Website to enhance public dialogue.

Schedule

- Proposed rule to Commission (12 months after approval of rulemaking plan)
- Public comment period (75 days after publication in the *Federal Register*)
- Final rule to Commission (12 months after public comment period ends unless significant public comments are received)